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**COMMENTS REGARDING US AND CANADIAN TRIBAL INTERESTS
Submitted by the INDIGENOUS NETWORK on ECONOMIES and TRADE
on the
PROPOSED POLICIES REGARDING THE CONDUCT OF CHANGED
CIRCUMSTANCES REVIEWS UNDER THE COUNTERVAILING DUTY ORDER
ON SOFTWOOD LUMBER FROM CANADA (C 122 839)**

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I. THE SUBMITTERS: INET

The following comments are presented by the Indigenous Network on Economies and Trade (INET), a platform open to Indian tribes across Canada and in the United States, who work together towards the protection of indigenous proprietary interests and their tribal economies. Our member tribes share the common belief that Indian rights are of relevance to international trade law and if respected could be the basis for more sustainable development, in the present case especially more sustainable logging practices.

Some of the members of INET have been involved in the Softwood Lumber Dispute, since the initiation of the investigation on Softwood Lumber from Canada, in April 2001. Joint submissions of Aboriginal peoples and environmental groups, who were given special standing, were made to the US Department of Commerce on May 15th, 2001. Aboriginal peoples from the Interior of British Columbia, the heartland of softwood lumber extraction, were the first indigenous peoples ever to make substantive filings to the World Trade Organization. Their *amicus curiae* brief was officially accepted by the WTO Panel on the US DoC Preliminary Determination on Softwood Lumber on April 26th, 2002¹ and circulated to all parties and third parties for comment. Since then filings have been made under INET and joined by the Nishnawbe Aski Nation and the Grand Council of Treaty 3². These filings to both the WTO and NAFTA panels on CVD have also been officially accepted.

INET has also started working with US tribes whose forestry operations are negatively impacted by cheap Softwood imports from Canada resulting in their prices dropping by more than 50%. They recommended and endorsed INET's lobby to Washington DC to discuss US and Canadian tribal concerns in the softwood lumber dispute with both Senators and the US DoC.

¹ See: Interior Alliance Indigenous Nations (2002) Submission to the WTO panel on US – Preliminary Determinations with respect to Certain Softwood Lumber from Canada DS-236, filed April 15th, 2002

² INET (2002) Submission to the NAFTA Panel on Softwood Lumber CVD, filed November 15th, 2003
INET (2003) US – *Amicus Curiae* brief to WTO – Final CVD Determination SL, filed January 23rd, 2003

The INET delegation met with the US Department of Commerce the week the proposed framework on softwood lumber was released and provided some initial reaction but promised to provide consolidated written comments by different tribes referring to the different provincial legislation. We were asked to specifically document how Indian people presently are excluded from the industry and how existing bidding processes are still influenced by big industry and also provide alternatives and how Indian people envision the forest industry, with their involvement ensuring more sustainable forest management. We have collected testimonies regarding the exclusion of Indian peoples from the industry in Canada and how it negatively impacts their multi-faceted uses of their land and tribal economies.

We will also provide specific comments regarding the respective policies and provincial legislation. On the basis of the questions asked by the US Department of Commerce and due to the exclusion from the industry which will be documented – we will go beyond the specific points listed in the bulletin and the specific formatting.

II. EXCLUSION OF INDIAN TRIBES³

Presently there is no significant participation of Indian tribes in the forest industry in Canada and indigenous peoples receive no remuneration at all for forestry in their tribal territories. The Canadian Institute of Forestry in its historic overview distinguishes between Aboriginal Forestry and Exploitation Forestry⁴. It limits Aboriginal Forestry to subsistence use for shelter, clothing, food and medicine and although it recognizes these important multi-faceted uses Aboriginal peoples have of the forests, it seems to ignore them in the context of current forestry practices, which they claim to have become more sustainable. There can be no sustainable forestry without taking these multi-faceted uses of Aboriginal peoples and their traditional knowledge into account.

³ See Appendix 3: letters of support from Indian tribes across Canada detailing their exclusion from the forest industry

⁴ For more information see: <http://www.cif-ifc.org/practices/history.htm>

In the following the submission will make reference to and include testimony of negative impacts of current forestry practices and document that indigenous peoples' knowledge is not part of forest management in Canada.

Aboriginal elders and land users today give testimony of the devastating impact of present forest practices in Canada on their uses, seeing them still as exploitation forestry⁵. As tribes in the United States have shown, tribal operators are in the best position to take into account these diverse uses and ensure more sustainable logging practices.

The above distinction also ignores the fact that Indian people have traditionally been involved in the forest industry and have just more recently – since tenure reforms about half a century ago instituted large scale long-term tenures – systematically excluded. In British Columbia Indian people had been involved in the forest industry in its earliest stages⁶: “By 1874 a commercial saw mill was established near Port Simpson; it employed Tsimshian and others from the region as loggers, sawmill workers, longshoremen and in other capacities. It purchased logs from Indian-owned logging outfits based in Port Simpson.”

The major change in forest policies and tenures under the 1948 Forest Act⁷ resulted in bankruptcies of many Indian operators and contractors and was a very traumatic experience for Indian communities across British Columbia, resulting in their further economic marginalization. Today the percentage of Indian people working in the forest industry is minuscule in comparison to the earlier period and to the very high total of direct jobs held in the forest industry by indigenous peoples nowadays.

⁵ See Appendix 2 on Forestry Impacts on Traditional Lifestyles: including trapper testimonies

⁶ See: Rolf Knight (1996) *Indians at Work*, New Star Books, Vancouver, p. 232

⁷ See: Peter Pearse (1992) *Evolution of the Forest Tenure System in British Columbia*, Report for the Province of British Columbia, Vancouver, p. 21

At a meeting with the MoF in 2002 Chief June Quipp of the Cheam Indian band⁸ reminded bureaucrats that once a majority of their families lived off the forest industry and now not one of their band members has a job in the industry. Indian chiefs and forestry experts in the natural resource departments of Indian bands can testify that whenever they ask for cut allocations they are told that all the timber has already been allocated and that there is no proportion of the harvest open to Indian tribes.

There is unequal distribution of resources, with most of the timber allocated through long-term tenures to a small number of big companies, who have special guarantees that have never be afforded to Indian peoples. Indian people typically can at best get one time non-renewable allocations or minimal percentages with no guarantees at all, in order to make them dependent on the discretion of the provincial government and the leverage of the companies dominating the industry. Indian tribes' lack of participation in Canada's timber industry inhibits their ability to provide specific comments on some of the points raised in the Bulletin, mainly geared at industry, but enables them to show how existing provincial policies are not inclusive and independent, but rather exclude Indian people and further consolidate the position of existing big players in the forest industry.

INET also wants to report that a recent application by the Lower St'at'imc Tribal Council⁹ in cooperation with the BC Institute of Technology to develop an entirely new approach to the Softwood Industry, including the knowledge of elders and using every part of the resource to the Softwood Industry Community Economic Adjustment Initiative, was turned down mainly on grounds that traditional use research and eco-system based planning¹⁰ could not be funded. These were exactly the elements that would have broadly involved the community and indigenous knowledge in new approaches and showed that even transition programmes block out indigenous peoples.

⁸ Meeting attended by Arthur Manuel, November 2002, Cheam Indian Band, BC

⁹ See also: Support letter by the Lower St'at'imc Tribal Council in Appendix 3

¹⁰ Community Forests Development Cooperation of Howe Sound (2003) Rejection letter regarding funding request to Clarke Smith, July 31st, 2003

III. OVERALL PURPOSE

The overall aim of the proposed policies of the US DoC for Changed Circumstances Reviews regarding Softwood Lumber is stated as “to serve as the basis for a long-term, durable solution to the ongoing dispute between the United States and Canada over trade in softwood lumber and encourage the development of an integrated market for forest products consistent with the goals of the North American Free Trade Agreement and sustainable forestry.”

The tribes on whose behalf this submission is made all want to see more sustainable forest management in Canada¹¹, because unsustainable softwood lumber extraction deeply impacts the ongoing uses of indigenous peoples of their Aboriginal Title¹² and treaty lands. On the other hand it also impacts on the economies of US tribes, who receive the benefits from forestry on their lands and are involved in more sustainable forestry operations on their own lands and cannot compete with cheap imports from Canada, where Aboriginal proprietary interests are not taken into account.

The US Department of Commerce has to deal with Indian tribes on a government to government basis and has done so in the past in fisheries negotiations. After the Boldt Decision¹³ recognized the treaty right to fish half the annual allowable cut was allocated to tribes in the United States and the tribes have played an important role in the creation and implementation of the Pacific Salmon Treaty¹⁴. According to the right to priority resource allocation¹⁵, which allows Indian communities preferred access to resources to meet their needs, for example in the case of Softwood Lumber, access to timber to build houses, and the trust

¹¹ A vision for more sustainable forest management is set out in the Appendix on Ecosystem based planning and traditional knowledge

¹² Aboriginal Title in Canada has been recognized in the Supreme Court Decision of: *Delgamuukw v. British Columbia* (1997) 3 S.C.R. 1010, following the US Supreme Court Decision in: *Cherokee Nation v. Georgia* (1831) 5 Pet. 1, 30 U.S. 1, 8 L. Ed. 25, one of the famous trilogy by Chief Justice Marshall

¹³ UNITED STATES of America, *Quinault Tribe et al., v. STATE OF WASHINGTON*, Washington State Department of Fisheries, et al., Civ. No. 9213, 384 F. Supp. 312; 1974 U.S. Dist.

¹⁴ For more information see: the Pacific Salmon Commission webpage: <http://www.psc.org/Index.htm>

¹⁵ *Winters v. United States* (1908) 207 U.S. 564, was followed 90 years later by the Canadian decision in *Regina v. Sparrow* (1990) 70 D.L.R. 385 mandating priority resource allocation to indigenous peoples

relationship both in the United States and in Canada the respective federal governments have to protect the interests of Indian tribes. Instead Canada openly violated its fiduciary obligation when it objected to arguments brought by Aboriginal peoples from Canada brought before the NAFTA Softwood Lumber Tribunal on CVD in the name of all provinces and industry associations¹⁶. It is therefore important that the US Department of Commerce carefully consider the independent comments made by Indian tribes.

The Canadian federal and provincial governments also breach their fiduciary obligation on the ground, by not implementing Aboriginal land and treaty rights recognized by the Supreme Court of Canada and protected under the Canadian Constitution as will be detailed in this submission. These federal and provincial policies confer subsidies to Canadian forestry companies who do not have to remunerate the proprietary interests of Aboriginal peoples, which is in violation of international trade law¹⁷. As long as there is no remuneration for the proprietary interests of indigenous peoples and the underlying question of the recognition of Aboriginal Title and the implementation of Aboriginal and treaty rights is not achieved there can be no long term solution in the softwood lumber dispute as set out as the overall aim of this policy bulletin. Both the softwood lumber issue and the question of Indian rights to forest resources and management have to be dealt with consistently and jointly to ensure a long term solution.

A number of Indian tribes in the US already engage in more sustainable forest management taking into account the multi-faceted uses of the forest by their peoples, Canadian tribes look to them as an example and have visited US tribal operations. Many tribes have also signed on to the principles of ecosystem based planning and support certification under the Forest Stewardship Council, whose Principle 3 in Canada protects Aboriginal and treaty rights¹⁸.

¹⁶ Weil, Gotshal and Manges, November 25th, 2002 correspondence to NAFTA Panel USA-CDA-2002-1904-03 in the name of the government of Canada and on behalf of all provinces and industry associations

¹⁷ For more details on the subsidy arguments and especially the definition of Aboriginal Title and Treaty Rights See: INET (2003) US – Amicus Curiae brief to WTO – Final CVD Determination SL, 23/01/2003

¹⁸ For more details and Indian tribes vision of more sustainable forest management, please see: Appendix I on Solutions, including: principles of ecosystem based planning and certification.

IV. GENERAL STATEMENT OF POLICY

Indian tribes were impressed with the understanding for these complex issues and the connection recognized by the US Department of Commerce in the first draft of the bulletin that stated¹⁹:

“Alternatively, if a province were to expand significantly the percentage of harvest ... in the hands of indigenous peoples, sales... by indigenous peoples could also suffice as an adequate basis for assessing the province’s timber sale programs.”

Unfortunately this key provision was missing in the final draft of the bulletin released for public comment on June 24th, 2003, but in a meeting at the US Department of Commerce, on June 25th, 2003 the INET delegation was assured that this had just been an oversight due to last minute changes and that this provision would have its place in the final framework.

