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October 23, 2019

Mr. James Maeder
Deputy Assistant Secretary for Antidumping
And Countervailing Duties
Enforcement and Compliance
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Room 18022
Washington, D.C. 20230

Re: *Comments Regarding Subsidy Programs Provided By Countries Exporting Softwood Lumber And Softwood Lumber Products To The United States (84 Fed. Reg. 55,561)*

Dear Deputy Assistant Secretary Maeder:

We submit these comments on behalf of the Conseil de l'industrie forestière du Québec ("CIFQ") and the Ontario Forest Industries Association ("OFIA") in response to the request by the Department of Commerce ("Commerce" or "the Department") for comments on Subsidy Programs Provided By Countries Exporting Softwood Lumber And Softwood Lumber Products To The United States. 84 Fed. Reg. 55,561 (Dep't of Commerce, Oct. 17, 2019).

The Department has prepared its Softwood Lumber Subsidies Reports to Congress in connection with its obligations under the Softwood Lumber Act of 2008 to ensure compliance with the Softwood Lumber Agreement of 2006 between Canada and the United States ("SLA

2006”) and to monitor, verify, and report on export charges collected under that agreement.¹

The purpose for the Department’s Softwood Lumber Subsidies Reports² expired on October 12, 2015 with the expiration of SLA 2006. Yet, the Department continues to solicit comments and to report to Congress.³

I. NEW RESTRICTIONS ON SOFTWOOD LUMBER TRADE ARE TO THE DETRIMENT OF DOWNSTREAM INDUSTRIES AND CONSUMERS

Canada has always been the primary and indispensable foreign supplier of softwood lumber to the United States. When the supply of softwood lumber from Canada is short and prices high, the cost of housing in the United States goes up, fueling inflation and depriving many Americans of the opportunity to buy new homes. Today, there are restrictions on Canadian softwood lumber being sold into the United States, the result of an ongoing dispute, and there are no negotiations looking toward settlement. There are interests on both sides of the border indifferent to the impact these restrictions are having on American consumers, and sustained demand through much of the last year has meant plenty of profit in addition to revenue for the U.S. Treasury. However, artificial and unsupported restrictions are not sustainable and can only damage both the U.S. and Canadian economies, especially when the North American housing market hits its next cyclical decline.

The U.S. lumber industry, seeking to increase the cost of essential materials for the U.S. housing market in order to increase its profits, insisted after the expiration of SLA 2006 that any

¹ See *Softwood Lumber Act of 2008*, <http://enforcement.trade.gov/sla2008/sla-index.html>; see also U.S. Gov’t Accountability Off., *Softwood Lumber Act of 2008: Customs and Border Protection Established Required Procedures, but Agencies Report Little Benefit from New Requirements*, GAO-10-220 (Dec. 2009) (“GAO Report”).

² H.R. Conf. Rep. 110-627, 764-65 *reprinted in* 2008 U.S.C.C.A.N. 536, 225-226 (“U.S.-Canada Softwood Lumber Agreement” is the subtitle of the conference report discussing the purpose and intent of the Softwood Lumber Act of 2008).

³ Central Canada notes that the Department claims its previous reports are available on its website, but the most recent two reports are only reports currently available on the cited website. See U.S. Department of Commerce, *Softwood Lumber Subsidies Report To The Congress*, (June 2018) at 6 n. 15 (“June 2019 Report”); <https://enforcement.trade.gov/sla2008/sla-index.html>

new agreement contain more trade restrictions than SLA 2006. Hence, there was no negotiating progress toward a mutually acceptable agreement that would be equitable for producers on both sides of the border, and U.S. downstream industries and U.S. consumers. Instead, the U.S. lumber industry filed petitions on Black Friday, November 25, 2016, seeking to renew litigation over softwood lumber trade and burden economic recovery.

The U.S. industry's petition relied heavily on prior Commerce and International Trade Commission ("ITC") investigation determinations, the most recent already seventeen years old, that Canadian softwood lumber was subsidized and threatening injury to the U.S. industry. The petition conveniently did not mention that these determinations were reversed by NAFTA binational panels, WTO panels, and the WTO Appellate Body, Extraordinary Challenge Committees, U.S. courts, and the agencies themselves in administrative reviews and remand determinations. The resulting remand and administrative review determinations, which are effectively the final determinations of record, were negative: no countervailable subsidies, no injury, and no threat of injury caused by imports of softwood lumber from Canada.

