

May 24, 2021

Mr. Ryan M. Majerus
Deputy Assistant Secretary
for Policy and Negotiations
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 (86 Fed. Reg. 22,020)*

Dear Deputy Assistant Secretary Majerus:

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. 86 Fed. Reg. 22,020 (Dep't of Commerce, April 26, 2021).

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 Central Canada last submitted comments on November 9, 2020.

A fundamentally important change has occurred since Central Canada submitted comments in 2020. The Biden Administration has committed to an all-government priority to address climate change and has tied policy governing international trade expressly to this new commitment.

Central Canada reviewed in its 2020 submission the programs Commerce still is countervailing that are related, even tangentially or marginally, to softwood lumber from Canada. These comments in the first quarter of 2021 repeat most of those of November 9, 2020 – the many reasons why Canadian lumber is not subsidized and there should be no countervailing duties imposed – but present two more reasons: Commerce is countervailing Canadian federal and provincial programs that are combatting climate change, contradicting and undermining the Biden Administration policy; the duties are raising lumber prices, exacerbating social injustice in the United States by artificially and substantially raising the cost of housing and putting homes out of the reach of millions of Americans.

¹ See *Softwood Lumber Act of 2008*, Pub. L. 110-246, tit. III, § 3301, 122 Stat. 1852 (2008) (codified at 19 U.S.C. § 1683); 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”); <http://enforcement.trade.gov/sla2008/sla-index.html>.

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; currently, only the most recent five reports are available on the website. See U.S. Department of Commerce, *Softwood Lumber Subsidies Report To The Congress*, (June 2020) at 6 n.14 (“June 2020 Report”); <https://enforcement.trade.gov/sla2008/sla-index.html>.

I. COMMERCE IS CONTRADICTING UNITED STATES POLICY TO ENCOURAGE FOREIGN GOVERNMENTS TO COMBAT CLIMATE CHANGE

Ambassador Katherine Tai, in her first speech as the new United States Trade Representative, said on April 15, 2021, “What we do here at home must be reflected in what we do abroad.”⁴ All over the United States, public utilities operate programs to reduce electricity demand at peak times. These programs have two purposes: they efficiently shift electricity supply to assure that no one in need at times of peak demand goes without air conditioning or heat. And they reduce the need for utilities to build unnecessary infrastructure that might be required only at moments of peak demand.

Provincial governments and utilities in Canada operate both types of programs. Commerce countervails them, ignoring that they are not specific to an enterprise or industry and ignoring entirely the service they provide to public utilities as conservation measures. These programs are not countervailable because they make no financial contribution to the production, manufacture, or export of softwood lumber, they are not specific to softwood lumber, and they involve valuable consideration in exchange for payments. But they also should not be countervailed because they are designed and intended to combat climate change.

The Governments of Ontario and Québec have been diversifying energy sources with environmentally friendly energy production that reduces the carbon footprint. Both provinces have encouraged electricity generated from biomass and have solicited competitive bidding from forestry companies with access to this resource. Commerce countervails, claiming the governments are overpaying the forest companies for the electricity.

Electricity is not lumber. Nor is the provision of it a good. All companies with the capacity to produce biomass-sourced electricity are invited to bid competitively for contracts. The governments are paying for the biomass-sourced electricity at rates proven comparable to

⁴ Remarks from Ambassador Katherine Tai delivered at the Center for American Progress, April 15, 2021. See <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/april/remarks-ambassador-katherine-tai-trade-policy-environment-and-climate-change>.

rates for the same type of electricity all over the North American continent, including in the United States. For all these reasons the biomass contracts should not be countervailed. But, in addition, they should not be countervailed because they are contributing to the fight against climate change by diversifying energy production and reducing dependence on fossil fuels.

