

November 8, 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. 56,251)*

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.<sup>1</sup>

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

---

<sup>1</sup> 86 Fed. Reg. 56,251 (Dep't of Commerce, Oct. 8, 2021).

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.<sup>2</sup> The purpose for the Department’s Softwood Lumber Subsidies Reports<sup>3</sup> expired on October 12, 2015 with the expiration of SLA 2006. Yet, the Department continues to solicit comments and to report to Congress. Central Canada last submitted comments on May 24, 2021 and does so again.

As Central Canada noted in its May 24, 2021 comments, President Biden has made climate change a top priority of his Administration, has committed to a whole-of-government approach to address this issue, and has tied policy governing international trade expressly to this new commitment. The President’s Executive Order on “Tackling the Climate Crisis at Home and Abroad” committed from the very start of his Administration that “climate considerations shall be an essential element of United States foreign policy and national security.”<sup>4</sup> He pledged to “work with other countries and partners, both bilaterally and multilaterally, to put the world on a sustainable climate pathway.” Yet, Commerce’s actions in the softwood lumber countervailing duty case raise doubts as to how seriously Commerce’s leadership is taking the President’s commitment.

Central Canada, in its comments of May 24, 2021, reviewed the programs Commerce still is countervailing that are related, even tangentially or marginally, to softwood lumber from Canada. These comments, reporting on the period of January 1 to June 30, 2021, repeat most

---

<sup>2</sup> 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”); U.S. Dep’t. of Commerce, *Softwood Lumber Act of 2008*, <http://enforcement.trade.gov/sla2008/sla-index.html> (providing previous Reports to Commerce).

<sup>3</sup> 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).

<sup>4</sup> Exec. Order No. 14008, 86 Fed. Reg. 7,619 (Jan. 27, 2021).

of Central Canada’s May 24, 2021 comments – the many reasons why Canadian lumber is not subsidized and there should be no countervailing duties imposed. However, Central Canada would like to emphasize here two additional reasons for lifting the countervailing duties: (1) Commerce is countervailing Canadian federal and provincial programs that are combatting climate change, contradicting and undermining the Biden Administration’s policy; and (2) the duties are artificially and substantially raising lumber prices, thus fueling inflation, raising the cost of housing and putting homes out of the reach of millions of first-time buyers and middle-class American families.

**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.”<sup>5</sup> Her speech centered on addressing the challenges of climate change. As Ambassador Tai emphasized, “Going forward, trade has a role to play in discouraging the race to the bottom and incentivizing a race to the top. We must conserve the resources we do have – and work with our trading partners to do the same – to both mitigate and adapt to climate pressures.”<sup>6</sup>

Other top officials have echoed the Administration’s commitment to a multilateral approach to combatting climate change. Speaking at the Ministerial Council meeting of the Organization for Economic Cooperation and Development in October 2021, U.S. Secretary of State Anthony Blinken praised his fellow ministers for being “aligned on the need to spark a race to the top for quality infrastructure projects around the world to support more projects that are

---

<sup>5</sup> Ambassador Katherine Tai, Remarks delivered at the Center for American Progress (Apr. 15, 2021), *available at* <https://ustr.gov/index.php/about-us/policy-offices/press-office/speeches-and-remarks/2021/april/remarks-ambassadaor-katherine-tai-trade-policy-environment-and-climate-change>.

<sup>6</sup> *Id.*

climate resilient, environmentally sustainable, free from corruption, and truly benefit the communities where they're built.”<sup>7</sup>

U.S. Secretary of Commerce Gina Raimondo also has pursued on an international level, at least symbolically, trade-related actions to fight climate change. Just this October, she and Singapore Minister for Trade and Industry Gan Kim Yong signed a Memorandum of Understanding implementing a partnership for growth and innovation which, among other objectives, seeks to mobilize the public and private sectors in both countries on behalf of “clean energy and climate change solutions.”<sup>8</sup>

Despite Secretary Raimondo’s own pronouncements in bilateral talks, Commerce continues to penalize efforts north of the U.S. border to encourage environmental sustainability and tackle climate change. The ongoing imposition of countervailing duties on Canadian softwood lumber exposes the Department’s primary commitment to sheltering domestic industry from legitimate foreign competition, contradicting the Administration’s goal of providing “international leadership” in the fight against climate change. .