The Department and the ITC, as in the past, issued affirmative final determinations in their antidumping, countervailing duty and injury investigations.⁴ Once again, the lawfulness of those determinations has been appealed to binational panels under U.S. law and NAFTA Chapter 19. The Panel hearing the challenge to the ITC's final affirmative determination has remanded the determination to the ITC. The remand requires the ITC to explain better its affirmative determination in light of significant contrary denying material injury.⁵ And, yet again, World Trade Organization dispute settlement panels have been asked to decide whether the

⁴ *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less than Fair Value*, 82 Fed. Reg. 51806 (Dep't of Commerce, Nov. 8, 2017); *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, 82 Fed. Reg. 51814 (Dep't of Commerce, Nov. 8, 2017); *Softwood Lumber Products from Canada*, Inv. No. 701-TA-566 and 731-TA-1342 (Final), USITC Pub. 4749 (Dec. 2017).

⁵ Interim Decision and Order of the Panel, *Softwood Lumber Products from Canada: Final Affirmative Injury Determinations*, Secretariat File No. USA-CDA-2018-1904-03 (Sept. 4, 2019).

Department of Commerce determinations comply with the United States' obligations under the WTO Agreements.⁶ This time, however, the United States' Executive Branch has been recalcitrant in nominating panelists to the NAFTA Binational Panels and the WTO Appellate Body and, therefore, is fully engaged in obstructing NAFTA, the WTO, and any institutions intended to preserve the vitality and values of free trade.⁷ The frustration of dispute settlement mechanisms under those agreements, although directed by the Administration at the United States' foreign neighbors, will be inflicted upon "Middle America" consumers at home.

The National Association of Home Builders formed a consumer alliance with the National Retail Federation and the National Lumber & Building Materials Dealers Association, committed to providing American consumers access to a stable, dependable and affordable supply of lumber and building materials. This American Alliance of Lumber Consumers ("AALC") supports free trade in lumber and building materials because access to lumber and other readily available building materials enables home builders to provide safe, decent and affordable housing at prices competitive with other, typically more expensive products.

The AALC recognizes that both trade litigation and the possibility of a trade-distorting agreement are detrimental to the housing market. NAHB Chairman Randy Noel observed that tariffs on Canadian softwood lumber have contributed to the increase of lumber prices since January 2017, such that the price of an average single-family home has increased by more than \$6,000. NAHB estimated that softwood lumber duties resulted in the net loss of 9,370 jobs in

⁶ Canada did not challenge the ITC Final Affirmative Determination at the WTO, limiting its challenge to NAFTA Chapter 19.

⁷ Notwithstanding that the requests for NAFTA Panel Review of the Department's 2017 Final Determinations related to softwood lumber products were filed nearly 24 months ago, and briefing has been complete for over 12 months, the Administration has not taken the necessary steps to convene a panel for either the countervailing duty or antidumping orders. A panel has been convened on the appeal of the International Trade Commission's injury determination, oral arguments were held in May, 2019. The panel issued an interim decision and remanded the final determination to the ITC for reconsideration. Interim Decision and Order of the Panel, *Softwood Lumber Products from Canada: Final Affirmative Injury Determinations*, Secretariat File No. USA-CDA-2018-1904-03 (Sept. 4, 2019).

the United States in 2018: “In other words, nearly nine jobs will be lost in U.S. industries for every job gained in domestic sawmills as a result of the lumber tariffs.”⁸

NAHB requested and was granted *amicus curiae* status to contribute the consumers’ perspective to the NAFTA Chapter 19 panel in the appeal of the ITC’s final affirmative determination. Petitioner, and the agency, vigorously opposed NAHB’s appearance and brief.⁹ They do not want the voices of American consumers to be heard.

