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Mr. Joseph Laroski
Deputy Assistant Secretary
for Policy and Negotiations
Enforcement and Compliance
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Re: *Comments Regarding Subsidy Programs Provided By Countries Exporting Softwood Lumber And Softwood Lumber Products To The United States (85 Fed. Reg. 26,924)*

Dear Deputy Assistant Secretary Laroski:

We submit these comments on behalf of the Conseil de l'industrie forestière du Québec ("CIFQ") and the Ontario Forest Industries Association ("OFIA") (collectively, "Central Canada") 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. 85 Fed. Reg. 26,924 (Dep't of Commerce, May 6, 2020).

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. **CANADIAN LUMBER IS FAIRLY TRADED**

The contest over Canadian exports of softwood lumber to the United States is less over economics than over public philosophy, one side defining itself as the custodian of private property rights, the other embracing a tradition of Crown lands subject to a conservative (and conservationist) patrimony. In the United States, conquest of the continent led to the Homestead Act, legislation fashioned to persuade “young men” to “go west.” Land was free provided it was cleared and farmed. Much of the cleared farm land, however, did not stay in farming. Trees grew back. Public forests became private (without being bought by private parties), and the United States adopted private property as a civil religion.

In Canada, similarly endowed with great forests (but with fewer people), the Crown prevailed. Land was, from the first, in the public domain and was not destined to become private. The Crown retained rights to exploit and manage natural resources. Canadians deem

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 says its previous reports are available on its website, but the most recent three reports are the only reports currently available there. See U.S. Department of Commerce, *Softwood Lumber Subsidies Report To The Congress*, (December 2019) at 6 n.14 (“December 2019 Report”); <https://enforcement.trade.gov/sla2008/sla-index.html>.

their forests a patrimony, never to be dedicated to a single use or for a single interest. Use of the forests, like the use of all things in the public domain, is balanced among competing interests and preserved for posterity. There is a public interest in preserving the forests, and a public right to do so, whereas in the United States the public interest has been privatized and private owners generally may dispose of natural resources as they please.

American lumber interests typically own the resources and set the prices and values themselves, or amongst themselves in what they call a market. American lumber interests proselytize their civil religion and think Canadians should adopt it by privatizing the public forests. Canadians resisting the civil religion are deemed heretics. The fruits of their labor are seen to be supplemented by the state and, consequently, are to be treated as unfairly traded. American lumber interests (principally large landholders) have been trying to prove for decades, usually without success, that the playing field for trade in softwood lumber must be levelled by offsetting the impact of Crown ownership of Canadian forests.

Formal success for the U.S. industry – proving the case according to international rules – is not the industry's main objective, which is to make Canadian exports to the U.S. market costly, thereby enabling the Americans to raise their own prices by squeezing supply. Continuous harassment through trade remedy actions can never stop the flow of Canadian softwood lumber into the United States because it is an essential commodity and Canadians have a lot of trees for few people while the United States has a diminishing supply of trees and a population roughly ten times greater than the population in Canada. The mismatch of people to resources creates a comparative advantage for the Canadian lumber manufacturers.

Offsetting comparative advantage is not the purpose of the U.S. trade remedy laws. Americans will always need Canadian softwood lumber, but the U.S. industry wants to undo Canada's comparative advantage by controlling the price.

Despite the portrait the U.S. industry wants to paint, of enterprising Americans on their private property individually taking on the leviathan of the Canadian state, over 40 percent of U.S. forests are public and are important providers of natural resources to lumber companies. In those forests, governments (mostly federal, some state, and county) typically pay for the roads and protection against forest fires, insects and disease. They run auctions, often with famously rigged bidding.

The United States frequently holds up these public operations as a model for Canada, while failing to acknowledge that Canadian industry pays for such services that the United States insists should not be paid by provincial governments in Canada. Even after Québec and British Columbia drew on criteria from the United States to develop auction systems, the United States has refused to acknowledge them and has rejected as self-serving any economist's analysis of the market-based stumpage prices that those auctions produce. The economics of the market are unable to change the political philosophy in Washington and U.S. timber interests perpetuate the dispute.