A. Indian Tribes in the Province of British Columbia

This provision has to be central to any review of provincial policies, because the lands of indigenous peoples are heartlands of softwood lumber extraction in all the provinces and territories subject to the duties. Especially in British Columbia where no treaties have been signed and all major organizations²⁰ have openly rejected the governments’ comprehensive claims policy aiming at the extinguishment of their rights. Indian tribes in the South Central Interior of British Columbia have categorically refused to negotiate under this policy and assert

¹⁹ United States Department of Commerce (2003) Proposed Analytical Framework on Softwood Lumber from Canada, Draft, January 6, 2003; Conceptual Starting Point – Selling Timber on a Market Basis

²⁰ Consensus Statement January 28, 2000:

“The Assembly of First Nations, including the Union of B.C. Indian Chiefs, the Interior Alliance and the First Nations Summit, hereby join together publicly to affirm the Aboriginal title and rights of all First nations in British Columbia and Canada. Canada’s Comprehensive Claims Policy is predicated on the denial of our rights and title. We categorically reject this policy and Canada’s implementation of this policy. We call upon Canada to assert the honor of the Crown and to adopt a new policy of recognition, affirmation and implementation of Aboriginal title.”

that the non-recognition of Aboriginal Title constitutes a subsidy under international trade law²¹. The proposal by the US Department of Commerce to reallocate tenure to Aboriginal people provides a solution for the softwood lumber issue and the land question and therefore a long-term sustainable solution.

It also has to be made very clear that provincial Indian organizations and a number of tribes in British Columbia have vehemently rejected BC's forest policy changes from its outset. With the Union of BC Indian Chiefs, the oldest provincial organization, rejecting both the process as failing to involve and accommodate indigenous peoples and the substance because the proposed reforms just further consolidate tenure in the hand of a few companies and "seriously compromise the ability of the provincial crown to meet its fiduciary obligations to First Nations and to reconcile Crown and Aboriginal Title."²² Similarly the First Nations Summit asked for the Forest Act Changes to be postponed in order to accommodate Aboriginal Title and Rights²³. No such accommodations were made and the Forest Act changes were passed without indigenous consent. A number of tribes, like the Carrier Sekani and the Haida have openly rejected the minimal and discretionary tenure hand back as unacceptable, stating²⁴:

There remains few economic opportunities for our people. We are not interested in quick fixes that would have us become a part of the problems facing the land - rather, it is our intention to initiate sustainable and responsible forestry in general application to all who operate here.

It also has to be noted that all the tribes and organizations from British Columbia mentioned above and a number of others such as the Okanagan Nation Alliance and the St'at'imc Chiefs Council are in support of INET's present comments documented in the enclosed letters of support and testimonies.

²¹ NRDC et al (2001) Petition for the Imposition of Countervailing Duties pursuant to Section 701 of the Tariff Act of 1930, Earthjustice Legal Defence Fund, Seattle, submitted May 10th, 2001, Part III: Aboriginal Title Subsidy

²² UBCIC Resolution, passed at the Union of BC Indian Chiefs AGA, November 15th, 2002, Vancouver

²³ See: First Nations Summit Resolution 0303.05: Call for Minister of Forests to Postpone Amendments to the Forest Act, 2003

²⁴ Letter by Guujaaw to Michael DeJong, Minister of Forests, Province of British Columbia, May 29th, 2003

B. Nishnawbe Aski Nation in Ontario and the Grand Council of Treaty 3

The Nishnawbe Aski Nation (also referred to as “NAN”), is a political organization comprised of the representatives from 49 member nations scattered throughout Northern Province of Ontario. The land occupied and used by the indigenous peoples of NAN comprises fully 2/3 of the province. NAN finds itself in a very unique position with respect to resources on its land base compared to other tribes across the province and Canada. Areas north of the 51st parallel have been virtually untouched by forestry. In order to protect the integrity and economic viability of this highly sensitive ecological zone – large parts of it covered by Boreal Forests, NAN has chosen to involve itself in the Softwood Lumber issue.²⁵

Since the purpose of this Policy Bulletin is to ensure that lumber producers and the timber market in the Canada and the United States operate under similar competitive conditions and to ensure that timber valuations are equilibrated, NAN felt it important to submit its comments and position that the province of Ontario in Canada, is not operating under similar competitive conditions as the United States. In fact, NAN is of the opinion that Ontario is operating under a system that is disproportionately undervalued compared to that of the United States and other Canadian provinces where Aboriginal tribes have more access and participation in the forestry market.

Correspondingly, NAN would concur with the suggestion that increasing the percentage of harvest in the hands of indigenous peoples would be an adequate basis for assessing the province’s timber sales. Furthermore, NAN would propose that in order to provide a more comprehensive and sustainable result, Aboriginal people should be part of the political negotiations on softwood lumber and future forest management processes. We are of the position that, only after this is done will true equilibrium be attained between Canada and the US.

²⁵ Nishnawbe Aski Nation Resolution 01/113 Canada/United States Softwood Lumber Dispute (16/08/01)

NAN has consistently held the position that Ontario subsidizes its forest industry as a result of the non-accommodation of rights affirmed in Section 35 of the *Constitution of Canada (1982)* which severely impacts how Aboriginal tribes participate in the forest market. NAN asserts that the province of Ontario is negligent in eliminating or reforming policies that would remove this as a constraint. Most recently at their 22nd Annual Keewaywin Conference, on July 29th, 30th, and 31st, 2003 all NAN chiefs in assembly heard a presentation on Softwood Lumber and endorsed INET's comments through a resolution²⁶.

The Grand Council Treaty # 3 is the traditional government of the Anishinaabe Nation in Treaty # 3. By treaty with Her Majesty in 1873, the Nation shared its duties and responsibilities and protected its rights respecting 55,000 square miles of territory. Therefore, the Anishinaabe Nation in Treaty # 3 maintains rights to all lands and water in the Treaty # 3 Territory commonly referred to Northwestern Ontario. In exercising its authority, the Grand Council expresses concern with proponents (such as big forestry companies) who carry out business activities that result in destruction to the environment or interfere with the traditional activities of individual or collective members of the Anishinaabe Nation in Treaty # 3. In support of INET's comments and following up on the jointly submitted Amicus curiae briefs, the Grand Council of Treaty 3 sent letters to the government of Canada and Ontario making the following demands:

- First of all, the Treaty must be respected by establishing a government to government relationship between the Anishinaabe Nation in Treaty #3, Canada and Ontario to address forestry and environmental health issues.
- Secondly, ecosystem planning units, which make sense to Anishinaabe people, must be addressed specifically, in holistic terms, in forest management plans. For our people this means that watersheds and traplines must be considered by assessing benefits, costs and risks of proposed timber management or other activities which may affect the health and sustainability of these ecosystems.
- Thirdly, all values, including traditional Anishinaabe cultural values and global environmental concerns must be considered, along with timber management.

²⁶ Letter by Chief Simon Fobister (July 2003) to the Government of Canada and Ontario, Subject: Forest Management Consultation in the Treaty #3 Territory. Grand Council of Treaty 3, Grassy Narrows

V. SPECIFIC COMMENTS

SECTION I. STANDARD for MARKET-BASED TIMBER SALES

As stated above Indian people have to date been across Canada excluded from the forest industry and are the only truly independent actors that could enter into the existing markets, because all other actors, like smaller operators, value added producers etc. alone are subject to existing pressures from the big companies that dominate the industry and entire economic environment. Indian tribes in Canada want to engage market mechanisms to ensure that the full price is paid for lumber extracted from their lands. Through INET tribes in Canada are starting to work with US tribes and learning from them how they market their timber through timber sales, competitive bids, appraisals and other market-based mechanisms.

There is also potential for trade between Canadian and US Tribes. Tanizul Timber operating the only licence in BC held by a tribe in 2002 traded with the Coleville Indian tribe in Washington BC, providing an alternative on their usual dependence on the local Canfor mill purchasing all the timber, especially since the latter has recently showed reluctance to buy beetle wood from Tanizul. Although THEIR licence foresees that Tanizul's timber sales are to be market based there is no such thing as a market in British Columbia and the Indian tribe finds it impossible to compete with the highly automatized mills of the big integrated wood product companies in the area.

Indian people in Canada also want to eliminate policies and practices that inhibit and divert markets. One of those policies is the 1986 Comprehensive Claims Policy²⁷ of the Canadian Federal Government that aims at the extinguishment of Indian land rights, fails to recognize Aboriginal Title and attempts to free companies from their duty to consult with indigenous peoples, accommodate and therefore remunerate their proprietary interests.

²⁷ DIAND (2000) Comprehensive Claims Policy and Status of Claims, Indian and Northern Affairs, Ottawa

Even the conservative BC courts have started to condemn the collusion between the federal government, provinces and big forestry companies, that Indian peoples refer to as the “business as usual approach” holding that²⁸:

[58] As I have said, the Crown Provincial and Weyerhaeuser were in breach of an enforceable, legal and equitable duty to consult with the Haida people and to seek an accommodation with them at the time when the processes were under way for a replacement of T.F.L. 39 and Block 6 and for a transfer of T.F.L. 39 from MacMillan Bloedel to Weyerhaeuser in the year 2000.

The present failure to deal with indigenous peoples results in unfair competition, because in the United States Indian tribes have to receive remuneration for resource extraction on tribal lands.

In order to reach “open and competitive, independently functioning markets, (with) buyers and sellers participating **unencumbered**” as stated in the bulletin, indigenous proprietary interests and rights have to be taken into account. As stated in a recent letter by the President of the Haida Nation who had taken BC to court and won to the premier of BC it was made clear that²⁹:

“The courts have described the current situation of the title dispute, as an ‘encumbrance’ and a ‘cloud over Crown title’, licenses issued by the Crown are described as ‘suffering a fundamental legal defect’. The courts warned that people ‘cannot rest on their certificate of indefensible title’. The fact that the Aboriginal Title has not been resolved throughout most of the province, strikes at the core of the province's assumption of clear title and your authority to grant tenures.”

There can be no “unencumbered” participation in markets in British Columbia and Canada unless the encumbrance of Aboriginal Title and treaty rights is dealt with in a comprehensive manner, regarding both indigenous involvement in forest management and remuneration for indigenous proprietary interests.

²⁸ See relevant paragraphs of *Haida Nation v. BC/Weyerhaeuser* (2002), BCCA 147 Docket: CA027999

²⁹ Guujaaw, President, Council of the Haida Nation, letter to Premier of British Columbia, Gordon Campbell, July 18th, 2003; Re: Investment Security and Forestry in British Columbia

SECTION I. A.: POLICIES AND PRACTICES THAT INHIBIT MARKET RESPONSE

When aiming at establishing fair and justifiable policies and practices with regard to forestry and market based approaches it is a pre-requisite that all the legitimate proprietary interests be taken into account. Governments have an obligation to consult and accommodate all owners of softwood trees or otherwise they invariably undermine the foundation for fair and equitable international trade. In regard to international trade the domestic policies in Canada that produce a financial benefit to companies who do not have to share revenues with Indian tribes must be assessed taking into account the full dimension of the proprietary interests of all judicially and constitutionally protected owners. In Canada the only constitutional provision protecting property rights actually refers to indigenous peoples³⁰, there is no general provision like in the United States. Not taking into account those indigenous proprietary interests would inhibit a full market price from being achieved and would unjustly benefit the softwood lumber industry.

Judicial decisions and constitutional provisions are made in order to assist governments in remedying situations which would otherwise create serious economic problems. Indian peoples have made and won their case that they hold collective proprietary interests in their traditional territories and that Aboriginal Title has an inherently economic aspect³¹ and therefore have a right to adequate remuneration. Indian proprietary interests are real property interests because they are directly and substantively linked to the land, not like the quasi-proprietary interests of forestry companies with long term tenures that Canada tries to invent in their WTO submissions in the Softwood Lumber Case³².

³⁰ *Constitution of Canada* (1982) Section 35 on Aboriginal and Treaty Rights

³¹ *Delgamuukw v. British Columbia* (1997) 3.S.C.R., 1010, paragraph 111.

³² See for example: Government of Canada, March 8, 2002, First Written Submission of Canada to the World Trade Organization Panel on: United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada, from now on Canada, FWS, March 8, 2002, paragraph 26

If governments try and overlook this essential aspect it will continue to create ongoing problems in establishing a genuine and functioning market and a long term solution to the US-Canada Softwood Lumber Dispute. It will result in economic policies and practices that will significantly undermine fair competition in the forest industry. Policies and practices that subsidize an industry in the long-term lead to its destruction and no proper remedial measures are put in place to protect those economic resources for future generations. Remuneration for ownership has been accepted a fundamental principle to determine the full value for economic resources. Indian tribes in Canada want to protect their resources and wealth for future generations and ensure that the full price for their resources is paid.