U.S. lumber manufacturers have never been able to provide all of the softwood lumber demanded by U.S. homebuilders. The erection of trade barriers to restrict Canadian softwood lumber supply serves only to raise prices on new homes and home renovations for Americans. The Department has lost sight of the important domestic interests of U.S. downstream industries and the consuming public in pursuit of mercantilist, protectionist policies that already have failed the final examinations of history.

II. **SUBSIDY ALLEGATIONS AND MARKET DISTORTIONS**

A. **Subsidies And Countervailability**

The Department’s Reports to Congress contain the disclaimer that the reference to a program as a subsidy “does not constitute a finding regarding the countervailability ... under U.S. law or the WTO SCM Agreement.”¹⁰ Subsidies that are not countervailable are presumed not to distort markets.

There are four critical considerations in determining whether a government program distorts trade and may be offset by a countervailing duty. First, there must be a financial

⁸ Randy Noel, *Results from Lumber Tariffs Highlight Folly of Protectionism*, *The Hill*, May 14, 2018, <http://thehill.com/opinion/finance/387556-results-of-lumber-tariffs-highlight-the-folly-of-protectionism>.

⁹ Response in Opposition to the National Association of Home Builders of the United States’ Motion for Leave to Participate as *Amicus Curiae*, *Softwood Lumber Products from Canada: Final Affirmative Injury Determinations*, Secretariat File No. USA-CDA-2018-1904-03 (May 31, 2018); Investigating Authority’s Response to Notice of Motion for Leave to Appear and File a Brief as *Amicus Curiae*, *Softwood Lumber Products from Canada*, Secretariat File No. USA-CDA-2018-1904-03 (May 31, 2018).

¹⁰ See, e.g., June 2019 Report at 35.

contribution by a government to the production or export of a foreign good.¹¹ Second, the financial contribution must confer a benefit on the subject merchandise.¹² Third, the beneficial financial contribution must be specific to an enterprise or industry or group of enterprises or industries.¹³ Fourth, the specific, beneficial financial contribution must cause a domestic industry to experience injury or be threatened imminently with injury.¹⁴ This last condition— injury or threat of injury—is determined by the ITC, not Commerce.

The main alleged Canadian softwood lumber subsidy, for the last four decades, has been “stumpage,” the sale of timber cutting rights by provincial governments that, by virtue of the Canadian Constitution, own most of Canada’s natural resources, including the forests. According to the allegation, the provincial governments sell the cutting rights for “less than adequate remuneration,” meaning that the governments supposedly do not recover from the private forestry sector the full and fair value of the cutting rights, with the difference between what they collect and what they should collect (what ought to be a market price) representing a financial contribution.

B. No Subsidies In Québec Or Ontario

Canadian softwood lumber exports to the United States have been the subject of protracted legal disputes four different times, beginning in 1982. The fifth legal dispute is now on appeal before binational panels, one convened and two yet to be convened, under NAFTA’s Chapter 19. Ultimately, stumpage has never been found to be unfairly subsidized, nor to injure or threaten injury, to any U.S. industry. Québec revised radically its stumpage system in 2011 to make it even more market-determined than the system in previous investigations, when no countervailable subsidy margin ultimately was found for Canada, including Québec.

¹¹ 19 U.S.C. § 1677(5)(B)(i).

¹² 19 U.S.C. § 1677(5)(B).

¹³ 19 U.S.C. § 1677(5)(A).

¹⁴ 19 U.S.C. §§ 1671(a)(2)(A), 1671d(b), 1677(7).

The purpose of Québec's Sustainable Forest Development Act is to sell standing timber at market prices: Chapter A-18.1, 1, 1, 1. "This Act establishes a forest regime designed to . . . (5) govern the sale of timber and other forest products on the open market at a price reflecting their market value . . ." Only through deployment of an unlawful benchmark has Commerce found that the Québec Act does not achieve its purpose.¹⁵

Previously, prices in Québec's private forest, representing 20 to 23 percent of the harvest, were used to establish prices in the public forest. Now, responding to specific U.S. demands and experience in British Columbia (whose new auction-based stumpage system had been recognized and accepted by the United States upon entry into force of the SLA in October 2006), public forest stumpage fees are derived from public auctions.