Public utilities all over the United States operate programs to reduce electricity demand at peak times, shifting electricity supply to assure that no one in need at times of peak demand goes without air conditioning or heat, and compensating electricity consumers whose normal energy demands are disrupted. These programs 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 the same types of programs as in the United

---

<sup>7</sup> Sec’y of State Anthony J. Blinken, Remarks before the OECD (Oct. 6, 2021), *available at* <https://www.state.gov/secretary-antony-j-blinken-and-oecd-secretary-general-mathias-cormann-at-a-joint-press-availability/>.

<sup>8</sup> Press Release, U.S. Dep’t Commerce, *U.S.-Singapore Partnership for Growth and Innovation: A Joint Statement by U.S. Sec’y of Commerce Gina Raimondo and Singapore Minister for Trade and Industry Gan Kim Yong* (Oct. 7, 2021), *available at* <https://www.commerce.gov/news/press-releases/2021/10/us-singapore-partnership-growth-and-innovation-joint-statement-us>.

States but, when it comes to Canada, Commerce treats the compensation for the interruption as a countervailable subsidy ignoring entirely the service consumers provide to public utilities in support of energy conservation. Commerce's actions undermine the U.S. Government's fundamental policy goal of fighting against climate change, which the Biden Administration says it has made a top priority.

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 taxes these renewable energy supplies, claiming the governments are overpaying for the electricity.

The biomass cogenerated power purchase agreements are awarded through transparent competitive bidding processes. The governments are paying for the biomass-sourced electricity at rates proven comparable to those for the same type of electricity all over the North American continent, including in the United States. The biomass cogenerated electricity supply agreements 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. Commerce is discouraging these efforts by countervailing research costs and treating money for expenditures to reduce greenhouse gas emissions as countervailable subsidies,<sup>9</sup> notwithstanding that they contribute nothing to the costs of producing or manufacturing softwood lumber and notwithstanding that

---

<sup>9</sup> See *Certain Softwood Lumber Products from Canada: Second Countervailing Duty Administrative Review*, Canadian Parties' Pre-Preliminary Comments Relating to the Climate Crisis, (May 7, 2021) (Barcode: 4119189-01).

the United States itself finances similar experiments and programs.<sup>10</sup> The result is the same: Commerce's interpretation and enforcement of trade remedy law penalizes foreign manufacturers and our closest trading partners for scientific research and for participating in programs to counter the effects of climate change.

Commerce's penalties on green programs in other countries undermine Ambassador Tai's commitment to President Biden's climate change policy and translate into a new phase of protectionism. The Biden Administration may very soon tax and exclude foreign goods for failing to meet environmental standards to address climate change.<sup>11</sup> As USTR stated in the *2021 Trade Policy Agenda and 2020 Annual Report*:

The Biden Administration will work with allies and partners that are committed to fighting climate change. This will include exploring and developing market and regulatory approaches to address greenhouse gas emissions in the global trading system. As appropriate, and consistent with domestic approaches to reduce U.S. greenhouse gas emissions, this includes consideration of carbon border adjustments.<sup>12</sup>

This policy contrasts with Commerce's approach to foreign goods that meet or exceed U.S. climate change-related standards; they continue to be taxed and excluded under the rubric of countervailable subsidies. As the Biden Administration ramps up its efforts to lower 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 magnify

---

<sup>10</sup> See, e.g., U.S. Dep't of Agriculture, Rural Dev. Agency, Advance Biofuel Payment Program Fact Sheet (Dec. 2019), available at [https://www.rd.usda.gov/sites/default/files/fact-sheet/508\\_RD\\_FS\\_RBS\\_AdvancedBioFuel.pdf](https://www.rd.usda.gov/sites/default/files/fact-sheet/508_RD_FS_RBS_AdvancedBioFuel.pdf); U.S. Env'tl. Protection Agency, Renewable Energy & Efficient Energy Solicitation Fact Sheet (Jan. 23, 2020), available at <https://www.energy.gov/sites/default/files/2020/01/f70/DOE-LPO-Renewable-Energy-Efficient-Energy-Jan2020.pdf>