Ontario and Québec have been encouraging all industries to reduce greenhouse gas emissions. In the forestry sector, the governments have been supporting experiments and the implementation of results that reduce greenhouse gas emissions and have begun to assign monetary value to such reductions. Commerce is countervailing these programs, notwithstanding that they contribute nothing to the costs of producing or manufacturing softwood lumber and notwithstanding that the United States itself finances and pays for experiments and programs leading to the reduction of greenhouse gas emissions.

In all these instances, Ambassador Tai's commitment is contradicted by Commerce policy. What the United States is doing abroad – countervailing programs combatting climate change – is not reflecting what the United States is doing at home, sometimes the identical program or activity. As the Biden Administration ramps up its efforts to reduce greenhouse gas emissions, reduce the carbon footprint, and make the use of electricity more efficient, Commerce's treatment of climate-protective programs as countervailable subsidies will only magnify the contradiction between what the Administration is doing at home and what it is doing abroad.

II. THE FORESTS ARE THE LUNGS OF THE EARTH

Ambassador Tai complained in her April 15, 2021 speech specifically about deforestation in the Amazon. The United States recognizes, particularly in bipartisan attempts to legislate for carbon capture, the significance of forests.⁵ Sustainable forestry may be the single most valuable thing countries can do to combat climate change.

⁵ See *the Carbon Capture Modernization Act* (S.407), introduced at the 116th Congress on Feb 17, 2019 by Senator John Hoeven (R-ND) and Senator Tina Smith (D-MN). On Mar 10, 2021, the Bill was

All public forests harvested in Central Canada are monitored to ensure sustainability, whether through the existing legislative framework for forest management, the Standard for Sustainable Forestry Initiative (“SFI”), or the Forest Stewardship Council (“FSC”), or both. The woodlands operations on Crown land are certified to ISO-14000 for the environment.

These certifications and adherence to strictly enforced federal and provincial laws, do not just happen. They require careful maintenance of the forests, suppressing as much as possible fires, insects and disease and promoting natural regeneration through selective cutting. Commerce countervails all programs in Central Canada where a government contributes to the achievement of sustainable forestry. The Government of Québec, for example, frequently prescribes for forestry companies how they may be permitted to cut, prescriptions that invariably inflate the harvest cost. The Government contributes to the inflated cost but, by law, never all of it. The forestry companies always must bear some of the inflated cost. Commerce countervails every penny the Government contributes to this cost, even when it is less than what arguably should be owed.

Canadian forests are broadly certified for sustainability because government stewardship and public ownership translate into a priority to protect the forest from exploitation and to preserve the resource in perpetuity. Nothing could be more central to the objective of combatting climate change than to promote the health of the forests. Nothing could contribute less to the logic of that goal than Commerce’s treatment of it.

reintroduced with technical changes to the Section 48A tax credit to incentivize the deployment of carbon capture, utilization and storage (CCUS) technologies, A summary of this legislation can be found here <https://www.hoeven.senate.gov/imo/media/doc/2021%20Carbon%20Capture%20Modernization%20Act%20One-Pager.pdf>.

III. COMMERCE'S ESCALATION OF LUMBER PRICES EXACERBATES SOCIAL INJUSTICE FOR AMERICANS IN HOUSING

There is a severe shortage of framing lumber in North America. The U.S. industry has been unable and unwilling⁶ to meet demand, especially during the Covid-19 building boom when people have been looking for more space in which to shelter.⁷ Americans who can afford it are building new and larger homes or expanding the space they already have. Limiting the supply of lumber from Canada serves no public purpose and is contrary to policies seeking to create jobs (construction jobs require building materials) and to achieve social justice.