Indian peoples in British Columbia and Canada agree that the existing changes to the provincial law do not address this fundamental problem. The changes only further consolidate tenure and will not create an independent and functioning market place. Indian tribes are ready to become new actors in the forest industry and to create competition but as long as forest tenure is locked up in the hands of only a few large companies this is next to impossible. In practical terms there have been no real reforms made, the Province of British Columbia has just engaged in a sophisticated publicity campaign trying to sell the changes off as bringing change when in the end they are the last desperate effort of industry and government to maintain the existing system.

Indian peoples as owners of the forests and its resources are in a very anomalous position regarding the forest industry because we contemplate this industry looking from the outside looking in. It is apparent that all other groups who have been inside the forest industry look at the industry in terms of keeping or increasing their control and benefit under the status quo. It is certain that any real change has to include Indian people in decision making and revenue sharing from the softwood lumber industry.

Section I.A.1. Appurtenancy Requirements

Many Indian tribes across Canada share and have a totally new vision of forestry. Instead of seeing all tenure consolidated in the hands of a few companies they want to see more local control and value added production in their territories. Reallocation of tenure to indigenous peoples would inherently be tied to the respective territories and lead to a diversification of tenure. It would ensure a more organically grown and deeply rooted system of local control, unlike the appurtenancy requirement that is often seen as artificial and in many cases has been already disposed of.

In the case of BC the removal of the appurtenancy requirement will result in mill closures, lead to mill consolidations and negatively effect many local communities. Still it has to be stressed that already to date the companies holding large scale tenures had highly automatized mills, that employed less and less people and that made it hard for smaller operators to compete. In most cases they are forced to pass on and trade the better quality timber with the big mills who are the only ones with a capacity to process them. Indian peoples aspire to running their own mills and manufacturing value added products in their respective territories.

In the case of Ontario one of the key requirements for the issuance of long-term tenures in Ontario still is that the tenure holder undertakes to build, operate or supply a wood-processing plant. This is generally true of both area-based and volume-based tenures. The reasons for linking the issuance of long-term logging rights with the construction of mills are historical. In 1899, in response to the U.S. Dingley tariff in 1897, the Ontario government, stepping in where the federal government failed, adopted the measure that all licence holders would be required to manufacture their saw logs in Canada. Guarantees of secure wood supplies have enabled companies to obtain financing to build the mills.

First Nations in Northern Ontario view this requirement as one more proof of the systemic preference for large, integrated industrial forest companies that have sufficient access to capital, human and natural resources to build and operate mills as well as to manage vast forest areas, operates to exclude smaller, locally-operated entities or tribes from the tenure process. Most tribes have neither the financial nor the technological capacity to build and operate the high-volume commodity mills which dominate the Canadian forestry sector. The appurtenancy requirement is a barrier to tribes' access to the use of timber for value-added production which might be more in keeping with the needs and values of Ontario tribes.³³

A more recent development in licensing and the appurtenancy requirement is the separation of forest management responsibilities from mill operations. For example, in ongoing negotiations to open up the area north of the 51st parallel in Ontario, under what the Ministry of Natural Resources has coined the Northern Boreal Initiative,³⁴ First Nations are negotiating control of Sustainable Forest Licenses without having to build a mill. This arrangement flows from the Ontario Forest Accord and Living Legacy, agreements which resulted from a provincial land use planning exercise completed in 1999.³⁵ This process is slow and controversial, and to date has not produced a license for any NAN tribe. The question remains as to whether such wood supply arrangements will give Aboriginal licence holders the flexibility to pursue different kinds of timber processing. Even if the provincial government allocates tenures to Aboriginal organizations, the main driver in licensing access to timber is still to ensure wood supply to existing mills and the Minister retains wide discretion to decide how much timber will be cut and which mills will receive the supply. It is the position of NAN that Ontario operates within a dysfunctional market because of this reason (ie. It is not free of this artificial restraint).

³³ See National Aboriginal Forestry Association. *Value Added Forestry and Aboriginal Communities: The Perfect Fit* (Ottawa: NAFA, 1997)

³⁴ Northern Boreal Initiative: A Land Use Planning Approach. Concept Document, July 2001. Ontario Ministry of Natural Resources. Posted to the Environmental Board Registry

³⁵ While commercial logging is not authorized in the far north (roughly above the 51st parallel), there is interest in forestry development by some First Nations and logging companies. See *State of the Ontario Forest Accord: An Interim Report on the Ontario Forest Accord Advisory Board* (Sault Ste. Marie, ON: Fraser Dunn Secretariat, Ontario Ministry of Natural Resources, March 6, 2001).

Section I.A.2. Minimum Cut Requirement

The forest industry needs to balance the current need for forest resources and sustainable development. The minimum cut requirement basically contemplates forest resources as merely a financial source of income for government or employment simply for the sake of employment. This requirement is environmentally and economically unsustainable. Continuing to use these kinds of administrative requirements will seriously undermine the softwood lumber market and seriously destroy softwood lumber as a sustainable resource.

It is apparent to Indian people who consider forests economically and also use them in a more multifaceted way that minimum cut requirements have to be removed to mitigate the negative impacts on other uses. Cut levels have to be determined according to supply and demand, and Indian control will bring cut levels down because we also value other uses of the forests. In essence the cost of softwood lumber needs to include the additional cost of sustainability. Commercial and traditional values and activities need to be seen in conjuncture and based upon proprietary interests of all owners of a resource.

Minimum cut requirements clearly show how fundamental economic factors can become distorted under the existing administered system where Indian people are excluded from making fundamental decisions regarding forest management.

The exclusion of indigenous peoples in Canada from the forest industry has not only resulted in the depletion of forest resources and destruction of their ecosystems but also in the impoverishment of many communities facing social problems such as housing crisis. One of the first priorities of Indian participation in the forest industry would be to overcome these problems and according to the principles of priority resource allocation ensure that community members have access to timber to build houses for their families.

Section I.A.3. Mill Closure Restrictions

It is clear that in a free market place the decision to close or not close a mill must be based upon the market for softwood lumber. Imposing mill closure restrictions is clearly linked to the fact that the forest industry in Canada lacks diversification. Forest tenure diversification will attract new investment to create value added alternatives to selling existing products under fair market value. It is clear that simply removing mill closure restrictions, like presently attempted in BC, will not create the fundamental changes needed to replace an outdated forest industry.

Indian tribes are looking for new opportunities to overcome the high level of unemployment and employment in the forest industry and value added processing is a key aspect of this kind of challenge. New opportunities will not materialize however unless the forest industry in Canada undergoes fundamental changes to meet the needs of the 21st Century. Without fundamental change in forest tenure just the existing giants will draw the benefit from mill closure restriction and gain further leverage over other producers.

Indian tribes in Canada are looking to the example of US tribes, who have put in place special provisions in their forestry regulations that foresee the employment of Indian loggers, even where the tribes do not cut the timber themselves and tribal employment in mills where they are owned by tribes. Tribal mills have managed to stay open where many other mills had to close down. Employment in the forest industry is a major source of employment on many reservations in the United States. This preferential employment of Indian people would not only be consistent with the principles of affirmative action, it also can be based on indigenous rights that allow Indian people to determine how their resources should be used and processed. As stated above priority resource allocation to meet the immediate (e.g.: housing) needs of indigenous communities is recognized both by the Supreme Courts of Canada and the United States.

Section I.A.4. Minimum Processing Requirements

Minimum processing requirements were established to ensure that a certain amount of work is done locally. This kind of requirement has become necessary in an economic environment with large scale long term forest tenures. Extensive forest tenures create special problems that need to be specifically addressed and a minimum processing requirement is part of this problem. It does address local resource use problems but it also has an impact on the free market system. Reallocating tenure to Indian tribes in their respective territories would diversify tenure and Indian tribes in the United States work hard on processing locally but without withdrawing from the free market system.

Indian tribes will use timber for the use and benefit of indigenous and local peoples but we will also participate in the free market system according to supply and demand. Minimum processing requirements will not be necessary if major tenure diversification materializes and Indian people become part of the new system.

Indigenous peoples through their strong link to their traditional territories provide a more organic and secure guarantee of local control. Their internationally and nationally recognized indigenous rights also give them special standing and substantive rights that have to be taken into account by both governments and companies. A lot of tribes have expressed interest in running smaller scale operations and engaging in value added production to benefit their local communities. Community members³⁶ have repeatedly expressed the need for access to timber and non-timber forest resources to meet the immediate subsistence needs of their families. This includes both wood supply to build houses on the reserves and a form of forest management that ensures minimum impacts on other multi-faceted uses of the forest resource.

³⁶ See especially in Appendix 3: Letter by the Secwepemc traditional government on communal uses and housing needs

Section I.A.5. Long-Term, Non Transferable Tenure

The existing tenure system in Canada is inherently imbalanced

Many groups have already commented on the fact that in Canada, where more than 94%³⁷ of all lands are still considered public, the majority of the forested land has been unilaterally allocated to forest industry giants. For example in British Columbia, ten integrated forest products companies holding long-term tenures control more than 55 percent of the provincial annual allowable cut. The Small Business Forest Enterprise Program, now renamed to Timber Sales Program only controls 13 percent.³⁸ Although BC has announced a tenure hand back to add up a total of 20%, non-government groups cannot follow their calculations and come up with lower numbers, but we all agree that not even 20% would ever be enough to effect the change needed in BC.

Indian leaders and tribes who have asked for a fair share in the forest industry for their peoples have repeatedly been told that all tenure in BC is already allocated. Indian people have not gotten any tenure allocations with similar guarantees as the forest industry giants. As a result Indian peoples have started to challenge what were once considered routine processes in the forest industry, such as transfers of tree farm licenses³⁹. Although the provinces, like the federal government on the international level⁴⁰, claim that those licenses are renewable in perpetuity and enshrine quasi-proprietary rights, they have lost these arguments both before international trade tribunals and in national courts. It is clear that the existing forest tenure system in Canada provides subsidies and that it violates the rights of indigenous peoples.

³⁷ Ministry of Natural Resources Canada (2002) State of Canada's Forests 2001-2002, Ottawa, p. 14

³⁸ Ministry of Forests, *Provincial Linkage AAC Report*, 2000

³⁹ Haida Nation v. BC/Weyerhaeuser (2002), BCCA 147 Docket: CA027999

⁴⁰ Government of Canada, March 8, 2002, First Written Submission of Canada to the World Trade Organization Panel on: United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada, from now on Canada, FWS, March 8, 2002, paragraph 26

Reallocation of tenure to indigenous peoples

It has become clear that only if the Indian land question and the Softwood Lumber Issue are dealt with consistently, on the basis of the recognition of proprietary interests of Indian tribes in Canada, will there be a long term viable solution regarding forestry in Canada. The reallocation of tenure to Indian tribes will solve both problems. It will automatically lead to a major diversification of tenure, because Indian peoples would then hold tenure situated in their respective territories, which will lead to more competition, and want to ensure more sustainable management of their forests, which will bring cut levels down and prices up.

The submitters therefore propose 70% reallocation of tenure to indigenous and local control.

Reallocating tenure to Indian peoples in Canada will bring prices for timber harvested from those lands up, because they value the land differently, seeing its multiple uses and want to make sure that they get the maximum profit from their lands and resources. Also indigenous peoples want to see the profits from their resources stay in their territories by engaging in value added activities. British Columbia has in the past half century maintained a resource exploitation industry, selling off resources from Indian lands without remunerating the real owners and aiming at extracting them at a minimum economic cost and therefore at the highest level possible without taking into account the resulting social and environmental cost. Also such an industry is no longer economically viable and can only be maintained by subsidies of 30% or more at the present time. Indian people would do away with those subsidies, ensure that their proprietary interests are remunerated and engage market mechanisms that ensure that fair prices are paid across North America. Where social, cultural and environmental costs are too high, cut levels will be reduced.

There is no such thing as independently functioning markets in Canada

The bulletin in this part recognizes the special situation and guarantees to long-term tenure holders and suggests that prices would have to be adjusted (up) to take these into account. That would again leave the level of adjustment to the discretion of the provincial government which has a long history of collaborating with the very same companies in setting stumpage prices and bringing them down to the lowest level possible. To Indian peoples it is clear that long-term tenures as held over the biggest part of provinces such as British Columbia by a small number of companies are simply not comparable to the small business programme or now the timber sales programme.