Nor are the forests in Canada all public. Particularly in what was once Upper and Lower Canada, significant tracts were privatized more than a century ago. Yet, even when prestigious economists demonstrate that timber is bought in functioning private markets at market prices, the United States refuses to acknowledge them as viable benchmarks for prices in the public forest.⁴

⁴ See Government of Ontario's Questionnaire Response, C-122-854, *Certain Softwood Lumber Products From Canada: Response of the Government of Ontario to the Department's May 21, 2019 Questionnaire*, (July 15, 2019) at Exhibit ON-PRIV-2 (Expert Report of Ken Hendricks, Ph.D., *An Economic Analysis of the Ontario Timber Market and an Examination of Private Market Prices in that Competitive Market – An Updated* (July 12, 2019)); see also Letter from the Government of Quebec to The Honorable Wilbur L. Ross, Jr. Secretary of Commerce, C-122-854, *Certain Softwood Lumber Products from Canada: Submission of the Expert Report of Robert C. Marshall, Ph.D.*, (July 11, 2019) at Attachment (Expert Report of Robert C. Marshall, Ph.D. (March 10, 2017)) ("Marshall Report").

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. In addition to housing's direct effect on Gross Domestic Product, it has cascading effects on demand for household goods and home equity loans that fuel consumer spending and support small businesses. Shrinking the supply of softwood lumber, or raising its price, restrains and damages the U.S. economy. Decline in the U.S. housing market triggered the global recession of 2008.⁵ Import quotas on lumber slowed down economic recovery.

The National Association of Home Builders ("NAHB") 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 affordable softwood lumber and other readily available building materials enables home builders to provide safe, decent and affordable housing.

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 has observed that tariffs on Canadian softwood lumber have contributed to the increase in lumber prices since January 2017, raising the price of an average single-family home by more than \$6,000.⁶ NAHB has estimated that softwood lumber duties resulted in the net loss of 9,370 jobs in the United

⁵ See JOHNSON, SIMON, AND JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 10 (2010).

⁶ Petitioners and the ITC vigorously opposed NAHB's request for *amicus curiae* status in the NAFTA Chapter 19 appeal of the ITC's final determinations, which was granted, because they do not want the voices of American consumers to be heard. 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).

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.”⁷ NAHB states that “the tariffs on Canadian softwood lumber are acting as a tax on American home builders and home buyers, making housing less affordable for American families and forcing builders to look overseas to other markets, including Sweden, Germany, Brazil and Austria in order to meet demand.”⁸

Facing a global recession precipitated by a global pandemic, the Department of Commerce continues to do the bidding of domestic lumber producers by zealously restricting Canadian access to the U.S. market and driving up the cost of housing. This sustained campaign is certain to slow economic recovery yet again, this time under the severest conditions since the Great Depression of the 1930s.

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. Although most timber harvesting in the United States is conducted on private lands, a significant volume of timber is harvested from public lands.⁹ The U.S. Forest Service and the Bureau of Land Management manage about 144.9 and 37.6 million acres of forest, respectively.¹⁰ The Forest Service engages in land use and resource management, conducts timber sales, and generates revenue.¹¹ In contrast, Canadian authorities in Ontario do not provide resource management services, and the Ontario industry incurs management costs for operating on Crown lands that its U.S. counterparts participating in Forest Service auctions do not. The prospect of returning a

⁷ 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>.

⁸ National Association of Home Builders, *Canadian Softwood Lumber*, <https://www.nahb.org/Advocacy/Top-Priorities/Material-Costs/Canadian-Softwood-Lumber> (last visited June 3, 2020).

⁹ Congressional Research Service, *Timber Harvesting on Federal Lands* at 2 (Apr. 12, 2019) (“In 2011, 88% of timber harvests were conducted on private lands.”).

¹⁰ *Id.* at 1.