The price of lumber has risen with demand but then carries the additional and onerous tariff from Commerce's countervailing duties. Affluent Americans are building bigger, but less affluent Americans are being shut out of the housing market because new construction for them is not affordable. Some thirty-six trade associations, led by the National Association of Home Builders, delivered a letter to Secretary Raimondo on March 12, 2021, reporting that tariffs from the *Softwood Lumber* dispute have raised the price of the average new home in the United States by \$24,000 and new apartments by \$9,000.⁸

The Biden Administration recognizes the unequal social and economic impact of climate change.⁹ Commerce subsidy policy is increasing this adverse impact, limiting supply of a

⁶ "In 2019, the Forest Service received no bids on 17.5 percent of the timber if offered, up from 15.6 percent that received no bids in 2018. That's 615 million board feet that weren't cut in 2019 because the timber industry did not bid on it." https://www.idahostatejournal.com/opinion/columns/the-public-loses-on-federal-timber-sales/article_8e541d75-42d0-5633-b9fe-25ee8d6d98c9.html

⁷ Ryan Dezember, "Despite Lumber Boom, Few New Sawmills Coming," *Wall Street Journal*, May 17, 2021 ("North America's sawmills can't keep up with demand, which has sent wood prices on a meteoric rise . . . Executives in the cyclical business of sawing logs into lumber said they are content to rake in cash while lumber prices are sky-high . . .").

⁸ Letter to Secretary Gina Raimondo, by American Gas Association, National Association of Home Builders, National Association of REALTORS et. al. on Mar 12, 2021, online at <https://www.nahb.org/-/media/NAHB/advocacy/docs/top-priorities/lumber/housing-coalition-letter-to-sec-raimondo-lumber-prices-031121.pdf>; see Kevin D. Williamson, "Missing The Forest For The Trees," *National Review*, March 18, 2021.

⁹ President Biden has promised that "Environmental justice will be at the center of all we do." In January, 2021, President Biden signed Executive Orders (EO) directing the federal government to address climate change, including a measure that would direct 40% of benefits from clean energy investments to

commodity in growing demand. It is penalizing foreign producers when foreign governments promote programs to combat climate change, adding to costs that visit social injustice upon hundreds of thousands of Americans.

Commerce is countervailing programs that are not countervailable under the most conventional interpretations of the trade law but is also contradicting the most important new objectives of the United States government. Trade will not be green as long as policies encouraged at home are penalized abroad.

The remainder of these Comments largely repeats the submission of November 9, 2020, which may benefit in particular new Members of the 117th Congress.

IV. 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 farmland, 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

disadvantaged communities. He also formed the White House Environmental Justice Advisory Council, *Tackling the Climate Criss at Home and Abroad*, to provide advice and recommendations to the Chair of the Council on Environmental Quality (CEQ) and the White House Environmental Justice Interagency Council on how to address current and historic environmental injustices, including an update to Executive Order 12898 signed by President Clinton in 1994.

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 adhere strictly to a belief system based on profit opportunities and think Canadians should adopt the same belief system by privatizing the public forests. They see the fruits of Canadian labor as supplemented by the state and, consequently, should 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 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 limited production capacity for a population roughly ten times greater than the population in Canada.¹⁰ 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

¹⁰ See Dezember, *Wall Street Journal*, May 17, 2021 (“in the South } there is a glut of cheap pine timber. Some Forest-products executives said they are considering acquisitions with their fast-accumulating cash. But there aren’t many new mills on the drawing board for North America.”)

Canada's comparative advantage by controlling the price through reducing supply.

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.¹¹

The United States frequently holds up these public operations as a model for Canada, while failing to acknowledge that Canadian industry typically 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.¹²

¹¹ Sales administered by the Idaho Department of Lands (IDL) are for about 1,123,000 acres of timberland (<https://timbercheck.blog/2021/02/06/idaho-timber-sales-bidder-collusion-may-have-cost-the-state-43-million/>). In a 2019 report, the authors "find significant evidence of bidder collusion at the IDL sales. The loss to the State of Idaho from bidder collusion over the time 2004 through 2015, estimated by Gaussian quadrature and corroborated by simulation, is approximately \$43million with a standard deviation of \$2.4million." Marshall, R, Richard, J & Shen, C 2019, 'Bidder Collusion: Accounting for All Feasible Bidders', University of Pittsburgh Working Paper Series, 19/006, Accessed May 17, 2021 at <https://www.econ.pitt.edu/sites/default/files/WP.19.06.upload.pdf>.