Recently announced changes in BC just further benefit large scale tenure holders

Even the recently announced minimal tenure hand back resulting in some allocation to Indian people, just further enshrined this inequality. The word “Tenure take back” is just used to cover up the fact that further subsidies are passed on to the big companies who hold long term tenure. The province of British Columbia has promised compensation to those companies which will give up minimal parts of their tenure in exchange for direct payments from the province to the company, which is just another form of subsidy. This so called compensation is especially painful for Indian tribes, who are aware that the province would not have to pay that compensation, but could simply legislatively enforce the take back. On the other hand the government of BC does not pay any compensation for past infringements to Indian people despite decisions by the Supreme Court of Canada⁴¹ and constitutional protection for their rights.

Indian tribes in British Columbia therefore oppose any compensation to companies, where it is rightfully owed to the tribes.

⁴¹ *Delgamuukw v. British Columbia* (1997) 3.S.C.R., 1010,

This is just one further example for how Indian people, who hold proprietary interests in those very territories, are disadvantaged and excluded to maintain the privileges of the big companies. Indian tribes have never been offered the same tenure guarantees as the big companies. Where and which tenure will be handed back is left to be decided by the companies and the discretion of the province. This process neither recognizes the rights of Indian people nor does it give them similar economic guarantees. In the past where direct awards and other agreements have been made with Indian people, low grade, uneconomical and impossible to harvest stands have been handed back. Direct awards are usually one time, non-renewable, and not even enough to operate a small mill, they just create dependency on government hand outs and collaboration with big companies, who take advantage of the marginalized economic position of Indian communities.

Regarding Forest Policies in Ontario

Similarly in Ontario Aboriginal peoples have had few opportunities to participate in the forest sector. In spite of the requirement for Aboriginal benefits from the forest sector imposed by Term and Condition #77 of the Class Environmental Assessment, there are currently no Aboriginal SFL holders in Ontario, and Aboriginal interests hold less than 3% of total harvest volumes.

Guidelines from the Ontario MNR place the responsibility for T&C #77 with the District Manager, who has no responsibility to allocate forest tenures. This has had the effect of minimizing the benefits to Aboriginal peoples since it results in Aboriginal peoples being visualized as nothing more than competing third-party interests.

Rather than addressing the need for access to tenure, the Ontario crown has attempted to appease Aboriginal interests by facilitating contract volume allocations in several forest districts.

In addition, most volume allocations to First Nations (as contracts), are given to collectives of 5 – 10 communities, leaving each community with embarrassingly small harvest share, that scarcely provides sustainable economic growth, in most cases. In addition, they must also sign a Memorandum of Understanding (MOU), agreeing to bring the wood exclusively to the SFL holder's mill. Other tactics such as dealing with the tribes on a "divide and conquer" basis has also been known to happen in the NAN territory. The situation with regards to access to meaningful tenure is much different for tribes in the United States.

Crown Forest Sustainability Act – violates treaty rights⁴²

The *Crown Forest Sustainability Act*, R.S.O. (also referred to as the "CFSA" or the "Act") was established after the completion of the Timber Class Environmental Assessment, which set parameters for how timber management must take place in Ontario's area of the undertaking. This regime provides for a variety of approvals necessary for the forest industry to engage in timber harvesting and development. The approvals relate to the creation and issuance of forest tenures (a sustainable forest license or "SFL") and the regulation of the exercise of forest tenures through timber management planning.

The key provisions (conditions) relating to First Nations interests are those relating to the protection of "native values," the Native Consultation Process and Term and Condition 77 (which relates to economic and employment opportunities from timber management). Although the *Act* does provide for some provisions to address First Nations interests, First Nations in Ontario have been hugely dissatisfied with the enforcement of these provisions. Very few opportunities have been made available for economic development compared with the profits received from a limited number of multinational multimillion dollar forest companies in Ontario.

⁴² For more information on the CFSA and the legal challenge please consult the background package provided to the US DoC by NAN

Revenue Sharing

The forest industry in Ontario generates C\$11 billion dollars annually which contributes over C\$2 billion to Ontario's balance of trade.⁴³

A portion of the fees collected by stumpage charges that are paid by license holders are funneled into Ontario coffers. It is the position of NAN that the current revenue stream in Ontario perpetuates the cycle of poverty and dependency for First Nations, as it goes from industry to municipality, to the provincial and federal governments and LASTLY to First Nations through transfer payments.

When a tribe in NAN proposed to the Ontario legislature the need for a process developed to ensure fair revenue sharing from resource development, they were flatly denied.⁴⁴ In a prepared statement, Ontario NDP Aboriginal Affairs Critic Gilles Bisson said, "*the Tories are perpetuating a two-tier system when it comes to revenue sharing from mining and logging,*" pointing out the fact that municipalities benefit from resource development, and First Nations do not as a, "*shameful and a denial of justice.*"

Overall, NAN First Nations/Tribes are of the position that the CFSA and the Timber Class EA do little to adequately accommodate Aboriginal and Treaty rights or proprietary interests, this is yet another reason why NAN is of the opinion that the Ontario government subsidizes its forestry companies and creates an unequal market between Canada and the United States.

Tribes across Canada and especially those supporting this submission have repeatedly made it clear that there has to be remuneration of indigenous proprietary interests.

⁴³ Forest Facts, supra.

⁴⁴ See NAN Press Release: *Tory Government Intent on Keeping Ontario First Nations in Poverty* (December 19, 2002)

Section I.A.6. Offsetting Provincial Actions

At the present time the huge size of the tenures and the concentration in the hands of a very limited number of companies – has afforded them with a level of security of supply and power which allows them to dominate the whole economic and political environment around them. They have established a rapport with the respective provincial officials – in setting stumpage rates and setting the annual allowable cut.

By keeping the annual allowable cut high, producing high volumes and obligating dependent operators in the Timber Sales Program to sell at all times they will keep prices for lumber low.

When Indian Tribes in the United States gained control over the forestry operations on their tribal lands they in many cases brought cut volumes down by half to more sustainable levels. The level of cut on tribal lands in the United States is about a fourth of the cut in areas with similar timber stands in tribal territories in Canada.

Indian Tribes in Canada are interested in learning from the experience of US tribes who take into account other uses such as hunting and fishing, and engage in more sustainable logging practices. They also make sure that their forests grow back every year by more than is cut that year. On the other hand in Canada annual cut levels are going up and have been unsustainable for the last decades, cutting at much higher rate than the forests re-grow.

SECTION I.B. MARKET-BASED PRICING

The present forest management regime in Canada creates very real and substantive barriers to a free market system. In addition to Canadian forest management being directly challenged by Aboriginal proprietary interests, it is also difficult if not impossible to rationalize it into a free market economy. This section of the bulletin on “market-based pricing” seems to artificially attempt to provide an economic framework to reconcile two separate almost mutually exclusive economic systems. The effectiveness of this proposed framework really would again depend on the good will of both government and industry to work in a competitive market environment, which they have to date undermined.

The bulletin aims at finding a “system that ensures an equivalent result”, instead of clearly asking for a market based system, which complicates and diffuses the discussion. Especially when no fundamental changes forest management are proposed and the very same small group of giant companies continue to control all the forest tenure in Canada, real change on the ground becomes impossible. Canada has proven that the existing forest tenure system does not work and basic access by new actors to forest resources especially by Indian peoples has to be ensured before a free market system can materialize.

The renaming of the existing forest tenure system in terms of a reference market and an administrative market will not achieve any long term solution to the Softwood Lumber Dispute between the United States and Canada. Any long term solution must include a major diversification in the existing forest tenure system. More people especially Indian people who have judicially and constitutional and protected rights need to be brought back into the picture. If Indian people are left out of the industry obviously the legal challenges that are presently being made by Indian tribes to the existing forest tenure system will continue and this legal uncertainty will hurt the development of this resource industry.

Indian tribes could help provide a truly independent reference market. The dynamics of including a new actor in the forest industry will bring new values and approaches to an industry that needs to evolve to meet the needs of a changed competitive and physical environment, with smaller timber stands that have been created by the old forest tenure system. A long term solution to the softwood lumber dispute requires major changes in the forest tenure system to ensure fair market remuneration to Indian peoples.

Section I.B.1. Reference Prices

To the extent that Indian Tribes in Canada get tenure, they will sell with a priority to Indian people and non-indigenous people in a free market system to ensure that the highest possible price is paid for their timber. Similar to the United States, in Canada there is federal jurisdiction over Indian lands under Section 91.24, which includes reserve lands and according to the Delgamuukw Decision tribal territories. Like in the United States tribes in Canada should therefore be given the right to administer their lands directly and independent from provincial interference. For the remaining parts of the territories that would still be co-managed with the province, mechanisms for remunerating indigenous proprietary interests will have to be put in place. Such a revenue sharing mechanism has to be based on the recognition of Indian land rights and not on provincial discretion, known as the major source of subsidies.

Indian control would ensure independent markets because we have not been part of the existing system that has been corrupted and permeated by subsidies throughout. Through the recently announced minor tenure take back announced in British Columbia, that in reality results in direct financial contributions from the province benefiting the big companies, and in minor allocations to Indian bands that agree to provincial policies, the province tries to draw Indian people into the existing system.

A number of the territorial organizations and tribal councils in British Columbia have rejected the recent changes to the Forest Act, including the tenure take back. In order to ensure independent Aboriginal control and reference markets a large proportion has to be brought under the control of Indian tribes in Canada.

It is clear to Indian tribes that without any major tenure reallocation, determining what a free market price is becomes impossible. To date there has been no fundamental change, in any of the Canadian provinces, big companies are still holding on to the control they presently have over the entire forest economy and maintain the resulting distortion of the market.

For example to get the up front investment necessary to bid on the Small Business Program – that has now been cosmetically renamed to Timber Sales Program – operators have to be in good standing with the banks, which often means getting the endorsement of or working with the big companies. Especially because most operators do not have the necessary milling capacities and do not have the sufficient money to invest on the superior technology and installations of the big companies they will have to work with the big mills to get some of the timber processed. On the other hand having been part of the Coalition for Sustainable Forest Solutions, we are also aware of the pressure to which value added producers are subjected from the big industry. In the past big companies always had to agree to free additional timber to be accessed by smaller producers and they have made it clear that the continuation and size of those program will depend on the extent to which they cooperate with them.

Indian people on the other hand have been systematically kept out of the forest industry. Indian bands bidding in the Small Business Program, after having worked hard on obtaining the necessary up front payment, after repeatedly not getting their bids accepted do no longer try to get into that program and its successor, set up under the very same parameters.

Indian Tribes in Canada look at the experience of US tribes involved in the forest industry. A number of tribes have taken over the forestry operations on their tribal lands and hold their own timber sales as mandated by tribal council resolutions or the respective tribal codes. Some tribes have set up or purchased mills, for example the Warm Spring Tribe in 1966, through a referendum by eligible voting members of the Confederated Tribes decided to purchase Warm Springs Forest Product Industries (WSFPI). Another example is the Yakama tribe, now one of the bigger Softwood producers in the West:

Yakama Forest Products was approved by General Council resolution in 1994 (GC-3-94) as a way to fully utilize and add value to the allowable timber cut that comes off the Nation's land. Phase 1 which started in January 1995 was to establish a log sorting facility in White Swan where logs from timber sales purchased by Yakama Forest Products can be sorted by grade and diameter to target specific log markets. Phase 2, which started in September 1998 is our small log saw mill which is setup to cut the 4" ~ 12" logs off of our timber sales. Phase 3 which started up in June 2003 utilizes our 13" and up logs. When this is at full production levels the combined production volume out of both mills will be close to 200 million board feet. Yakama Forest Products is operated as an enterprise, or separate business entity.

The majority of the tribes who have no mills, set up their own timber sales and put them up for bid, either by closed bid with a deadline or by oral auction. Tribes that have their own mills have an appraisal system calculating their cost and then setting the price accordingly. They include the cost of milling and logging and some will also include the cost of road building, while others do not include those additional costs, like for example of reforestation. Generally the tribes invest much more in sustainable logging and to protect the ecosystems, but those extra costs must not always be directly reflected in the appraised rate. Even some of the tribes that mill, like the Coleville, do not have capacities to process big logs, so they remarket those. Like many of the tribes without mills they sort logs and then broker them off, that is how they get premium prices. That way they log the trees themselves and employ their own people. Some tribes have regulations that require tribal loggers, even a certain percentage if they sell off the whole lot.