All Crown timber in Québec (100%) is sold either directly at auction or at prices derived from auction prices. Québec reserves 25% of the annual allowable cut of Crown timber for sale in auctions, in addition to the private forest harvest and timber purchased by Québec border mills from New England and New York. Nearly half of Québec's stumpage thus is priced directly by public auctions, private forest sales, and purchases of U.S. logs.

The *Bureau de mise en marché de bois* ("BMMB"), allowing for variations in harvesting conditions and hauling distances, prices the remaining Crown timber based on the prices obtained at auctions of timber from the public forests. With much of the forest remote, there would be few competitive bids in many regions. The application of auction prices effectively simulates competition where otherwise there might be none.

Forestry companies who have invested in mills and rely on the availability of standing timber must pay a premium of 18% of their previous year's stumpage in an advance lump sum, prior to the harvesting period and regardless whether they will proceed to harvest any timber at

¹⁵ See *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, 82 Fed. Reg. 51814 (Dep't of Commerce, Nov. 8, 2017) and accompanying Issues and Decision Memorandum at Comments 35, 37, 39-40.

all, in order to obtain rights to any of the remaining public forest (approximately half the remaining harvestable forest, or 75% of the public forest). The Québec industry must pay, in addition to that 18% premium, auction prices determined by the BMMB and annual dues for established mills.

Ontario's residual value system had been recognized by Commerce and an independent NAFTA arbitration panel in *Lumber IV*, after years of thorough investigation, as providing no countervailable subsidy.¹⁶ The Ontario industry also incurs the costs of obligations from operating on Crown lands, such as the preparation of long-term forest management plans, that typically are not incurred by participants in U.S. Forest Service auctions.

The industry in both Québec and Ontario provides a service to the provincial governments when industry builds and maintains roads in remote areas. These roads are deeded to the relevant governments to expand the province's infrastructure, provide for emergency vehicles, and permit a variety of recreational uses for each province's citizens. Both provinces reimburse a portion, but not all, of the expenses to build and maintain these roads. Absent these partial reimbursements, industry would be forced to bear the entire burden of building and maintaining government roads for a wide variety of uses and users. Thus, these reimbursements are not subsidies but, rather, partial payment for services rendered.

Even though U.S. lumber producers have criticized the stumpage systems in Canada, they have embraced support from publicly funded programs in the United States. In April of 2018, Pleasant River Lumber Company accepted a US\$4,226,000 grant from the Maine Technology Institute (MTI) to assist with a US\$12 million sawmill expansion project. The program was financed from a US\$45 million bond approved by voters that MTI manages on

¹⁶ See Decision of the NAFTA Panel on Third Remand, *In the Matter of Certain Softwood Lumber Products from Canada: Final Countervailing Duty Determination* USA-CDA-2002-1904-03, May 23, 2005 at 21-22.

behalf of the State of Maine.¹⁷ The Department strains, despite NAFTA and WTO Panel decisions to the contrary, to characterize Québec and Ontario stumpage systems as subsidies, when it might more easily report to Congress on the apparent subsidies received by U.S. Lumber Coalition companies, prominently such as Pleasant River Lumber, at home.

C. The Department Claims Subsidies Even Where It Found None

The Department, although careful to disclaim countervailability, has not been careful about what its Reports have characterized as subsidies to softwood lumber. The Department's June 2019 report knowingly misrepresents programs as supposedly subsidizing softwood lumber when the Department itself has found to the contrary. For example, multiple reports, including the most recent June 2019 Report, identify the "Ontario Northern Industrial Electricity Rate Program" ("NIER") as a purported subsidy on the manufacture of softwood lumber, referencing the countervailing duty investigation of *Supercalendered Paper from Canada*.¹⁸ However, the Department failed to acknowledge that it found in both the Preliminary and Final Determinations of *Lumber V* (the determination currently under appeal) that "sawmills are not eligible for the program," and "are expressly excluded from receiving assistance under the NIER."¹⁹ The Department applied no countervailing duty to lumber to offset NIER, yet continues to misrepresent in its Reports to Congress that NIER might be a softwood lumber subsidy. The Department's forthcoming June 2019 Report should not perpetuate this misrepresentation.