¹² 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*,

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.¹³ Decline in the U.S. housing market triggered the global recession of 2008.¹⁴ 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. There is an inherent injustice in the distribution and availability of American 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

(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) ("Hendricks Report")); 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").

¹³ See, e.g., Bipartisan Letter from Ninety-Eight Members of Congress to President Donald J. Trump (October 20, 2020) (discussing rising softwood lumber prices affecting Representatives' constituents).

¹⁴ See, e.g., Simon Johnson and James Kwak, *13 Bankers: The Wall Street Takeover and The Next Financial Meltdown* (2011).

January 2017, raising the price of an average single-family home in 2018 by more than \$6,000¹⁵ and in 2021 more than \$24,000. NAHB has estimated that softwood lumber duties resulted in the net loss of 9,370 jobs in 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.”¹⁶ 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.”¹⁷ In the following two years, fueled by the global pandemic, this problem grew exponentially worse.

Facing a global recession precipitated by a global pandemic, the Department of Commerce continues to do the bidding of domestic lumber producers and timber owners by zealously restricting Canadian access to the U.S. market and driving up the cost of housing. “Prices for forest products like lumber and plywood have soared because of booming demand from home builders making up for lost time, a DIY explosion sparked by stay-at-home orders

¹⁵ 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).

¹⁶ 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>.

¹⁷ 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).

and a race among restaurants and bars to install outdoor seating areas.”¹⁸ Some builders refuse projects because of the price of lumber.¹⁹

NAHB’s Randy Noel explains that certain factors compound the negative effect of increased lumber costs on construction.²⁰ People with secured loans are not able to increase funding to match the increased costs. Obtaining new funding or increasing existing ones is difficult because appraisal values are not keeping up with rapidly increasing costs. The sustained campaign to restrict Canadian access to the U.S. market 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 for themselves 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.²¹ The U.S. Forest Service and the Bureau of Land Management manage about 144.9 and 37.6 million acres of forest, respectively.²² The Forest Service engages in land use and resource management, conducts timber sales, and generates revenue.²³ 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

¹⁸ Wall Street Journal, July 9, 2020, “America Is on a Lumber Binge,” <https://www.wsj.com/articles/america-is-on-a-lumber-binge-11594305886>.

¹⁹ Lumber Prices Continue to Price Home Owners — and Builders — Out of the Market, <http://nahbnow.com/2020/09/lumber-prices-continue-to-price-home-owners-and-builders-out-of-the-market/> (Sept. 15, 2020).

²⁰ *Id.*

²¹ Congressional Research Service, *Timber Harvesting on Federal Lands* at 2 (Apr. 12, 2019) (“In 2011, 88% of timber harvests were conducted on private lands.”).

²² *Id.* at 1.

²³ *Id.* at 4-6.

return of a greater share of fire and insect protection services to the Government of Québec, as is done in the United States, has prompted inevitable allegations from the Department of Commerce of new subsidies, but all it has meant is a government acceptance of responsibility to protect the forest.

U.S. lumber producers have benefited from various federal, state, and local government programs. The Center for Sustainable Economy (“CSE”) reports that the U.S. Forest Service “sells its timber far below cost.”²⁴ The CSE used a methodology reviewed by the Congressional Research Service. Congress appropriates national forest timber sale programs that include planning and preparation of timber sales, reforestation, elimination and containment of southern and mountain pine beetles, road construction, road maintenance, and timber research. The CSE calculated about US\$1.2 billion appropriated of public funds for commercial logging in 2017, excluding additional off-budget funds expended in support of logging activities.

Some of the most prominent and vocal members of the U.S. Coalition protesting Canadian lumber enjoy themselves state tax credits and abatements and in 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.²⁵ Pleasant River is among the most aggressive members of the U.S. Coalition complaining of government assistance to Canadian competitors.