Section I.B.2. Transparency

To date there is little transparency in the forest industry and forest management in Canada, making it hard for Aboriginal peoples to access information in which they have legitimate interests. The current forestry regime in Canada has encouraged collusion and even the so-called reference markets are influenced by the big integrated forest product companies, turning down bids from Indian bands without giving reasons. On the other hand tribes in Canada like in the US commit to setting out clear procedures for timber sales from forests under their control.

Indian tribes share the US DoC's concern for transparency in the forest industry. They have to report that presently it is becoming increasingly hard for indigenous peoples to obtain information about logging operations in their territories. When Aboriginal peoples engage in eco-system based planning for their territories they often find it hard to obtain information, such as forest cover data and more specific information on forestry activities.

The recent legislative changes in British Columbia have further passed on forest management obligations to companies. This is of great concern to indigenous peoples, because companies have in the past often argued that they do not have to meet constitutional obligations towards Aboriginal peoples, although even the conservative BC Court of Appeal found that companies cannot ignore these⁴⁵. Companies do no longer have to deposit specific logging plans, but just make them available upon request, which can potentially lead to long tiresome procedures for indigenous communities. Their capacities are already stretched in responding to the provincial referral system let alone having to invest significant time and effort in obtaining information from logging companies.

⁴⁵ for more detail see: *Haida Nation v. BC and Weyerhaeuser*, [2002] BCCA 147, Date: 2002/02/27
Haida Nation v. BC and Weyerhaeuser, [2002] BCCA 462, Date: 2002/08/19:

The obligation to consult and accommodate Aboriginal interests is squarely in the governments and companies who repeatedly fail to meet it.

On the other hand Indian communities are very transparent, according to government studies they are the public entity on whom most reporting obligations are imposed. Not only are all their bidding processes transparent, their reports are also publicly accessible. Indian bands have stringent reporting and accounting requirements that are reviewed by the federal Department of Indian Affairs, whose approval processes and overregulation have been criticized by many. Still Indian tribes are committed to transparency in their operations and would ensure that all information about their forestry operations is publicly available.

Indian tribes in Canada like in the US would commit to practices such as timber sales with clear regulations mandated by the respective tribes, including timely publication of notices and results and unequivocal procedures.

As already stated above, Indian tribes in Canada see a real problem with the policy bulletin potentially endorsing current forestry regimes in Canada. Presently there are no independent market mechanisms at play. Current timber sales programmes that provinces might try to couch under the definition of a reference market, are in reality severely distorted, both because smaller producers have to rely on the milling capacities of the bigger players to process certain logs and because of the dominance of the big integrated forest product companies of the overall economic environment.

To date procedures have often been not transparent, and even after Indian bands invested a substantial effort securing the up front investment necessary to bid in the smaller programmes, their bids were often turned down with no reasons given, discouraging future efforts.

SECTION III. CHANGED CIRCUMSTANCES REVIEW

This review has to include the Indian tribes from the respective territories and provinces and measure to which extent their proprietary rights are taken into account. It should also specifically seek the views of indigenous peoples, because at present they are excluded from the forest industry and their aspiration is to become involved as new, independent actors in the industry without being subject to the pressure and dominance of the big companies. Indian peoples can serve as an indicator for the openness and transparency of the industry of which they are presently not a part, but in which they constantly seek a significant place.

Special attention should be paid to the fact whether indigenous peoples have been consulted, given a substantive right to participate and accommodated in an appropriate way. Both according to the government to government relationship with tribes in the us and the fiduciary obligation in Canada indigenous peoples and their rights have to be taken into account. The evidential burden is on the provinces to show that they have met their obligations towards indigenous peoples and provided remuneration and an opportunity to participate in the forest industry. The Changed Circumstance Review would just allow for the removal of the duties if all the fundamental conditions are met, including the opportunity for indigenous peoples to participate in the forest industry. There should be no gradual or partial reduction of the duties.

In closing it is also important to state that indigenous peoples in Canada do not believe in the value of any kind of interim agreement along similar terms as the Softwood lumber Agreement, that has failed both industry and indigenous peoples. Chances are high that indigenous peoples would be further marginalized and not have any access to quota. A long-term solution to the Softwood Lumber Disputes requires that some of the fundamental issues, such as diversification of tenure, creating the setting for market conditions, etc. are addressed. Any interim agreement would just significantly lower the readiness of the Canadian parties to concede to those long overdue changes.

VI. CLOSING COMMENTS

As tenures in Canada⁴⁶ are instruments of public policy, governments have an opportunity to redesign the tenure system to address the objectives of fairness, transparency and respect for the proprietary interests of Aboriginal Peoples.

Public policy changes could be stimulated by the bulletin and lead to a new standard of forest management in Canada, one which incorporates Aboriginal rights, values and land use practices and redresses the historical exclusion of Aboriginal Peoples. This would be of beneficial to tribes both in Canada and the United States, because in an increased share in lands and resources, would involve tribes in Canada as new actors and further tribal economies on both side of the territory. The Royal Commission on Aboriginal Peoples made this clear:

“Aboriginal peoples need much more than territory to become economically, culturally and politically sufficient. Without adequate lands and resources, aboriginal nations will be unable to build their communities and structure the employment opportunities necessary to achieve self-sufficiency..”

“Only a small proportion of Canada’s resource income has come back to aboriginal people, most in form of transfer payments such as social assistance. This has never been, and is not the choice of aboriginal people. They want to free themselves from the destructive burden of welfare and dependency but to do this they need to have what was taken away. They need lands and resources...”

In conclusion, it is hoped that these comments will be carefully considered by the Import Administration, International Trade Administration, Department of Commerce, as submitted. Most importantly, we are appreciative of the fact that this Department is willing to consider the “whole” picture, rather than what is only submitted by Canada, the provinces and their forest industry as it is an issue that deeply affects Indian tribes in Canada and the United States.

⁴⁶ The majority of forest land in Canada is publicly-owned by 71% by provincial governments and 23% by the Federal and territorial governments. The remaining 6% is privately owned. Most First Nation communities (80%), are located within Canada’s commercial forest zones. Consequently, they have a keen interest both in the management and economic utilization of these forests. See *Aboriginal Held Forest Tenures in Canada – A Draft Report on Current Progress*. National Aboriginal Forestry Association, May 2003 at www.nafaforestry.org.

APPENDICES

Appendix I: POSITIVE ALTERNATIVES

A. Forest Certification and Capacity Building

An important development that could force industry and the government to make changes will be the development of Ontario regional standards for Forest Stewardship Council (FSC) accreditation. The FSC's Principle #3 and its four criteria refers to Indigenous Peoples' Rights, and requires any company wanting to get certified must demonstrate that its forest practices meet or exceed these criteria. Criterion 3.1 clearly states that:

“Indigenous Peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies.”

Another fact that could influence future tenure allocation is the availability of funding to support forestry capacity development amongst First Nations. Many are lacking in the skills and capital needed to operate forest based businesses.

Often the governments and industry are not willing to provide funding so First Nations negotiate with them on an equal playing field while these organizations have the necessary human resource capacity and access to technological information to ensure a sound forest tenure.

Access to forest tenure and timber allocations, across Canada, have arisen only as a result of concerted Aboriginal-initiated efforts. These have typically involved activism lead to court cases, legal action and claims settlement. In the cases of other tribes such as NAN, some of these efforts have been undertaken, but to no avail.⁴⁷

Finally, an additional factor that is worth noting is the widespread displeasure of the tribes with the large-term and large-scale tenure system. This leaves no volume available for smaller ventures, and large licensees do the management. There is the possibility of future activism by Aboriginal peoples to communicate their desire to become long-term tenure holders. Finally Aboriginal communities want to become involved in value added production of goods that use every part of the tree and also in the marketing of other non-timber forest products.

⁴⁷ See NAN Press Releases: *Chiefs Call on the Ontario Government to Address Grassy Narrows Concerns* (February 12, 2003), *Third Blockade Erected in Ontario – New One in Hornepayne First Nation* (February 18, 2003), and *Mushkegowuk Chiefs Offer Support to Grassy Narrows First Nation* (February 19, 2003).

B. Ecosystem Based Planning and Management:

Ecosystem-based planning is applicable at the full range of spatial scales from large sub-continental and regional landscapes to small watersheds and individual patches or ecosystem types. In order to protect ecosystem health and biodiversity at all scales through time, ecosystem-based planning needs to begin with as large a landscape as possible to ensure that ecological processes are maintained throughout the region as planning proceeds to landscapes of multiple watersheds, to individual watersheds, and eventually to patches or individual ecosystem types.

Accommodation of Aboriginal Title and treaty rights is a major factor in designing and implementing an ecosystem-based planning process. Community interests that participate in an ecosystem-based planning process are required to have a significant constituency, a clear means of regularly communicating with their constituency, and a clear means of being held accountable to their constituency and to the broader community. Industrial interests, along with other interests, need to be comfortable with, and adopt the philosophy and principles of an ecosystem-based approach to planning.

It is a system of ecosystem protection, restoration, and human use that, as a first priority, maintains natural ecological integrity and biological diversity across the full range of spatial and temporal scales, while providing for ecologically and culturally sustainable communities and their economies.

- Natural reflects pre-industrial ecological conditions and includes Indigenous management systems.
- Ecological Integrity means protecting, maintaining, or restoring natural ecosystem composition, structures, and functions.
- Ecosystem-based management is inclusive of a wide range of human activities, and recognizes that healthy human communities provide the necessary human resources to implement ecosystem-based management.
- The sum of community economies is the global economy.
- This system of management may be applied to the spectrum of ecosystems, and to the range of conditions from unmodified landscapes to urban landscapes, and from terrestrial ecosystems to marine ecosystems.
- Moving to ecosystem-based management from conventional management systems requires a transition period that provides for development of diverse, inclusive community-based economies founded upon ecosystem-based plans.

Appendix II. Forestry Impacts on Traditional Lifestyles

In Canada, as in the United States, a number of Aboriginal languages and cultures are in danger of extinction. In today's society other measures are having an impact on traditional lifestyles. For the purposes of illustration INET has taken the liberty to provide for the Department a number of testimonies that speak to the issue on the impacts of forestry in Northern Ontario, first hand.⁴⁸

Testimonies of Ontario Tribal Members who intensively use the Land

Informant A. Interview on the Impact of Forestry. May 28, 2003 Moose Factory

"I have a regular job, and I get a few weeks off each year, which I take in the fall, in order to go to my trapping area for hunting and trapping. In the past couple of years I put my truck on the railway to Cochrane, and then drove from there to my trapline on forestry roads. I go into my camp from the road by Skidoo. Previously I have flown in there by float plane from Cochrane, which is expensive. But I will retire from my job soon, and then I will then spend more time in the bush. I want to spend more time in the bush with my sons, who are interested in learning to hunt and trap and live in the bush.

Large areas of the trapline I am now using has been cut over by forestry in the past few years. This has driven away the animals from the area. Consequently, large parts of the area are now useless for hunting and trapping. It takes many years before the animals will return to an area that has been cut over. Some moose may return to the area within a few years, after bushes like the willows grow up, but it is not until the aspen, poplar and other trees become established that more of the animals and furbearers return. This is not for at least ten years.

I have also noticed that forestry roads are having a major impact on my area. The roads that are today being put into my trapping area are permanent gravel roads, with bridges. The forestry companies no longer use the dirt roads with temporary stream crossings that they once used in the past. One of the problems that come from these roads is theft. People can now drive in and out easily. I had a canoe and my traps stolen from one of my camps by people who came in by road. I also know of another case in which a Cree trapper had a skidoo stolen from his camp, as a result of a forestry road.

These roads also bring in White hunters to an area. Now I have to wear a red fluorescent jacket in the fall, in case one of these hunters shoots at me. I also noted that the fishing and hunting outfitters in my area are also opposed to forest cutting, as it ruins the area for their business. One outfitter was given a licence a few years ago to set up two camps in my trapping area, but I was never consulted about this beforehand by the government. However, this outfitter will have to close up in the next few years, as forestry cutting gets closer to him."

⁴⁸ Testimonies from Informant A, B, and C. Moose Factory and Cochrane, Ontario (May 28 – July 8, 2003).

***Interview B - The impact of forestry on Hunting and Trapping - Cochrane, Ontario
Canada, June 27, 2003***

"I grew up in a very small village of people who worked for the Ontario Northland Railway. My earliest memories are of going hunting and trapping in the bush around there with my father. I also lived for a while at Moose Factory, and used to go hunting around the community there with my two aunts. By the time I started high school I could skin and prepare my own marten and mink pelts.