¹¹ *Id.* at 4-6.

greater share of fire and insect protection services to the Government of Québec, as is done in the United States, prompts allegations from the Department of Commerce of a new subsidy.

U.S. lumber producers have benefited from various federal, state, and local government programs. Hankins Inc./Hankins Lumber Company received US\$1.3 million dollars in subsidized lending by the state of Mississippi in 2010 and US\$100,000 in state grants and loans in 2013.¹²

Some of the most prominent and vocal members of the U.S. Coalition protesting Canadian lumber are among the most voracious recipients of government largesse in the United States. Between 2011 and 2017, two subsidiaries of PotlatchDeltic received US\$1.5 million and US\$612,154 Arkansas sales and use tax credits.¹³ Another PotlatchDeltic subsidiary in Nevada was approved for about US\$2.5 million sales and use tax abatement for ten years in 2001.¹⁴ Weyerhaeuser Company, a subsidiary of Weyerhaeuser, was approved for US\$103 million in Kentucky tax credits or rebates in 1995 which the company would have received during subsequent years.¹⁵ Between 2004 and 2017, various Weyerhaeuser subsidiaries received about US\$90 million from several states and the federal government, including a US\$20 million tax credit from Oklahoma in 2016 and a US\$905,421 federal grant in

¹² Subsidy Tracker Individual Entry, <https://subsidytracker.goodjobsfirst.org/subsidy-tracker/ms-hankins-Inchankins-forest-products-lnc> (last visited May 29, 2020); see also Subsidy Tracker Individual Entry, <https://subsidytracker.goodjobsfirst.org/subsidy-tracker/ms-hankins-lumber-company> (last visited May 29, 2020).

¹³ Subsidy Tracker Individual Entry, <https://subsidytracker.goodjobsfirst.org/subsidy-tracker/ar-potlatchdeltic-manufacturing-llc> (last visited May 29, 2020); see also <https://subsidytracker.goodjobsfirst.org/subsidy-tracker/ar-deltic-timber-corporation-0> (last visited May 29, 2020).

¹⁴ Fiscal Analysis Division, Legislative Counsel Bureau, *Report on Tax Abatements, Tax Exemptions, Tax Incentives for Economic Development and Tax Increment Financing in Nevada*, (February 2009) at 36 (available at <https://www.leg.state.nv.us/Division/Research/Library/HotTopics/FiscalAffairs/TaxAbatementsExemptionsIncentives.pdf>).

¹⁵ Subsidy Tracker Individual Entry, <https://subsidytracker.goodjobsfirst.org/subsidy-tracker/ky-weyerhaeuser-company> (last visited May 29, 2020).

2004.¹⁶ Between 2006 and 2017, Stimson Lumber Company received about US\$2.8 million from Oregon and Washington in tax credits and training reimbursements.¹⁷ Seneca Sawmill Company received US\$71,045 through an Oregon energy incentives program in 2016.¹⁸ Between 2007 and 2018, Swanson Group received property tax abatements and training reimbursements totaling US\$497,643.¹⁹ Pleasant River Lumber Company received US\$857,690 from the State of Maine in property tax abatements and tax rebates between 2008 and 2017.²⁰ Additionally, 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 behalf of the State of Maine.²¹ Pleasant River is among the most

¹⁶ Good Jobs First, 36 Results Found, https://subsidytracker.goodjobsfirst.org/prog.php?parent=&statesum=&fedsum=&major_industry_sum=&hq_id_sum=&company_op=starts&company=Weyerhaeuser+Company&major_industry%5B%5D=&hq_id=&free_text=&subsidy_level=&subsidy_op=%3E&subsidy=&face_loan_op=%3E&face_loan=&subsidy_type%5B%5D=&sub_year%5B%5D=&state=&federal= (last visited May 29, 2020).