²⁴ John Talberth & Ernest Niemi, Center For Sustainable Economy, *Environmentally Harmful Subsidies in The U.S: Issue #1 – The Federal Logging Program* (2019).

²⁵ 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/>.

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.²⁶

The COVID-19 pandemic surprisingly intensified North American demand for a dwindling timber supply, disrupting the wood supply chain while threatening the health of the workforce. Federal assistance programs such as the SBA Economic Injury Disaster Loans (EIDLs), the SBA Paycheck Protection Program (PPP), Enhanced Unemployment Insurance (UI), and Tax Relief are utilized by timber-related businesses under the provisions of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act; P.L. 116-136). A survey by the American Logger’s Council found that 72% of respondents applied for federal assistance. Of those, 84% applied for assistance with the PPP and 12% applied for assistance with the EIDL program. The majority of respondents (92%) who applied for assistance were approved.

In addition to the federal programs, the CARES Act provided \$150 billion in direct assistance to state governments, collectively known as the Coronavirus Relief Fund, and some states have used these monies to establish grant programs that assist forest landowners and timber-related businesses. For example, the State of Alabama established a grant program for qualifying timber owners that sold timber between March and July 2020, and the State of

²⁶ SLA 2006 at Article XIII and Annex 2C.

Vermont established a grant program for forest product businesses that experienced economic harm due to the COVID-19 pandemic.²⁷²⁸

Under the standards Commerce applies to Canada, all these American programs would be countervailable. Emergency circumstances have justified this assistance, but it raises questions about what constitutes a “level playing field” and fair competition.

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.

Commerce, as in the past, issued affirmative final determinations in its antidumping and countervailing duty investigations following the 2016 petitions.²⁹ Once again, the lawfulness of those 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

²⁷ For Alabama, “Memorandum of Understanding Between Alabama Department of Finance and the Alabama Forestry Commission for the Distribution of CARES Act Coronavirus Relief Funds,” August 24, 2020; Vermont: Vermont Act 138, “ An Act Relating to Providing Financial Relief Assistance to the Agricultural Community due to the COVID-19 Public Health Emergency,” enacted July 2, 2020.

²⁸ CRS Report for Congress, R46636, <https://www.hsdl.org/?abstract&did=848310> (last visited May 3, 2021).

²⁹ *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).

to decide whether the Commerce determinations comply with the United States' obligations under the WTO Agreements.³⁰ The WTO Panel decision, holding seventeen of Commerce's nineteen findings contrary to the international obligations of the United States, will be discussed momentarily.

A NAFTA Panel 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.³¹ 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"³² 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.³³ 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

³⁰ Canada did not challenge the ITC Final Affirmative Determination at the WTO, limiting its challenge to NAFTA Chapter 19.

³¹ 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.

³² Commerce's subsidy findings labelled the Canadian imports "unfairly traded."

³³ 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.

V. 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."³⁴ 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.³⁵ Second, the financial contribution must confer a benefit on the subject merchandise.³⁶ Third, the beneficial financial contribution must be specific to an enterprise or industry or group of enterprises or industries.³⁷ Fourth, the specific, beneficial financial contribution must cause a domestic industry to experience injury or be threatened imminently with injury.³⁸ 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.

³⁴ See, e.g., June 2020 Report at 39.

³⁵ 19 U.S.C. § 1677(5)(B)(i).

³⁶ 19 U.S.C. § 1677(5)(B).

³⁷ 19 U.S.C. § 1677(5)(A).

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

According to the allegation, the provincial governments sell the cutting rights (a “financial contribution”) 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 benefit.

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 on appeal before dispute settlement panels yet to be convened under NAFTA. The United States has appealed to the WTO Appellate Body the WTO Panel decision that found no subsidies.³⁹ The last Administration systematically prevented the Appellate Body from convening to hear the Administration’s appeal.