As an adult I worked for the railway, until recently. I lived for fifteen years at a small settlement for the railway workers and a nearby hydroelectric dam. While living there I used to always trap during my time off after work. I used to set out my traps on the weekends, and check them in the evenings, after I had finished my shift for the railway. I do not trap during the coldest months of January to March, but I trap for the rest of the winter. When this community closed several years ago, I moved to Cochrane, but I continued to trap and hunt in the same area, travelling from Cochrane by truck. Some years I could make up to \$10,000 from trapping. I also hunt for food, including moose, geese, ducks, partridge, and rabbits and I fish for sturgeon, pike, trout and pickerel.

While small-scale forest cutting began much earlier, I first noticed large-scale forestry cutting beginning in the 1970s. At first the areas cut were fairly small, but soon mechanized harvesting came in, and then large areas began to be clear-cut each year. In recent years the forestry company has supplied me with maps that show the parts of my trapline that were cut in various years. The company now wants to cut the few remaining large trees on my trapping area.

After the trees in an area have been cut, all the animals leave and the area is useless for hunting or trapping. It takes many years for the animals to return. There are very few parts of my trapping area left where forestry has not driven most of the animals away. This problem has been made even worse recently, since the forestry companies have begun spraying with herbicides after harvesting. This is to kill off the deciduous trees. It prevents the willows and poplars and other fast-growing trees from growing back. These are the trees that the moose and beaver feed on. Because the spraying prevents the growth of these trees, the animals that feed on them do not return to these areas. Consequently, animals may not return to areas that have been cut over for twenty or thirty years.

The company is supposed to warn me when they are planning to cut trees in a part of my trapping area. However, in some cases they have cut trees without giving me any advanced warning. As a consequence, I have lost traps that were destroyed by the forestry harvesting activities. The forestry company also builds its own forestry access roads. The roads that they build today are permanent, with permanent bridges. Although they are not officially public roads, there are no gates across them, so that anyone can drive them. In the fall outside hunters come into my area using these roads.

The forestry company sometimes plants trees in an area that they have harvested. However, in some cases they do not plant the same species that grew there before. For example, in one area they harvested jack pine, but they replanted the area with black spruce. In my opinion, to encourage the animals to return to an area after harvesting they should replant the area with the same species that they harvested from this area.

I have written many letters to the forestry company, complaining about the environmental damage done to my trapping area by forestry. The company has not responded to my complaints, except to claim that they are following the Ontario environmental regulations. In one case they paid me for some, but not all, of my traps that were destroyed when they cut over a part of my trapping area without giving me any warning.”

Interview with Informant C, on the impacts of forestry, Moose Factory, Ontario Canada, July 8, 2003

“I have hunted and trapped all my life in my own hunting and trapping area. We used to trap over a much wider area, but some years ago the government gave out some of this area to other trappers. My Uncle, who has now passed away, used to trap in this area before me. He trapped and hunted there all his life – in the old days he used to go there by canoe. He paddled from Moose Factory to Hannah Bay and from there up the Hurricanaw River, and then up a tributary leading towards his hunting area. He used go as far as he could by canoe before freeze-up, and then he would store the canoe and continue by snowshoe. In those days they would move camp every few weeks. In the spring he would go and fetch the canoe, and then after break-up he would go by canoe all the way back to Moose Factory.

A main road was put into my trapping area about 27 years ago (around 1975), to provide access to a new mine. Earlier I had helped to stake the area where the mine was built. Right after the road was finished, the forestry company began forestry cutting along the road. It soon reached my hunting and trapping area. The forestry company made its own access roads off the main road. They did not use forestry camps in this area – the workers went back to town every evening. After they finished cutting a particular area, we noticed that all the animals had moved away – the moose, the caribou, the beavers and marten and all the other animals. After 3 or 4 years the moose start to return, but it is only after many years that most of the animals have returned to the area, but they never came back in the numbers that had been before forestry had begun.

I have seen instances where oil and other forms of pollution were left behind by forestry machines. The oil must have been leaking from one of the forestry machines. One of these instances was in an area that was being cut by a second forestry company. I complained about this to the Ontario Ministry of Natural Resources, and they are still investigating this.

The first forestry company has also sprayed herbicides in the area, to keep willows and other deciduous species from growing back. I am very concerned about this spraying, not only because it holds back the willows, which many of the animals that I depend on eat, but the poison from the spray gets into the environment, including the food that the other animals eat and in the waters where I catch fish. I am afraid that their meat may be polluted. We have noticed that some of the fish now have ulcers on their flesh, and we are concerned that this may be caused by pollution in the water, due to the spraying. The spray gets into the environment, and after the snow melts it gets carried into the rivers

Some years ago I began to complain to the forestry company cutting in this area, about the damage due to forestry. I told them I would make a claim against them. I contacted a lawyer to help me with my case. After that, the forestry company began to take me seriously and to cooperate with me. Eventually I was paid some compensation for traps that had been destroyed due to forestry. But I was never compensated fully for all the damage done to my land due to forestry.

The forestry company showed me maps where they planned to cut in future years. In some cases I asked them not to cut in certain areas that were important for my trapping and hunting, but they went ahead and cut there anyway. Once in Cochrane they showed me a map that indicated the locations of forestry access roads and where they had been cutting. I told them that some parts of the map were wrong.

The road to the mine, which is now closed, is open to the public as far as a bridge near my camp, but after that it is supposed to be private. But there is no gate or barrier on the road, except right at the mine site. People from town bring camping trailers and stay all summer. I have asked them to only come between May 20 and September 15, so that they would not interfere with my hunting and trapping, and so far they have agreed to this.

Three years ago the forestry company asked me to work with them. They pay me \$6,500 a year to warn them about things that I see that are not being done correctly. I advise them about environmentally sensitive areas, like water crossings, and about instances when their sub-contactors are not following proper procedures. However, the company does not always follow my advice, such as staying away from areas I would prefer they did not cut, and the spraying of herbicides after harvesting.

In the past the forestry company's access roads were not built with proper bridges to cross streams and rivers. These crossings would block up the streams, so the fish could not migrate up them. In other cases they put in bridges built of logs that they cut nearby. After they had finished cutting, non-native sports hunters could come and make use of these bridges to access parts of the area. This situation has improved lately. The forestry company now puts in proper prefabricated bridges, and, following my requests, after they have finished the area, they remove them."

Appendix III. Letters of Endorsement from Indigenous Peoples and Organizations from across Canada

LIST OF ATTACHED LETTERS and RESOLUTIONS:

1. Nishnawbe Aski Nation Resolution on Tribal Involvement in the US Canada Softwood Lumber Dispute, July 31st, 2003
2. Letter by Grand Council of Treaty #3 Support of the Comments of INET
3. Letter by First Nations Summit of BC: Additions to INET comments
4. Letter by the Union of BC Indian Chiefs: Indigenous Rights and Softwood Lumber Policies,
5. Okanagan Nation Alliance, Resolution #7, Tribal Involvement in the US Canada Softwood Lumber Dispute
6. Letter by St'at'imc Chiefs Council, Softwood Lumber Policy Bulletin
7. Letter by the Lower St'at'imc Tribal Council, Comments on the SL Bulletin
8. Letter by Chief Mike Retasket, Bonaparte Indian Band, Shuswap Nation
9. Letter by the Secwepemc Traditional Government on Multifaceted Use and Community Needs
10. Letter by Carrier Sekani Tribal Council on the Policy Bulletin
11. Letter by the Cheam Indian Band, St:olo Nation, on Indigenous Rights and Softwood Lumber

RESOLUTION 03/66
TRIBAL INVOLVEMENT IN THE US-CANADA SOFTWOOD LUMBER DISPUTE

WHEREAS the Nishnawbe Aski Nation territory covers two thirds of Ontario, but Ontario claims exclusive jurisdiction over our traditional territories as Crown lands. The Crown delegates management responsibilities to companies, who hold long-term tenure while drawing maximum economic benefits;

WHEREAS the Southern part of our traditional territories has been subject to unsustainable Softwood Lumber extraction affecting the current and traditional uses, such as hunting, fishing and other harvesting, and we do not want to see these destructive policies and practices duplicated in the North;

WHEREAS tribes in the United States support Canadian First Nations in their struggle to gain control over their forests, and they have expressed interest in cross-border trading and investment relationships;

WHEREAS our First Nations are not remunerated for forest resources taken from our traditional territories, which constitutes a subsidy under international trade law, and our First Nations are excluded from the forest industry and are not adequately involved in decision making regarding forest management;

WHEREAS Aboriginal peoples from across Canada, including the Nishnawbe Aski Nation, have become involved in the Softwood Lumber Dispute. Submissions on Aboriginal and Treaty rights have been made under the umbrella of the Indigenous Network on Economies and Trade (INET) to the World Trade Organization (WTO) and North American Free Trade Agreement (NAFTA) and;

THEREFORE BE IT RESOLVED that the Nishnawbe Aski Nation hereby express their support for these submissions raising Aboriginal proprietary interests to be taken into consideration at the international trade level;

FURTHER BE IT RESOLVED that NAN Chiefs-in-Assembly endorse the INET comments to be made on the US Department of Commerce's Proposed Framework on Softwood Lumber, and request that the final version recognizes that Aboriginal peoples have to play a key role in forest management and tenure diversification and;

FINALLY BE IT RESOLVED that Aboriginal peoples have to receive remuneration from any forestry activity in their traditional territories and that NAN requests that First Nations from both the United States and Canada be part of any political negotiations on Softwood Lumber otherwise any interim agreements without their consent will be rejected.

Carried

DATED AT GINOOGAMING FIRST NATION, THIS 31ST DAY OF JULY, 2003.

MOVED BY: Chief Theresa Hall
Attawapiskat First Nation

SECONDED BY: Chief Dean Cromarty
Wunnumin Lake First Nation



Grand Council Treaty #3

CENTRAL OFFICE:

P.O. Box 1720
Kenora, Ontario
P9N 3X7
Ph: (807) 548-4214
Fax: (807) 548-5041

August 6th, 2003

Grant D. Aldonas,
Under Secretary for International Trade,
Central Records Unit, Room 1870,
U.S. Department of Commerce,
Pennsylvania Avenue and 14th Street, NW.,
Washington, DC 20230

Re: Support of the comments of the Indigenous Network on Economies and Trade on the Proposed Policies Regarding the Conduct of Changed Circumstance Review of the Countervailing Duty Order on Softwood Lumber From Canada (C 122 839)

Dear Under Secretary Aldonas,

I am writing you in the name of the Anishinaabe people of the Grand Council of Treaty 3 to reiterate our positions regarding the Softwood Lumber Issue. Our lands stretch from Northwestern Ontario to Manitoba and are throughout impacted by unsustainable softwood lumber extraction. Not only have our people been excluded from the forest industry with the companies failing to take our traditional knowledge and Anishinaabe law into account, but we have also not received any remuneration for the extraction of resources in our traditional territories. As you are aware we have joined in the previous submissions of the Indigenous Network on Economies and Trade that the non-recognition of Aboriginal Title and rights and the non-implementation of treaty rights is a subsidy under international trade law. Our amicus curiae briefs have been officially accepted by tribunals of both the World Trade Organization and NAFTA.

We want to again stress, that any long-term solution of the Softwood Lumber Dispute has to involve indigenous peoples and we encourage you to make provision for the reallocation of tenure to the control of indigenous peoples. Our commitment to more sustainable forest management and remuneration for our proprietary interests lead to a more appropriate valuing of the resource.

In closing we want to make it clear that present forest policies in Ontario and Manitoba do violate our constitutionally protected Aboriginal and treaty rights and concentrate power and control in the hands of a small number of companies, that also fail to take our rights into account. We have put both companies and the provincial and federal governments on notice that we will challenge their policies and practices at the provincial, national and international level.

The Grand Council of Treaty 3 is ready to work with tribes in both Canada and the United States and all other interested parties on a long-term sustainable solution of the Softwood Lumber Dispute and would be ready to meet with you to discuss our vision. My office can be reached at: (807) 548 4214.