¹⁷ Stuart Hedstrom, *Pleasant River Lumber Awarded \$4.2M Grant For \$12M Project In D-F; Company Carrying Out \$20M Expansion Between Two Mills*, *The Piscataquis Observer*, (April 19, 2018), <https://observer-me.com/2018/04/19/pleasant-river-lumber-awarded-4-2m-grant-for-12m-project-in-d-f-company-conducting-20m-expansion-between-two-mills/>.

¹⁸ June 2019 Report at 22-23.

¹⁹ Memorandum from Gary Taverman, Assoc. Deputy Assistant Sec'y for Antidumping and Countervailing Duty Operations to Ronald K. Lorentzen, Acting Assistant Sec'y for Enforcement and Compliance, U.S. Dep't of Commerce, C-122-858, *Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada* (April 24, 2017) at 88; Memorandum from Gary Taverman, Assoc. Deputy Assistant Sec'y for Antidumping and Countervailing Duty Operations, U.S. Dep't of Commerce, to James Meader, Senior Director, U.S. Dep't of Commerce, C-122-858, *Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Issues and Decision Memorandum for the Final Determination* (Nov. 1, 2017) at 18-19.

The Department has referenced a Pulp and Paper Green Transformation Program, a Transformative Technology Program, and a Forest Innovation Program, all programs of the Government of Canada, among its alleged softwood lumber subsidies. The first program terminated in March of 2012 and pertains to the production of pulp and paper, not softwood lumber, a fact the Department also knows from the *Supercalendered Paper* investigation.²⁰ The latter two similarly are listed as programs not for the support of softwood lumber, but rather for research and development into emerging forest biomass, biochemical and nanotechnology programs. The Department has inquired into some of these programs in another investigation and knows the facts about them.²¹

The Department also spends seven pages, approximately 20% of the June 2019 report, discussing alleged subsidies from the *Uncoated Groundwood Paper* investigation, but fails to acknowledge that the investigation was terminated because the International Trade Commission did not find material injury or threat of material injury from Canadian imports. An injury or threat of injury determination is required to find a subsidy countervailable.

The Department mentions softwood lumber marketing program subsidies, but some of these programs no longer exist (for example, the VWP expired in March 2011²²), or are so old, with so little value, they serve only to give an exaggerated impression of government assistance. The Department examined Canada's Investments in the Forest Industry Transformation Program in the *Supercalendered Paper from Canada* investigation, but found no use of the program and therefore no countervailable subsidies.²³

²⁰ *Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination*, 80 Fed. Reg. 63535 (Oct. 20, 2015) and accompanying Issues and Decision Memorandum at 26 (hereinafter "SC Paper Final CVD Determination IDM")

²¹ *Id.*, at 26, 58.

²² June 2019 Report at 29.

²³ SC Paper Final CVD IDM at 53.

The Department has been questioning and investigating tiny programs in Québec's private forest for more than three decades. These programs have always been found irrelevant or *de minimis*. They also provide far less support to private forest owners than the United States and state and local governments provide for private forest owners.

Commerce repeatedly has reported to Congress “subsidies identified in connection with the SLA which have been reviewed by an arbitration panel” and “Additional Subsidies Identified in Connection with the SLA.”²⁴ SLA 2006 and its dispute settlement mechanisms in fact neither identified nor defined countervailable subsidies. The agreement had no provision for identifying and offsetting countervailable subsidies. And none of the “subsidies” identified was countervailed by the Department in *Lumber V*, except for Québec Road Credits, for which the Department now seeks a double remedy by imposing duties to offset credits that previously had been offset fully by export taxes under the SLA. The credits have been discontinued; the offset was collected for all the credits ever provided. The road credits never provided a subsidy (they were fees for service), but they also no longer exist.

III. THE DEPARTMENT IS INVESTIGATING “SUBSIDIES” THAT COULD NEVER BE SPECIFIC, INCLUDING STANDARD ELECTRICITY PRACTICES FOR THE BENEFIT OF THE GRID

The Department has expanded the reach of its investigations into softwood lumber and other forestry products by examining programs that cannot be considered specific, such as general worker training and employment assistance programs. Tax programs, such as the Scientific Research and Development Tax Credit and the Acquisition of Manufacturing and Processing Equipment, likewise are being scrutinized even though they are widely available to companies from many industries. Similarly, depreciation rates for certain classes of assets, such as the Additional Capital Cost Allowance for Class 29 Assets, are not only widely available to all

²⁴ June 2019 Report at 33-34.

taxpayers, but also constitute a mandatory application of the tax law whereby fixed assets are required to be included in certain classes at certain depreciation rates.