Now, for the first time, under the most unlikely of circumstances (unprecedented domestic prosperity during the period of investigation), a finding of material injury has been sustained by a NAFTA Chapter 19 binational panel, provided the imports ultimately are found to be unfairly traded. Also unprecedented, the United States, for nearly three years, has prevented NAFTA panels from convening to hear Canada’s appeals of the Department’s dumping and unfair subsidy determinations.⁴⁰

Never in this running battle has an impartial adjudication, whether of the old General Agreement on Trade and Tariffs (“GATT”), or the WTO, or NAFTA dispute resolution panels upheld the Department of Commerce’s stumpage subsidy findings. Softwood lumber exported from Canada to the United States, the most critical building material for American homes, is not

³⁹ See *United States – Countervailing Duty Measures on Softwood Lumber from Canada*, DS 533 Panel Report (August 24, 2020), available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds533_e.htm

⁴⁰ Should the NAFTA panels ultimately find that the Canadian imports are not unfairly traded, the injury determination will be effectively vacated because injury must be by reason of unfair trade.

subsidized and is not unfairly traded, and that conclusion was confirmed once again, in a 226-page decision of an impartial, international WTO panel on August 24, 2020.⁴¹

The WTO panel reviewed the Department's most recent countervailing duty determination and found that virtually every reason advanced by the United States for imposing duties on imports of softwood lumber from Canada was unfounded. In the refrain of the Report, "an objective and unbiased investigating authority" would not have reached the conclusions reached by the Department. On 17 of 19 issues before the WTO Panel the United States was found to be in violation of its international obligations.

According to the WTO Report, the Department repeatedly failed to provide evidence or reasoning for its decisions and, in most instances, available evidence was expressly contrary to the Department's analysis and conclusions. The legitimate conclusion of the Panel is that, as to the international rules of trade, there should be no countervailing duty order and the United States should not be collecting cash deposits pursuant to such an order.

The WTO panel rejected for many reasons the Department's use of a Nova Scotia benchmark to measure supposed stumpage subsidies in Québec and Ontario. The benchmark was based on a commissioned survey of private forest prices.

The panel's most straightforward statement about the benchmark may have been: "{W}e have enough information to consider that the errors that the USDOC detected in the survey would have led an impartial and objective investigating authority to not find the {Nova Scotia} survey reliable for establishing benchmark prices." The Department's findings of stumpage subsidies in Québec and Ontario are entirely dependent on the Nova Scotia benchmark that the WTO panel rejected unequivocally.

The WTO panel also criticized the Department's presumptions that auctions in Québec

⁴¹ See *United States – Countervailing Duty Measures on Softwood Lumber from Canada*, DS 533 Panel Report (August 24, 2020), available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds533_e.htm.

and private stumpage and log prices in Ontario were distorted, and criticized Commerce's failure to consider stumpage benchmarks that were available within the territories and jurisdictions of Québec and Ontario. The Panel said, "USDOC improperly rejected using the proposed auction stumpage prices in Québec as a stumpage benchmark," and added that, "the USDOC's findings pertaining to Ontario's stumpage market did not, either individually or collectively, demonstrate price distortion in that market. Further, the USDOC did not provide a reasoned and adequate basis for rejecting, as a stumpage benchmark, log prices in Ontario."

The WTO panel's report requires the Department to consider fairly and carefully the evidence regarding the prevailing market conditions for stumpage in each province. The evidence of market-oriented stumpage and log transactions in each province is longstanding and abundant.

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.⁴²

Previously, prices in Québec's private forest, representing 20 to 23 percent of the annual 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

⁴² 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.

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.⁴³ The WTO panel decided that this evidence could be ignored no longer.

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 addition to that 18% premium, auction prices determined by the BMMB and annual dues for established mills. The WTO panel found that these payments are remuneration that should be considered by the Department in any stumpage subsidy analysis.

⁴³ See Marshall Report.

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.⁴⁴ 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 WTO report upheld the potential for such Ontario private stumpage and log prices to be considered as the benchmark for Ontario Crown wood purchases.