<sup>11</sup> For example, the Administration is actively contemplating the imposition of carbon border adjustment taxes. See, e.g., Bloomberg, *John Kerry Says Biden Evaluating Border Adjustment Tax* (Apr. 23, 2021), available at <https://www.msn.com/en-us/movies/trailer/john-kerry-says-biden-evaluating-border-adjustment-tax/vp-BB1fZhxV>.

<sup>12</sup> Office of the U.S. Trade Representative, *2021 Trade Policy Agenda and 2020 Annual Report* (Mar. 2021) at 3, available at <https://ustr.gov/sites/default/files/files/reports/2021/2021%20Trade%20Agenda/Online%20PDF%202021%20Trade%20Policy%20Agenda%20and%202020%20Annual%20Report.pdf>.

the contradiction between what the Administration says it wants the world community to do and how it treats foreign efforts to live up to the new American standards.

## II. **THE FORESTS ARE THE “LUNGS OF OUR PLANET”**

Sustainable forestry may be the single most valuable thing countries can do to combat climate change. According to one estimate, deforestation is responsible for around 25 percent of greenhouse gas emissions.<sup>13</sup> Ambassador Tai, echoing the refrain that forests are “our planet’s lungs,” complained in her April 15, 2021 speech specifically about deforestation in the Amazon. More recently, she welcomed a deal with Vietnam to reduce illegal logging, which she called “a model – both for the Indo-Pacific region and globally – for comprehensive enforcement against illegal timber.”

The provinces of Central Canada understand well the linkages between timber harvesting and responsible environmental stewardship. 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”). The woodlands operations on Crown land are certified to ISO-14000 for the environment.<sup>14</sup>

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

---

<sup>13</sup>Lauren Bennett, *Deforestation and Climate Change*, The Climate Institute (Apr. 18, 2017), *available at* <http://climate.org/deforestation-and-climate-change/>.

<sup>14</sup> According to the ISO website, “ISO 14001... maps out a framework that a company or organization can follow to set up an effective environmental management system. Designed for any type of organization, regardless of its activity or sector, it can provide assurance to company management and employees as well as external stakeholders that environmental impact is being measured and improved,” International Organization for Standardization (ISO), ISO 14000 Family: Environmental Management, *available at* <https://www.iso.org/iso-14001-environmental-management.html>.

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 for the environmental service the companies perform.

Canadian forests are broadly certified for sustainability because government stewardship and public ownership translate into a priority to preserve the forest in perpetuity and protect it from exploitation. 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.

### **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, and the burden is falling on the unemployed and the less affluent. The U.S. industry has been unable and unwilling<sup>15</sup> to meet demand, especially during the Covid-19 building boom when people have been looking for more space in which to shelter.<sup>16</sup> 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 the Biden Administration's policies seeking to "Build Back Better," create jobs, and achieve social justice.

---

<sup>15</sup> Mike Garrity, *The public loses on federal timber sales*, Idaho State Journal (Feb. 21, 2020) ("In 2019, the Forest Service received no bids on 17.5 percent of the timber it 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."), available at [https://www.idahostatejournal.com/opinion/columns/the-public-loses-on-federal-timber-sales/article\\_8e541d75-42d0-5633-b9fe-25ee8d6d98c9.html](https://www.idahostatejournal.com/opinion/columns/the-public-loses-on-federal-timber-sales/article_8e541d75-42d0-5633-b9fe-25ee8d6d98c9.html).

<sup>16</sup> 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 . . ."), available at <https://www.wsj.com/articles/despite-lumber-boom-few-new-sawmills-coming-11621243982>.