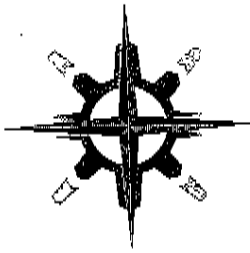
Meegwetch,



Grand Chief Leon Jourdain
Grand Council of Treaty 3

Cc:

Arthur Manuel, Spokesperson Indigenous Network on Economies and Trade
Grand Chief Stan Beardy, Nishnawbe Aski Nation
Grand Chief Margaret Swan, Southern Manitoba Chiefs Organization
Grand Chief Francis Flett, Manitoba Keewatinowi, Okimankinak Inc.
Regional Chief Charles Fox, Chiefs of Ontario
National Chief Phil Fontaine, Assembly of First Nations
President Stewart Phillip, Union of BC Indian Chiefs
Grand Chief Edward John, First Nations Summit
Interior Tribes of British Columbia (Nlaka'pamux, Okanagan, Secwepemc, St'at'imc et al.)
Carrier Sekani Tribal Council and Northwest Tribal Treaty Groups in BC
Yakama Tribal Council
Confederated Tribes of the Colville Federation
Menominee Tribal Council



FIRST NATIONS SUMMIT

August 6, 2003

Grant D. Aldonas,
Under Secretary for International Trade,
Central Records Unit, Room 1870,
US Department of Commerce,
Pennsylvania Avenue and 14th Street, NW,
Washington, DC
20230

Attention: Additions to INET comments on Proposed Policies Regarding the Conduct of Changed Circumstance Reviews of the Countervailing Duty Order on Softwood Lumber from Canada (C 122 839)

Dear Under Secretary Aldonas,

The First Nations Summit provides a forum for First Nations in British Columbia to address issues relating to treaty negotiations as well as other issues of common concern. The First Nations Task Group is the political Executive of the First Nations Summit and is mandated to act on behalf of the Summit. According to this mandate we are submitting the following comments on the Proposed Policy Framework for Softwood Lumber.

The First Nations Summit has followed the US-Canada Softwood Lumber Dispute with great concern and in a number of enclosed resolutions and letters repeatedly stated that a long term solution needs to take into account and accommodate Aboriginal Title and rights. We made similar statements prior to the passage of the recent Forest Act Changes, First Nations Summit Resolution # 0303.05 states that the amendments to the Forest are: "the most extensive in more than 50 years" and "will have direct impacts and effects on the treaty negotiations process in Canada."

Still the amendments were passed without our consent and without accommodating Aboriginal interests and Aboriginal peoples in British Columbia are still to a large extent excluded from the forest industry. These concerns will have to be addressed to find a long-term solution to both the Softwood Lumber Dispute and indigenous challenges to the current Forest Management Regime in Canada.

As we have repeatedly stated Aboriginal peoples have to receive compensation for the use of forest resources taken from their traditional territories. In a previous letter to Secretary of Commerce Don Evans has outlined our own solution for the Softwood Lumber Dispute, including more sustainable forest management by involving indigenous peoples.

..../2

We are confident that the Department of Commerce will reference the important role Aboriginal peoples have to play in more sustainable forest management in the final version of the bulletin.

Respectfully,
FIRST NATIONS SUMMIT TASK GROUP

Herb George (Satsan)

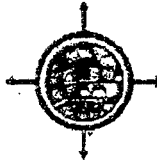
Grand Chief Edward John

Lydia Hwitsum

OUR LAND IS OUR FUTURE

UNION OF BRITISH COLUMBIA INDIAN CHIEFS

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August 6, 2003

Mr. Grant Aldonas
Under Secretary for International Trade
Central Records Unit, Room 1870
U.S. Department of Commerce
Pennsylvania Avenue and 14th Street
Washington, DC 20230

Dear Under Secretary Grant Aldonas:

RE: INDIGENEOUS RIGHTS AND SOFTWOOD LUMBER POLICIES

On behalf of the Union of British Columbia Indian Chiefs (UBCIC) I would like to endorse the comments of the Indigenous Network of Economics and Trade (INET). In particular Indian peoples in British Columbia have judicially recognized and constitutionally protected Aboriginal rights to their lands. Aboriginal title is a key aspect of Aboriginal rights and is a collective proprietary interest in our territories. Aboriginal title however is not recognized by the federal and provincial governments and all this policy is a financial contribution to the Canadian forest industry.

In this regard the Interior Alliance and the Indigenous Network of Economics and Trade (INET) have submitted amicus curiae briefs to the World Trade Organization (WTO) and North American Free Trade Agreement (NAFTA) to this affect and they have been accepted. The Union of BC Indian Chiefs feel that the United States Commerce Department must include indigenous peoples as a significant part of a new and diversified forest tenure and market system.

It is my opinion that the INET submission does contribute toward this direction and would ask that your Office seriously consider this matter in the final Bulletin on this matter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Stewart Phillip', written over a horizontal line.

Chief Stewart Phillip
President

OKANAGAN NATION ALLIANCE
ANNUAL GENERAL MEETING
July 9 – 10, 2003

RESOLUTION #7

**TRIBAL INVOLVEMENT IN THE US CANADA SOFTWOOD LUMBER
DISPUTE**

WHEREAS: The Okanagan Nation Alliance (ONA) Annual General Assembly took place in Penticton BC on July 09th and 10th, 2003.

WHEREAS: A keynote presentation by Arthur Manuel, Spokesperson for the Indigenous Network on Economies and Trade (INET) outlined US and Canadian Tribal concerns in relation to the US Canada Softwood Lumber Dispute.

WHEREAS: The Okanagan people expressed concerns about the Softwood Lumber Issue, especially the exclusion of Aboriginal peoples from the forest industry, unsustainable harvest levels and lack of remuneration to the tribes in British Columbia for forestry on their Aboriginal Title lands.

WHEREAS: Also our relatives, representatives of the Confederated Tribes of the Colville, were present at the ONA Annual General Assembly and talked about the impacts tribes in the United States suffer from lumber imports from Canada sold at less than fair market prices and expressed interest in cross-border relations.

WHEREAS: A number of Okanagan Bands and other Interior peoples went logging under tribal authority pursuant to Aboriginal Title and without a provincial government permit.

WHEREAS: As a follow up submissions have been made to the US Department of Commerce and the amicus curiae briefs of INET have been officially accepted by both the World Trade Organizations (WTO) and North American Free Trade Agreement (NAFTA) opening the door for indigenous participation in the process.

THEREFORE BE IT RESOLVED: That the ONA and its members take this opportunity to express their support for these submissions asking for Aboriginal proprietary interests to be taken into consideration at the international trade level and request INET to continue to report on this international matter to the ONA and other tribes in British Columbia and Canada on these proceedings.

FURTHER BE IT RESOLVED: That the ONA invites comments by its members and Indian peoples in British Columbia and Canada on the US Department of Commerce's Proposed Framework on Softwood Lumber, documenting the present exclusion of Indian peoples from the forest industry and proposing ways of our future involvement including major forest tenure diversification to our peoples, and



FINALLY BE IT RESOLVED: That Indian tribes from both the United States and Canada should be part of any political negotiations on Softwood lumber in order to establish our decision making authority regarding our ownership and benefit from our forest resources.

Moved by: Dixon Terbasket, Lower Similkameen Indian Band

Seconded by: Byron Louis, Okanagan Indian Band

Disposition: All in favour. Motion carried unanimously.



ST'ÁT'IMC CHIEFS COUNCIL

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July 22, 2003

Grant D. Aldonas
Under Secretary for International Trade
Central Records Unit, Room 1870
U.S. Dept of Commerce
Pennsylvania Avenue and 14th Street, NW
Washington, DC 20230

Attention: Softwood Lumber Policy Bulletin

Please be advised that we, the St'át'imc, an indigenous people within the confines of British Columbia and Canadian boundaries, have several justifiable, well-founded and legally binding concerns that are relevant to the proposed policies on softwood lumber from Canada.

The main points of contention are the continuing practice of non-recognition of legitimate **Aboriginal Title** within BC, the exploitation and unsustainable rate of harvest in BC forestry practices, and the pointed exclusion of indigenous peoples from the timber industry, along with the complete denial of any remuneration resulting from the sale of our timber. We maintain a legal proprietary right to our Aboriginal Title lands, including the timber, which has been deliberately denied and neglected. Due to our legal Aboriginal title to land and resources where timber is being extracted without our consent or involvement, and the neglect of this issue in the international trade of lumber by the BC and Canadian governments, the situation essentially amounts to a subsidy under international trade law.

The BC and Canadian governments have illegally claimed exclusive jurisdiction over Aboriginal Title territories in British Columbia without benefits of treaties. In 1982, section 35 of the Canadian Constitution legally extended constitutional protection to Aboriginal Title and Rights, however this provision has not yet been adequately or fairly implemented. In 1997, the Supreme Court of Canada finally declared that Aboriginal Title continues to exist in much of BC where legal agreements and treaties have not been carried out. This includes our St'át'imc territory, along with many other indigenous Nations within BC. Regardless of these prominent legislative proclamations and decisions by Canada, indigenous peoples in BC continue to be denied meaningful access to the timber industry, remuneration for the exploitation of our natural resources, or meaningful input and decision making about how our lands are managed.

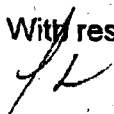
More pointedly, we are absolutely outraged by the planned legislative changes to the forestry industry that are being undertaken by the BC provincial Liberal government called the *Results Based Code* under which the plan is to implement "the working forest". With this illegal scheme, the BC government plans to confer approximately 45 million hectares of Aboriginal title lands to private, corporate interests. In addition to deliberately neglecting provincial, federal and international legal obligations in relation to Aboriginal title and indigenous peoples, this format reduces government and public oversight of timber companies and cuts environmental safeguards.

Furthermore, these planned legislative changes to the forest industry in BC invites foreign investment to Aboriginal title lands without fully informing the private investors that Aboriginal title continues to exist over the lands and resources for which long-term agreements and leases are being discussed. Once our Aboriginal title lands and resources have been entered into international agreements by the provincial government, the domestic legal obligations of BC and Canada toward indigenous peoples lose their viability as the international trade laws will take precedence.

As a participant of the Interior Alliance, a submission was made in conjunction with the Natural Resource Defense Council to the Department of Commerce on May 10th, 2001 that was based upon our inherent rights to our traditional territories including natural resources. The Interior Alliance proposed that the failure to provide for adequate compensation arrangements to indigenous peoples for their proprietary interests by the forestry companies whose activities clearly comprise infringements on Aboriginal Title in turn constituted a financial contribution by government and provided the companies with an economic advantage.

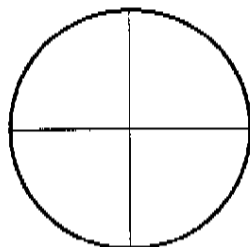
In conclusion, we request consideration of our above noted concerns in your review of the softwood lumber issue. It is our view that the non-recognition of Aboriginal Title is a subsidy under international trade law. As a result of this exploitation throughout history and into the present, indigenous peoples in Canada and British Columbia have been and continue to be economically and politically marginalized in every sphere of society as a means of ensuring continued government and industry's unimpeded access to the natural resources.

With respect,


Chief Garry John
Chairperson
St'át'imc Chiefs Council

Lower Stl'atl'imx Tribal Council

LOWER STL'ATL'IMX TRIBAL COUNCIL



P.O. Box 255
Mount Currie, BC
V0N 2K0

Phone: 604-894-0021
Fax: 604-894-0031
E-Mail: LSTC@telus.net

Moving

Motivating

Managing

Thursday, August 07, 2003

Grant D. Aldonas,
Under Secretary for International Trade
Central Records Unit Room 1870
U.S. Department of Commerce
Pennsylvania Avenue and 14th Street, NW
Washington, DC 20230

Subject: Comments of the Indigenous Network on Economies and Trade on the Proposed Policies Regarding the Conduct of Changed Circumstances Review of the Countervailing Duty Order on Softwood Lumber From Canada (C 122 839)

Dear Under Secretary Aldonas.

As a Hereditary Chief within the Stl'atl'imx Tribe, North America of the Americas, I concur and support the other Native Leaders, regarding the Comments of the Indigenous Network on Economies and Trade, as they relate to the Softwood Lumber Bulletin.

I further support the United States on its US DoC Softwood Lumber Bulletin and hope that a resolution is achieved on the matter.

We the Indigenous Population have been denied access to the economies afforded by the Softwood Lumber Industry. As a result, we must rely on Government Subsidies, Grants and short-term programs to sustain ourselves, which we wish to change.

We recently were invited to write a letter of Interest and proposal to the Softwood Industry Community Economic Adjustment Initiative, which provides a non-repayable program. However, our proposal was rejected, as per the letter enclosed. 1pg.