The WTO panel also rejected the Department's countervailing duty findings on transactions involving reciprocal obligations between the province and the industry, such as sales of biomass electricity to the government or reimbursements of expenses incurred for observing environmentally sustainable partial cut obligations. This decision has an important impact on other "programs" that the Department has treated as countervailable.

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.

"Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under Title VII of the Tariff Act of 1930 is not in conformity with the obligations of the United States under

⁴⁴ 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.

the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures,” according to Section 129(b) of the Uruguay Round Agreements Act, “the Trade Representative shall consult with the administering authority and the congressional committees on the matter.” There is no record that any such consultation has taken place since the WTO Report was issued publicly in August 2020, or that the United States has acted in any way to bring the Commerce measures into compliance with the international obligations of the United States. The Commerce Report to Congress to which these Central Canada comments will be appended most likely will continue to assert subsidies that the WTO panel found, if subsidies at all, are not countervailable.

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 June 2020 Report, for example, referenced a Transformative Technology Program and a Forest Innovation Program, 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 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.⁴⁵ Although the Department recognizes that the Transformative Technology Program expired on March 31, 2014, it continues to report this program to Congress as a Canadian subsidy.

The Department also spends several pages discussing alleged subsidies from the *Uncoated Groundwood Paper* investigation yet fails to acknowledge that the investigation was terminated because the ITC unanimously did not find material injury or threat of material injury

⁴⁵ See *Lumber V* PDM at Appendix II; see also *Lumber V* IDM at Appendix II.

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),⁴⁶ 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 June 2020 report, claiming, without support, that the program is still available.⁴⁷

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 American tree farmers as outright grants.

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."⁴⁸ 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.

⁴⁶ June 2019 Report at 29.

⁴⁷ June 2020 Report at 10.

⁴⁸ June 2020 Report at 5, 37-38.

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 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 Independent Electricity System Operator’s (“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 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.⁴⁹ 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.⁵⁰

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.⁵¹ The statute permits countervailing only the purchase of goods for more than adequate remuneration.⁵² The fixed payments here, to secure electricity capacity, by definition, cannot be

⁴⁹ *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.”).

⁵⁰ *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”).

⁵¹ 19 U.S.C. § 1677(5)(E).

⁵² 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

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 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

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).

investigation.⁵³ Additionally, the Department has initiated investigations on log export restraint programs that it has previously found not countervailable.⁵⁴ These actions, if continued, could render these reports to Congress pointless.

The law for finding subsidies has not changed: it remains necessary for petitioners to allege a subsidy and to substantiate the allegation.⁵⁵ 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.”⁵⁶

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

⁵³ See Section II.C *supra*.

⁵⁴ *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).

⁵⁵ 19 U.S.C. § 1671a(b)(1).

⁵⁶ 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).

that companies did not use their “best efforts” in responding to the Department’s questionnaires and threats 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.⁵⁷ The Appellate Body found that the Department of Commerce “must make a reasonable assessment based on evidence 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.⁵⁸ 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.⁵⁹

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.⁶⁰ 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.”⁶¹ The most recent WTO panel hearing this dispute rejected those excuses.

Congress ought to discourage 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.

⁵⁷ Appellate Body Report, *United States — Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/AB/R (adopted Mar. 5, 2020) pp.32-34.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ 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).

⁶¹ *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.⁶² The law, however, remains unchanged: Congress requires petitioners to make detailed, informed, and specific allegations.⁶³ 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.

Finally, Congress should apply the new standard introduced by the Biden Administration: foreign government efforts to arrest climate change should be praised and rewarded, not countervailed to discourage governments from engaging fully in preserving the planet. In the case of *Softwood Lumber*, respect for government intervention to save the planet would confirm that there are no countervailable subsidies making for unfair competition.

Respectfully submitted,



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⁶² 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).

⁶³ 19 U.S.C. § 1671a(b)(1).