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, including a disproportionate number of minorities, are being shut out of the housing market because new construction for them is not affordable. Thirty-six trade associations, led by the National Association of Home Builders (“NAHB”), 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.<sup>17</sup> In an October letter to the Secretary submitted on the record in the countervailing duty case, the NAHB criticized the continuing and detrimental impacts that the softwood lumber duties are having on small businesses and job creation, while putting home ownership out of reach for around 60 percent of all U.S. households.<sup>18</sup> A recent letter to the President from NAHB asked for help to ensure that “housing remains a key component of American socio-economic opportunity, creating jobs and ensuring the U.S. economy continues to move forward.” The Association warned that current domestic supply chain disruptions, coupled with high countervailing duties on lumber imported from Canada, could exacerbate the housing crisis.<sup>19</sup> NAHB urged the President to put an end to the counterproductive softwood lumber tariffs.

---

<sup>17</sup> Letter to Sec’y Gina Raimondo, by American Gas Association, National Association of Home Builders, National Association of Realtors *et. al.* (Mar. 12, 2021), available at <https://www.nahb.org/-/media/NAHB/advocacy/docs/top-priorities/lumber/housing-coalition-letter-to-sec-raimondo-lumber-prices-031121.pdf>; see also Kevin D. Williamson, *Missing The Forest For The Trees*, Nat’l. Rev. (Mar. 18, 2021) available at <https://www.nationalreview.com/2021/03/missing-the-forest-for-the-trees/>.

<sup>18</sup> *Certain Softwood Lumber Products from Canada: Second Countervailing Duty Administrative Review, Letter to Sec’y Gina Raimondo by the National Association of Homebuilders* (Oct. 6, 2021) (Barcode: 4171127-01).

<sup>19</sup> See Letter to President Joseph R. Biden by the National Association of Homebuilders (Oct. 6, 2021), available at [https://www.nahb.org/-/media/NAHB/advocacy/docs/top-priorities/lumber/biden-lumber-letter-october-2021.pdf?\\_ga=2.22870011.1754950285.1634131660-1714461538.1634131660](https://www.nahb.org/-/media/NAHB/advocacy/docs/top-priorities/lumber/biden-lumber-letter-october-2021.pdf?_ga=2.22870011.1754950285.1634131660-1714461538.1634131660).

The Biden Administration recognizes that climate change has exacerbated existing social and economic inequality.<sup>20</sup> As Ambassador Tai stressed in her April 15 speech, “We expect justice and equity to be on everyone’s agenda, and we welcome creative solutions to the massive challenges we face with the environment, with climate change, and trade as a whole.” Even as USTR solicited nominations in October 2021 for the Trade and Environment Policy Advisory Committee with a specific focus on receiving applications from those with “environmental justice” qualifications,<sup>21</sup> Commerce’s subsidy policy – in direct contradiction to the Biden Administration’s goals -- is moving the country further away from policies that tackle climate change, whose extreme impacts such as floods, droughts, and hurricanes fall most heavily on poor and marginalized populations.

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. A proper interpretation of the Tariff Act’s provisions on countervailable subsidies would result in an outcome consistent with those objectives. Commerce, relying on an erroneous and unnecessarily protectionist analysis, rejects this interpretation, distorts the law, and calls something a subsidy that is not. Trade will not be green as long as policies encouraged at home are penalized abroad.

The trade law of the United States implements international agreements codified in the Uruguay Round Agreements Act. In the WTO framework of those international agreements, the Department of Commerce is to be an “objective and unbiased investigating authority.” WTO panels judge Commerce actions according to this criterion, whether Commerce choices reflect

---

<sup>20</sup> President Biden has promised that “Environmental justice will be at the center of all we do.” EO 14008, *supra* n. 4, included a measure that would direct 40% of benefits from clean energy investments to disadvantaged communities. The EO also established the White House Environmental Justice Advisory Council 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.

<sup>21</sup> See Office of the U.S. Trade Representative, *Notice of Continuation and Request for Nominations for the Trade and Environment Policy*, 86 Fed. Reg. 56,749, 56,750 (Oct. 21, 2021).

an “objective and unbiased investigating authority.” When the agency consistently finds all monetary transactions between foreign governments and private parties “subsidies,” it is not “objective and unbiased.”