¹⁷ Good Jobs First, 6 Results Found, https://subsidytracker.goodjobsfirst.org/prog.php?parent=&statesum=&fedsum=&major_industry_sum=&hq_id_sum=&company_op=allwords&company=Stimson+Lumber+Company&major_industry%5B%5D=&hq_id=&free_text=&subsidy_level=&subsidy_op=%3E&subsidy=&face_loan_op=%3E&face_loan=&subsidy_type%5B%5D=&sub_year%5B%5D=&state=&federal= (last visited May 29, 2020).

¹⁸ Subsidy Tracker Individual Entry, <https://subsidytracker.goodjobsfirst.org/subsidy-tracker/or-seneca-sawmill-company> (last visited May 29, 2020).

¹⁹ Good Jobs First, 9 Results Found, https://subsidytracker.goodjobsfirst.org/prog.php?parent=&statesum=&fedsum=&major_industry_sum=&hq_id_sum=&company_op=starts&company=Swanson+Group&major_industry%5B%5D=&hq_id=&free_text=&subsidy_level=&subsidy_op=%3E&subsidy=&face_loan_op=%3E&face_loan=&subsidy_type%5B%5D=&sub_year%5B%5D=&state=&federal= (last visited May 29, 2020).

²⁰ Good Jobs First, 17 Results Found, https://subsidytracker.goodjobsfirst.org/prog.php?parent=&statesum=&fedsum=&major_industry_sum=&hq_id_sum=&company_op=starts&company=Pleasant+River+Lumber&major_industry%5B%5D=&hq_id=&free_text=&subsidy_level=&subsidy_op=%3E&subsidy=&face_loan_op=%3E&face_loan=&subsidy_type%5B%5D=&sub_year%5B%5D=&state=&federal= (last visited May 29, 2020).

²¹ 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/>.

aggressive members of the U.S. Coalition complaining of government assistance to Canadian competitors.

These figures are merely indicative and include information from publicly available sources only. They do not include subsidies with undisclosed amounts and are not the products of a systematic investigation. Were the Department of Commerce investigating those subsidies, it could allocate benefits from earlier years to more recent periods of investigations. The conclusion of the 2006 Softwood Lumber Agreement included a US\$500 million bounty divided among petitioners, while another US\$450 million was set aside to fund “meritorious initiatives,” including initiatives related to forest management and sustainability issues of direct benefit to private U.S. companies.²²

Neither the petitioners nor the Department have identified any viable countervailable subsidies in Canada. The U.S. industry’s 2016 petition relied heavily on prior Commerce and International Trade Commission (“ITC”) investigation determinations for softwood lumber trade remedy orders that always had been reversed or terminated 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 of Commerce, as in the past, issued affirmative final determinations in its antidumping and countervailing duty investigations.²³ Once again, the lawfulness of those

²² SLA 2006 at Article XIII and Annex 2C.

²³ *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).

determinations has been appealed to binational panels under U.S. law and NAFTA Chapter 19. Yet again, World Trade Organization dispute settlement panels have been asked to decide whether the Department of Commerce determinations comply with the United States' obligations under the WTO Agreements.²⁴

A NAFTA Panel recently affirmed on remand the International Trade Commission's final injury determination. It is the first time in the history of the softwood lumber trade dispute that an injury determination of any kind has been upheld on appeal, and it came under new legal circumstances.²⁵ Despite unprecedented prosperity in the U.S. industry during the period of investigation, changes in the law permitted the International Trade Commission to find that the mere presence of "unfairly traded"²⁶ competition in the U.S. market meant that the U.S. industry could have performed even better than it did and, therefore, was materially injured by Canadian imports. This new legal standard produces inevitable and hazardous results, as manifest in this first trial in the dispute over softwood lumber.²⁷ Meanwhile, "Middle America" consumers, are left to pay the (higher) price.

After the expiration of SLA 2006, the U.S. lumber industry insisted that any new agreement between Canada and the United States contain even more trade restrictions than the expired agreement. Consequently, 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

²⁴ Canada did not challenge the ITC Final Affirmative Determination at the WTO, limiting its challenge to NAFTA Chapter 19.