More troubling, perhaps, is the Department's investigation of electricity programs shared by U.S. utilities that are designed to manage the operational efficiency and load balance of the electricity grid. The Ontario IESO Demand Response and Québec's Interruptible Electricity Option are similar to U.S. programs, integral to provincial strategies to guarantee electricity supply to residences at times of peak demand. Rather than build more and costly infrastructure that may often be idle or underutilized, or seek to purchase shortfall from other places they may only hope will be facing less demand and, therefore, have available capacity when needed (such as New York and New England, from or to which both may sell or purchase emergency supplies), Ontario and Québec purchase guarantees of supply to be surrendered by large electricity users within their respective jurisdictions.

These programs are not countervailable subsidies because they do not involve goods; they do not provide a benefit to the companies who participate; and they are not specific to an industry or enterprise or group of industries or enterprises. To the contrary, they are common throughout North America for both industry and individuals. They are designed to enable the utilities to fulfill statutory mandates to service all customers continuously, regardless of weather conditions, by reducing consumption. Both the Ontario and Québec programs are open to all medium to large electricity customers, and both are intended to ensure that electricity is available to all provincial residents during the coldest winter months (December through March) and the warmest summer months when demand for electricity is at its peak.

Hydro Québec ("HQ") and the Ontario Independent Electricity System Operator ("IESO") both pay subscribers to the programs fixed credits to secure a baseline of capacity (the critical minimum the utilities must have to service peak demand), and variable credits at set rates to compensate for foregone electricity. Participating utility customers risk business disruption that

can cause them significant losses, typically outweighing the value of payments they may receive for curtailed energy use.

Interruptible electricity programs are common throughout North America, no less in the United States than in Canada.²⁵ U.S. petitioners themselves have been reported to participate in government-sponsored energy efficiency projects that have paid extraordinary sums of money. Such programs have become essential to the rational management of electrical power.²⁶

There is no statutory provision for countervailing the payment of more than adequate remuneration for security of supply, nor for the service of foregoing a right to power.²⁷ The statute permits countervailing only the purchase of goods for more than adequate remuneration.²⁸ The fixed payments here, to secure electricity capacity, by definition, cannot be found to provide any benefit, and cannot be countervailed.

Variable credits are given only when notices of interruption are issued, and the participating user curtails its electricity use. In these instances, the participant reduces or ceases business activities, incurring slowdown or shut down costs and resumption or restarting costs. Thus, the variable credits buy the service of foregone electricity use, at often a steep price for the companies.

²⁵ *Demand Response Compensation in Organized Wholesale Energy Markets*, 76 Fed. Reg. 16,658, 16,658-16,661, 16,660 n.21 (Mar. 24, 2011) (amending 18 C.F.R. pt. 35) (“{i}t is the policy of the United States that ... unnecessary barriers to demand response participation in energy, capacity and ancillary service markets shall be eliminated.”)

²⁶ *Demand Response Compensation in Organized Wholesale Energy Markets*, 76 Fed. Reg. 16,658, 16,660 n.15-16 (Mar. 24, 2011) (amending 18 C.F.R. pt. 35) (“Demand response tends to flatten an area’s load profile, which in turn may reduce the need to construct and use more costly resources during periods of high demand; the overall effect is to lower the average cost of producing energy”)

²⁷ 19 U.S.C. § 1677(5)(E).

²⁸ 19 U.S.C. § 1677(5)(E)(iv); *USEC Inc. v. United States*, 411 F.3d 1355, 1364-65 (Fed. Cir. 2005) (“The statute does not contemplate the purchase of services for more than adequate remuneration to be a subsidy.”) (Quoting 19 U.S.C. § 1677(5)(E)(iv)); cf. *Low Enriched Uranium from France: Notice of Amended Final Negative Determination Pursuant to Final Court Decision, Rescission of Administrative Review, and Revocation of the Countervailing Duty Order*, 72 Fed. Reg. 29,301 (Dep’t of Commerce, May 25, 2007).