A WTO Panel, employing this definition, issued a report on August 24, 2020 responding to a Canadian complaint about Commerce’s treatment of 19 programs in the current softwood lumber dispute. The Panel concluded, for 17 of the 19, that no “unbiased and objective investigating authority” could have reached the conclusions reached by Commerce.

The WTO judgment is not unlike a U.S. court that might find no “rational connection between the facts found and the choice made.”<sup>22</sup> The WTO is applying the treaty the United States signed and the Constitution recognizes as the “supreme law of the land.” Although Commerce and U.S. courts deny the authority of international bodies, they nonetheless have a persuasive power that ought to be respected inasmuch as they do not answer to political or lobbying interests and are “unbiased and objective.” We will discuss this particular WTO decision in more detail further on.

The remainder of these Comments largely repeats the submission of May 24, 2021 but serves as a useful reminder of the unfounded claims made against softwood lumber exports from Canada.

#### **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

---

<sup>22</sup> *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

farming. Trees grew back. Public forests became private (without being bought by private parties), and the United States became even more wedded to the primacy of private property.

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 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 with very few constraints.

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 in reality 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.<sup>23</sup> 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 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, sometimes with infamously rigged bidding.<sup>24</sup>

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.<sup>25</sup>

---

<sup>23</sup> See Dezember *supra* n. 16 (“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.”).

<sup>24</sup> Marc Barany, *Idaho timber sales bidder collusion may have cost the state \$43 million*, Timbercheck (Feb. 6, 2021) available at <https://timbercheck.blog/2021/02/06/idaho-timber-sales-bidder-collusion-may-have-cost-the-state-43-million/> (Sales administered by the Idaho Department of Lands (IDL) are for about 1,123,000 acres of timberland. A 2019 report found “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 \$43 million with a standard deviation of \$2.4 million.” (citing Robert C. Marshall, Jean-François Richard and Chaohai Shen, *Bidder Collusion: Accounting for All Feasible Bidders*, University of Pittsburgh Working Paper Series, 19/006, available at <https://www.econ.pitt.edu/sites/default/files/WP.19.06.upload.pdf>).

<sup>25</sup> See *Certain Softwood Lumber Products from Canada: Second Countervailing Duty Administrative Review, 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* (July 12, 2019) (“Hendricks Report”); see also *Certain Softwood Lumber Products from Canada: Second Countervailing Duty Administrative Review*, Letter from the Government of Quebec to The Honorable

The United States frequently holds up its own public forestry 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.

At the same time that U.S. lumber producers criticize the stumpage systems in Canada, they embrace support from publicly funded programs for themselves in the United States. President Biden himself has recognized the importance of government support for lumber and logging in the fight to preserve the environment and promote economic equality. In a recent proclamation, he noted:

My Administration is also supporting business opportunities that advance forest conservation and create jobs by expanding markets for innovative forest products through Federal programs such as the United States Department of Agriculture Forest Service Wood Innovations and Community Wood grant programs. We are proposing investments in sustainable and innovative uses for wood waste materials to produce advanced biofuels, biochar, heat, and power — including through sustainable aviation fuels and other sustainable biofuels. These programs have the potential to support increased connections between the health of our forests, economic opportunity, and the production of valuable renewable energy.<sup>26</sup>

---

Wilbur L. Ross, Jr., Sec'y of Commerce (July 11, 2019) at Attachment (Expert Report of Robert C. Marshall, Ph.D. (Mar. 10, 2017)) ("Marshall Report").

<sup>26</sup> Press Release, The White House, *A Proclamation on National Forest Products Week 2021* (Oct. 15, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/15/a-proclamation-on-national-forest-products-week-2021/>.

Although most timber harvesting in the United States is conducted on private lands, a significant volume of timber is harvested from public lands.<sup>27</sup> The U.S. Forest Service and the Bureau of Land Management manage about 144.9 and 37.6 million acres of forest, respectively.<sup>28</sup> The Forest Service engages in land use and resource management, conducts timber sales, and generates revenue.<sup>29</sup> 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 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 long 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.”<sup>30</sup> 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.