²⁵ See Decision of the NAFTA Panel on Remand, *In the Matter of Softwood Lumber from Canada: Softwood Lumber Injury Determinations USA-CDA-2018-1904-03*, May 22, 2020.

²⁶ The Department of Commerce subsidy findings labelled the Canadian imports "unfairly traded."

²⁷ See Trade Preferences Extension Act of 2015, Pub.L. No. 114-27, § 503(a), 129 Stat. 362, 384 (2015) (amending 19 U.S.C. 1677(7) to add "The Commission may not determine that there is no material injury or threat of material injury to an industry in the United States merely because that industry is profitable or because the performance of that industry has recently improved.").

petitions on Black Friday, November 25, 2016, seeking to renew litigation over softwood lumber trade and burden economic recovery.

II. SUBSIDY ALLEGATIONS AND MARKET DISTORTIONS

A. Subsidies And Countervailability

The Department of Commerce'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."²⁸ The Department, therefore, allows that not all "subsidies" included in its report are countervailable. 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 contribution by a government to the production or export of a foreign good.²⁹ Second, the financial contribution must confer a benefit on the subject merchandise.³⁰ Third, the beneficial financial contribution must be specific to an enterprise or industry or group of enterprises or industries.³¹ Fourth, the specific, beneficial financial contribution must cause a domestic industry to experience injury or be threatened imminently with injury.³² This last condition – injury or threat of injury- is determined by the International Trade Commission, not the Department of 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 who, by virtue of the Canadian Constitution, own most of Canada's natural resources, including the forests.

²⁸ See, e.g., June 2019 Report at 35.

²⁹ 19 U.S.C. § 1677(5)(B)(i).

³⁰ 19 U.S.C. § 1677(5)(B).

³¹ 19 U.S.C. § 1677(5)(A).

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

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. The dispute is also on appeal at the World Trade Organization (“WTO”). Ultimately, stumpage has never been found to be unfairly subsidized, and only now, for the first time, under the most unlikely of circumstances (unprecedented domestic prosperity during the period of investigation), has material injury been found – provided the imports ultimately are found to be unfairly traded, which has not yet happened.³³ Québec revised radically its stumpage system in 2013 to make it even more market-determined than the system in previous investigations, when no countervailable subsidy ultimately was found for Canada, including Québec.

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.³⁴

³³ Should the NAFTA panels ultimately find that the Canadian imports are not unfairly traded, injury determination will be effectively vacated because injury must be by virtue of unfair trade.

³⁴ 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.

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 auction system has been examined thoroughly and fully endorsed as market-determined by a prominent economist whose report the Department of Commerce has variously ignored and denied.³⁵

The *Bureau de mise en marché de bois* ("BMMB"), allowing for variations in harvesting conditions and hauling distances (and more than a dozen other considerations impacting value), 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 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

³⁵ See Marshall Report.

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 the Department of Commerce and an independent NAFTA arbitration panel in *Lumber IV*, after years of thorough investigation, as providing no countervailable subsidy.³⁶ 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 payments for services rendered.

C. The Department Claims Subsidies Even Where It Found None

The Department of Commerce, although careful to disclaim countervailability, has not been careful about what its Reports have characterized as subsidies to softwood lumber. The Department's December 2019 report knowingly misrepresents programs as supposedly subsidizing softwood lumber when the Department itself had found to the contrary.³⁷

³⁶ 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.

³⁷ The Department ignored its findings in *Lumber V* and reported the Ontario Northern Industrial Electricity Rate Program to Congress until its most recent December 2019 report where it finally was removed. See June 2019 Report at 22-23.

The December 2019 Report, for example, referenced a Transformative Technology Program and a Forest Innovation Program, all programs of the Government of Canada, among its alleged softwood lumber subsidies. These programs 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 examined the Forest Innovation Program in *Lumber V* and found it either not to be used by the Canadian lumber producers or not to have provided countervailable benefits.³⁸ Although the Department reports that the Transformative Technology Program expired on March 31, 2014, it continues to report this program to Congress as a subsidy.