These programs are neither *de jure* nor *de facto* specific. Use may sometimes create an illusion of disproportionality, but HQ and IESO are buying electricity interruption from companies that use the most electricity in the respective provinces. It is much easier – and therefore to the convenience and benefit of the utilities – to administer significant interruption from a limited number of large operations than smaller quantities of electricity from smaller operations. Pulp and paper mills are voracious consumers of electricity and, therefore, ideal candidates for utilities to find available potential supply. Utilities seek them out because they are best situated to help solve a problem for the utilities, not the other way around.

IV. SUBSIDY FINDINGS REQUIRE SUBSTANTIATED ALLEGATIONS AND THOROUGH INVESTIGATION

The Department appears to be changing its practices to treat all countries the way that it views China: inherently cheating and deserving of punishment regardless of the facts or the Department's legal obligations. The Department appears to be carrying over that distrust into how it is treating traditional market economies such as Canada. The Department has taken to finding "subsidies" that are not even alleged, countervailing them without investigation.²⁹ These actions, if continued, could render these reports to Congress pointless.

The law has not changed: it remains necessary for petitioners to allege a subsidy and to substantiate the allegation.³⁰ However, the Department now asks companies to report "any other forms of assistance to your company" from the federal and various provincial governments over a decade or more. The Department nowhere defines "assistance," which is a term that does not appear in the statute, nor in the Department's regulations. Nor has the Department ever defined the term. Yet, the Department also has ruled that, "The Department, not

²⁹ See Section II.C *supra*.

³⁰ 19 U.S.C. § 1671a(b)(1).

responding parties, makes the determination of whether assistance is reportable and ultimately countervailable,” again without defining “assistance.”³¹

The Department’s question broadly implicates all merchandise. This unbounded inquiry has led to extreme diligence and extraordinary over-reporting of transactions between governments and private companies. It has made all recent countervailing duty investigations among the most voluminous trade remedy investigations in history as governments and government-owned enterprises and private companies search records for the period of investigation and for the AUL, for virtually every transaction between and among them. Any accidental oversights or omissions are met with accusations that companies did not use their “best efforts” in responding to the Department’s questionnaires, and threats that adverse inferences will be applied.

Even as the Department has demanded more expansive records, it has complained (at the WTO) that the records have become greater than the Department’s capacity to review and analyze them.³² The Department warns responding companies and governments to leave nothing out, and then excuses itself for failing to examine the record and facts when it receives “too much.”³³

Congress ought to discourage the Department from treating trustworthy allies and trade partners as dishonest, and the Department should not abandon statutory procedures in favor of suspicion and prosecution. Honest inquiry is being replaced by presumptive interrogation and considered judgment by automatic conclusions.

³¹ Memorandum from Gary Taverman, Assoc. Deputy Assistant Sec’y for Antidumping and Countervailing Duty Operations, U.S. Dep’t of Commerce, to Paul Piquado, Assistant Sec’y for Enf’t and Compliance, U.S. Dep’t of Commerce, C-122-854, *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Supercalendered Paper from Canada* (Oct. 13, 2015); see also SC Paper Final CVD determination.

³² Statement of Counsel for the U.S. Trade Representative at the Public Hearing in DS533, *United States—Countervailing Measures on Softwood Lumber from Canada*, (Feb. 26-27, 2019).

³³ *Id.*

The Department now accepts any and all allegations from petitioners, often without any supporting evidence, demanding that respondents prove themselves innocent (or free) of countervailable subsidies. The law, however, remains unchanged: Congress requires petitioners to make detailed, informed, and specific allegations.³⁴ The Department is required to collect information that proves there is a subsidy and that it is countervailable.

Congress has not shifted this burden, nor do the international rules countenance such a shift. The Department's departure from the law has meant enormously burdensome and unnecessary investigations, and many erroneous presumptions. The contents of the Department's periodic reports on softwood lumber testify to this legal departure.

Respectfully submitted,



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³⁴ 19 U.S.C. § 1671a(b)(1).