---

<sup>27</sup> Congressional Research Service, *Timber Harvesting on Federal Lands*, R45688, prepared by Anne A. Riddle (July 28, 2021), at 2 (“In 2011, 88% of timber harvests were conducted on private lands.”).

<sup>28</sup> *Id.* at 1.

<sup>29</sup> *Id.* at 4-6.

<sup>30</sup> John Talberth and Ernest Niemi, *Environmentally Harmful Subsidies in The U.S: Issue #1 – The Federal Logging Program*, Center For Sustainable Economy (May 2019), available at <https://sustainable-economy.org/wp-content/uploads/2019/05/CSE-Federal-logging-report-May-2019.pdf>.

Some of the most prominent and vocal members of the U.S. Coalition protesting Canadian lumber enjoy for themselves state tax credits and abatements. 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.<sup>31</sup> Pleasant River is among the most aggressive members of the U.S. Coalition complaining of government assistance to Canadian competitors.

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.<sup>32</sup>

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. Most respondents (92%) who applied for assistance were approved.

---

<sup>31</sup> 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), available at <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/>.

<sup>32</sup> Softwood Lumber Agreement between the Gov’t of Canada and the Gov’t of the United States (2006), Article XIII and Annex 2C.



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 Vermont established a grant program for forest product businesses that experienced economic harm due to the COVID-19 pandemic.<sup>3334</sup>

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.

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 consumers. Instead, the U.S. lumber industry filed petitions on Black Friday, November 25, 2016, seeking to renew litigation over softwood lumber trade and burden economic recovery. Commerce, as in the past, issued affirmative final determinations in its antidumping and countervailing duty investigations following the 2016 petitions.<sup>35</sup>

---

<sup>33</sup> For Alabama, see *Memorandum of Understanding Between the State of Alabama Department of Finance and the Alabama Forestry Commission for the Distribution of CARES Act Coronavirus Relief Funds* (Aug. 24, 2020), available at [https://governor.alabama.gov/assets/2020/08/scanner@finance.alabama.gov\\_20200826\\_112352-002.pdf](https://governor.alabama.gov/assets/2020/08/scanner@finance.alabama.gov_20200826_112352-002.pdf); for Vermont, see S.351 (Act 138), enacted July 2, 2020.

<sup>34</sup> Congressional Research Service, *Timber Harvesting on Federal Lands*, R46636, prepared by Anne A. Riddle (Dec. 10, 2020).

<sup>35</sup> *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less than Fair Value*, 82 Fed. Reg. 51,806 (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).

The impact of the renewed round of duties fell heavily on the U.S. economy and most Americans. 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 underwrite consumer spending and support small businesses. Shrinking the supply of softwood lumber, or raising its price, restrains and damages the U.S. economy.<sup>36</sup> Decline in the U.S. housing market triggered the global recession of 2008.<sup>37</sup> Import quotas on lumber slowed down that economic recovery.

The NAHB in 2016 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 countervailing duties imposed since that time, however, have caused a substantial increase in the price of lumber and housing. New demand created by the Covid-19 pandemic made this problem exponentially worse. As explained in Part III above, there is an inherent injustice in the distribution and availability of American housing.

Facing a global recession precipitated by a global pandemic, as well as increasing inflationary pressures, 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

---

<sup>36</sup> See, e.g., Bipartisan Letter from Ninety-Eight Members of Congress to President Donald J. Trump (Oct. 20, 2020) (discussing rising softwood lumber prices affecting Representatives' constituents).

<sup>37</sup> See, e.g., Simon Johnson and James Kwak, *13 Bankers: The Wall Street Takeover and The Next Financial Meltdown* (2011).