Here in the Province of British Columbia, the Tribes did not cede, surrender, sell or let to wit any of our Tribal Territories to anyone. We have always questioned Canada's jurisdiction for allowing the BC Government to slaughter our forest. Without, consultation, consent and remuneration for trees taken from our Aboriginal Title to Land.

We have always recommended a sustainable forest management and protection of watersheds that have been ruined beyond repair, (from Hydro Production) thus endangering the wild pacific salmon stocks.

Lower Stl'atl'imx Tribal Council

We certainly, appreciate INET bringing these concerns forward to you and the World Trade Organization. There has been a lack of Free Choice, which continuously disallows Indigenous peoples from participating in the Softwood Industry.

We would like to be part of the solution with this dilemma, and would welcome wood lot licenses openness. Aside from our Aboriginal Title and Rights, we believe in the universal equality and shared prosperity.

We have innovative technologies that would optimize the use of the forests, by harvesting traditionally equal with the Softwood Lumber Commercial uses.

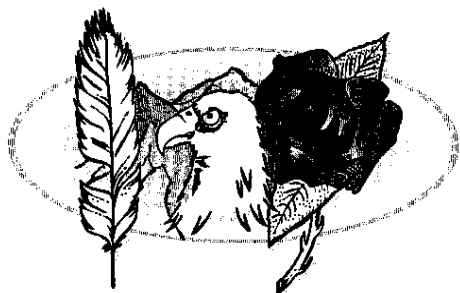
Mr. Under Secretary Aldonas, we appreciate all your help with this Industry. Further, we are requesting INET to represent our interests by continuing to work with you. We will provide INET with information for you review and assistance. Should you have any questions, I can be reached by email at, clarkeo@telus.net

God Speed!



Clarke Smith, LSTC Program Coordinator and Hereditary Chief.

Cc Prime Minister J. Chretien, Art Manual INET



Bonaparte Indian Band

Stuctwesemc Indian Government of the Shuswap Nation

Box 669, Cache Creek, BC V0K 1H0 Tel: (250) 457-9624 Fax: (250) 457-9550

Grant Aldonas
Under Secretary for International Trade,
Central Records Unit, Room 1870,
U.S. Department of Commerce,
Pennsylvania Avenue and 14th Street, NW.,
Washington, DC 20230;

Bonaparte Indian Reserve, 5 August, 2003

Dear Under Secretary for International Trade,

I am writing you as the chief and in the name of the people of the Bonaparte Indian Band and of the Shuswap (in our language Secwepemc) Nation.

Our people have lived in Secwepemc territory since time immemorial and our elders hold the most detailed knowledge over the area that is passed on from generation to generation and still practiced to date. Therefore indigenous peoples are the first to suffer from unsustainable resource exploitation in their traditional territories. The International Convention on Biological Diversity, to which Canada is a signatory and the United States an observer, recognizes the central role indigenous peoples for the conservation of biological diversity, especially Article 8j makes reference to traditional knowledge as a means of in situ conservation. The Bonaparte Indian Band and Secwepemc people have been actively involved in the CBD proceedings and have worked hard for the implementation of the principle of prior informed consent of indigenous peoples to any developments on their lands.

It is clear that in order to preserve biodiversity and this knowledge our people have to have access to their territory. In the 1997 Delgamuukw Decision the Supreme Court of Canada recognized the collective proprietary interests of Aboriginal peoples in their traditional territories, but the federal and provincial governments have to date refused to implement this decision and thereby violate the Canadian constitution that protects Aboriginal and treaty rights.

My community has conducted extensive traditional use studies and eco-system based plans for the Hat Creek and Robertson Creek areas. We conduct our own logging according to these standards in these areas. As a chief I know how hard it is for our Aboriginal peoples to access their traditional territories and timber resources. We do not have the sufficient means to produce extensive eco-system based plans for our entire territory, most of which is allocated as long-term tenures to big companies. These

companies and the provincial government often fail to take our traditional knowledge into account.

In order to ensure more sustainable management and harvesting of forest resources, Indian people have to play the key role that is internationally recognized. The experience of the Bonaparte Indian band is a small example of how our people could actually be involved in the forest industry throughout their territory and make it more economically and environmentally sustainable.

In closing I want to fully endorse the comments by the Indigenous Network on Economies and Trade (INET) on the proposed frame work on Softwood lumber calling for a major reallocation of tenure in the hands of indigenous peoples. The Secwepemc people have been involved in the filings to both the US Department of Commerce and the international tribunals in the Softwood Lumber Dispute and feel encouraged by the official acceptance of our submissions regarding indigenous proprietary interests before both the WTO and NAFTA.

We will continue our work on both the international trade and environmental law front and hope that we can contribute to and be part of a long-term sustainable solution of the Softwood Lumber Dispute,

Kukstemc,



Chief Mike Retasket
Bonaparte Indian Band
Shuswap Nation

Secwepemculecw Traditional Government
Box 837
Chase, British Columbia, Canada V0E 1M0

August 3, 2003

Grant Aldonas
Under Secretary for International Trade,
Central Records Unit, Room 1870,
U.S. Department of Commerce,
Pennsylvania Avenue and 14th Street, NW.,
Washington, DC 20230;

Re: Indigenous Rights and Softwood Lumber Policies

Dear Under Secretary Grant Aldonas,

I am writing to you in the name of Secwepemc elders, land users, women and youth, who still use our land for traditional and spiritual purposes. You might have heard about the terrible forest fires presently raging in our territory around Kamloops. Part of it has to do with the present forest management system that fails to take our indigenous knowledge into account, traditionally our people would have conducted controlled burns earlier in the year to control the fire hazard. The current uncontrolled fires have a devastating effect on our eco-systems and wildlife and therefore our traditional uses. The present industrial forestry methods used by big industry also creates incredible damage to our watersheds and fresh water supplies, and in turn, affects fish and other wildlife.

Our people have conducted a traditional and current use study for the entire watershed and are now working on an eco-system based plan that would balance our multi-faceted uses with commercial-industrial activity. Still the provincial government and companies totally ignore our data, that is of the highest scientific standards and compatible with their systems, in their planning. For example Interfor holds a long-term tenure over the whole area of our historic Neskonlith Douglas Reserve over which we have a specific claim, but does not take into account the data from our traditional use study, instead we suffer the effects of their destructive forestry practices on a daily basis. Also we receive no payment at all for the resources taken from our lands and most of our families on the reserve live below the poverty line.

To build houses for our families our people went logging under tribal authorization but without a provincial permit. The province claimed exclusive ownership over the trees and ceased them, but according to the 1997 Delgamuukw decision we also own those trees. The courts since then allowed us to sell the trees and cover our costs. The profits are kept

in trust with our lawyers and the province has to pay for all of our court costs, but is stalling the process.

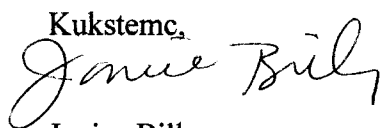
In addition, in the summer of 2001, we constructed permanent buildings within our traditional territory at MacGillvray Lake and were issued a trespass notice. The building was subsequently seized and destroyed at the Government of British Columbia. We are prohibited by provincial law to cut trees to build homes on our unceded, traditional territories. Our inherent land rights are not recognized the Governments of British Columbia and Canada, despite precedent setting legal cases in the Supreme Court of Canada.

Therefore we have become involved in the Softwood Lumber Dispute, to make sure that our proprietary interests are taken into account at the international trade level. Our territories are the heartland of Softwood Lumber extraction and we have supported and continue to support the submissions of the Indigenous Network on Economies and Trade due to their rights based perspective.

Our peoples meaning our elders, land users and youth, have to again be put in charge of managing the forests, to ensure more sustainable management. Community needs of forest resources to build homes have to be met first before broader access.

We are aware that the tribes in the United States manage their own forests in a way that takes into account many uses, employing primarily their tribal members in forestry operations and receiving the revenue. We want to learn from their experience and share a similar vision for forest management. A fair price for lumber has to cover our ownership and the cost of more sustainable management.

Our people have a long history of standing up for their rights and we are ready to work with you on finding a principled solution to the Softwood Lumber Dispute,

Kukstemc,


Janice Billy
Spokesperson

Carrier Sekani Tribal Council



Office of The Tribal Chief

July 21, 2003

Arthur Manuel
Indigenous Network on Economics and Trade
Dominion Building
Suite 714
207 West Hastings St.
Vancouver, British Columbia
V6B 1H7

Fax: 604 608 0244

**Re: Submission to the United States Department of Commerce Regarding the
Policy Bulletin on the Canada-United States Softwood Lumber Dispute**

Dear Arthur Manuel:

The Carrier Sekani Tribal Council hereby gives our support to your initiative to ensure that First Nations in British Columbia are treated justly in light of international decisions related to softwood lumber. To date the Carrier Sekani Tribal Council has opposed amendments to BC forest legislation and policy since First Nations were neither consulted nor accommodated due to the changes. Furthermore we acknowledge that the collected softwood lumber duties attributable to BC be returned to BC First Nations to provide partial compensation to them for past infringements of Aboriginal Title and/or rights due to forest resource extraction by softwood lumber companies.

Sincerely,
CARRIER SEKANI TRIBAL COUNCIL

Harry Pierre
Tribal Chief

A handwritten signature in black ink, appearing to read 'Harry Pierre'. The signature is fluid and cursive, written over the printed name.

pc: Carrier Sekani Tribal Council Chiefs
Grand Chief Edward John, Task Group, First Nations Summit
Justa Monk/Gerald Wesley, Co-chairs, Northwest Tribal Treaty Nations
Chief Stewart Philip, President, Union of BC Indian Chiefs



CHEAM INDIAN BAND

TEL: (604) 794-7924

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52130 OLD YALE ROAD, ROSEDALE, BRITISH COLUMBIA, CANADA V0X 1X0

August 6, 2003

Grant Aldonas
Under Secretary for International Trade,
Central Records Unit, Room 1870,
U.S. Department of Commerce,
Pennsylvania Avenue and 14th Street, NW.,
Washington, DC 20230;

Dear Mr. Aldonas

Re: Indigenous Rights and Softwood Lumber

I write to you today on behalf of the Pilalt Tribe to state our positions regarding the Softwood Lumber Issue. Pilalt *Solh Temexw* (*Halq'emeylem* word for sacred/title lands) is 120 km northeast of the city of Vancouver, British Columbia. We the Pilalt *Xwexwilmexw* (word for the original people of this land, in this case the Pilalt Tribe Members) have and continue to be excluded from the forest industry with companies failing to take our traditional knowledge and Pilalt law into account when operating within *Solh Temexw*. Moreover, we have received no remuneration for the extraction of resources within our traditional territories.

We the Pilalt *Xwexwilmexw* hold a collective proprietary interest in *Solh Temexw*. Pilalt title is a collective proprietary interest of the Pilalt derived from Pilalt law exercised by Pilalt community members, land users and youth according to the direction of our Elders. Pilalt title has not been ceded to the Crown, the Pilalt therefore assert and affirm that our title includes the right to select, for all, appropriate land uses within Pilalt *Solh Temexw*. (*Delgamuukw*)

Given the irrefutable economic component of our collective proprietary interests in *Solh Temexw*, and the clear direction given through the Canadian judiciary, third party proponents and Government are required to fully recognize and accommodate our title. (*Delgamuukw*) However, the current Forestry regime provides subsidies to logging companies by exempting them from remunerating the proprietary interests of Aboriginal People through policies such as the Comprehensive Claims Policy aiming at extinguishment of Aboriginal Title, and

of riparian buffer zones along with natural pattern disturbance emulation policy allowing for huge clear cuts for the sole benefit of companies.

The Pilalt *Xwexwilmexw* believe that the present forest practices in British Columbia violate our constitutionally protected Aboriginal rights while continuing to concentrate the control of our forests into a few companies' hands. These companies then benefit from the Crowns regime of foregoing compensation for our collective proprietary interest that the Federal Government is under legal obligation to protect and take into account. We have put both companies and the provincial and federal governments on notice that we will challenge their policies and practices at the provincial, national and international level.

Anything less than full recognition and accommodation for our Pilalt collective proprietary interest constitutes an undue hardship, and hence would be inconsistent with the continuity of the Pilalt relationship with *Solh Temexw*.

To establish a long term viable agreement between the two countries Aboriginal people should be part of the political negotiations on Softwood lumber in order to establish our decision making authority regarding our ownership and benefit from our forest resources.

Sincerely,

A handwritten signature in black ink, appearing to read "Sidney Douglas". The signature is written in a cursive, flowing style.

Sidney Douglas
Head Councilor
Cheam Village of the Pilalt Tribe