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 ITC unanimously 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 2011),³⁹ or are so old, with so little value, they serve only to give an exaggerated impression of government assistance. Although the Department reported in its June 2019 report that the VWP program expired in March 2011, it omitted that statement in its December 2019 report, claiming, without support, that the program is still available.⁴⁰

³⁸ See *Lumber V* PDM at Appendix II; see also *Lumber V* IDM at Appendix II.

³⁹ June 2019 Report at 29.

⁴⁰ December 2019 Report at 10.

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*. Most of the \$450 million bounty for "meritorious initiatives" in the United States, however, has gone to private tree farmers as outright grants.

The Department of 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."⁴¹ 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

⁴¹ 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.⁴² 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.⁴³

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.⁴⁴ The statute permits countervailing only the purchase of goods for more than adequate remuneration.⁴⁵ The fixed payments here, to secure electricity capacity, by definition, cannot be found to provide any benefit, and cannot be countervailed or considered to be countervailable subsidies.

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

⁴² *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.”).

⁴³ *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”).

⁴⁴ 19 U.S.C. § 1677(5)(E).

⁴⁵ 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).

costs. Thus, the variable credits buy the service of foregone electricity use, at often a steep price for the companies.

These programs are neither *de jure* nor *de facto* specific. Use may sometimes create an illusion of disproportionality, but Hydro Québec 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 of Commerce 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.⁴⁶ Additionally, the Department has initiated investigations on log export restraint programs that it has previously found not countervailable.⁴⁷ These actions, if continued, could render these reports to Congress pointless.

⁴⁶ See Section II.C *supra*.

⁴⁷ *Preliminary Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada*, 57 Fed. Reg. 8,800, 8,810 (March 12, 1992), unchanged in *Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada*, 57 Fed. Reg. 22,570, 22,604 (May 28, 1992).

The law for finding subsidies has not changed: it remains necessary for petitioners to allege a subsidy and to substantiate the allegation.⁴⁸ 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 responding parties, makes the determination of whether assistance is reportable and ultimately countervailable,” again without defining “assistance.”⁴⁹

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 Average Useful Life of assets (“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 threatens that adverse inferences will be applied.

The WTO Appellate Body recently found that applying adverse facts available to the discovery of unreported assistance, while refusing to conduct any further inquiry, is inconsistent with the Agreement on Subsidies and Countervailing Measures.⁵⁰ The Appellate Body found that the Department of Commerce “must make a reasonable assessment based on evidence

⁴⁸ 19 U.S.C. § 1671a(b)(1).

⁴⁹ 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).

⁵⁰ Appellate Body Report, *United States — Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/AB/R (adopted Mar. 5, 2020) pp.32-34.

and cannot simply infer” that the information was “necessary” and that the Department must take into account the facts available on the record before mechanically inferring that the unreported assistance was a countervailable subsidy.⁵¹ The Department’s utilization of its “other assistance” question and application of adverse facts available was repudiated fully as a violation of the United States’ international obligations.⁵²

Even as the Department has demanded more expansive records, it complained (at the WTO) that the records have become greater than the Department’s capacity to review and analyze them.⁵³ 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.”⁵⁴

Congress ought to discourage the Department of Commerce 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.

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.⁵⁵ The law, however, remains unchanged: Congress requires

⁵¹ *Id.*

⁵² *Id.*

⁵³ 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).

⁵⁴ *Id.*

⁵⁵ See *Certain Softwood Lumber Products from Canada: Certain New Subsidy Allegations*, C-122-858 (August 5, 2019); see also Memorandum from the Team, AD/CVD Operations, Offices I and III, U.S. Dep’t of Commerce, to Erin Begnal, Director, AD/CVD Operations, Office III, U.S. Dep’t of Commerce, C-122-854, *Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada: Analysis of New Subsidy Allegations* (Feb. 13, 2020).

petitioners to make detailed, informed, and specific allegations.⁵⁶ 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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⁵⁶ 19 U.S.C. § 1671a(b)(1).