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 and a race among restaurants and bars to install outdoor seating areas.”<sup>38</sup> Some builders refuse projects because of the price of lumber.<sup>39</sup>

NAHB’s Randy Noel explains that certain factors compound the negative effect of increased lumber costs on construction.<sup>40</sup> People with secured loans for new housing are not able to increase funding to match the increased costs faced by builders. Obtaining or increasing funding is also difficult because appraisal values are not keeping up with rapidly increasing costs, and many real estate deals are falling through.<sup>41</sup> The price increases are also impacting small businesses and having spillover effects in building-related sectors such as concrete and lighting fixtures.<sup>42</sup> The sustained campaign to restrict Canadian access to the U.S. market has slowed economic recovery yet again, this time under some of the severest conditions since the Great Depression of the 1930s.

The newest round of countervailing duties is exacting a high price from most Americans. Yet, 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

---

<sup>38</sup> Ryan Dezember, *America Is on a Lumber Binge*, Wall Street Journal (July 9, 2020) available at <https://www.wsj.com/articles/america-is-on-a-lumber-binge-11594305886>.

<sup>39</sup> National Association of Home Builders, *Lumber Prices Continue to Price Home Owners — and Builders — Out of the Market*, NAHBNow, (Sept. 15, 2020), available at <http://nahbnow.com/2020/09/lumber-prices-continue-to-price-home-owners-and-builders-out-of-the-market/>.

<sup>40</sup> *Id.*

<sup>41</sup> See Nicole Freedman, *Soaring Home Prices Are Roiling Appraisals and Upending Sales*, Wall Street Journal (Oct. 10, 2021), available at <https://www.wsj.com/articles/soaring-home-prices-are-roiling-appraisals-and-upending-sales-11633858381>.

<sup>42</sup> According to NAHB’s Oct. 6, 2021 letter to Sec’y Raimondo, *supra*. n. 18, “more than 95 percent of NAHB’s builder members are small entities as defined by the U.S. Small Business Administration (“SBA”). Over 80 percent of NAHB’s builder members construct fewer than 25 homes per year and more than half build fewer than 10 homes per year. A typical NAHB builder member firm is truly a small business, employing fewer than 14 workers.”

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.

Once again, the lawfulness of Commerce's final 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 Commerce determinations comply with the United States' obligations under the WTO Agreements.<sup>43</sup> The WTO Panel decision, holding seventeen of Commerce's nineteen findings contrary to the international obligations of the United States, will be discussed momentarily.

## **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."<sup>44</sup> 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

---

<sup>43</sup> Canada did not challenge the ITC Final Affirmative Determination at the WTO, limiting its challenge to NAFTA Chapter 19.

<sup>44</sup> See, e.g., U.S. Dep't of Commerce, *Softwood Lumber Subsidies Report to the Congress*, (June 2020) at 39.

contribution by a government to the production or export of a foreign good.<sup>45</sup> Second, the financial contribution must confer a benefit on the subject merchandise.<sup>46</sup> Third, the beneficial financial contribution must be specific to an enterprise or industry or group of enterprises or industries.<sup>47</sup> Fourth, the specific, beneficial financial contribution must cause a domestic industry to experience injury or be threatened imminently with injury.<sup>48</sup> 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. 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.<sup>49</sup> The last Administration systematically prevented the Appellate Body from convening to hear the

---

<sup>45</sup> 19 U.S.C. § 1677(5)(B)(i).

<sup>46</sup> 19 U.S.C. § 1677(5)(B).

<sup>47</sup> 19 U.S.C. § 1677(5)(A).

<sup>48</sup> 19 U.S.C. §§ 1671(a)(2)(A), 1671d(b), 1677(7).

<sup>49</sup> See *United States – Countervailing Duty Measures on Softwood Lumber from Canada*, DS 533 Panel Report (Aug. 24, 2020), available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds533\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds533_e.htm).

Administration's appeal and forestalled adoption of the dispute settlement reports by the WTO Dispute Settlement Body.

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.<sup>50</sup>

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 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.<sup>51</sup>

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 panel report, "an objective and unbiased investigating authority" would not have reached the conclusions reached by the Department. On seventeen of nineteen issues in dispute, the WTO panel found that the United States was 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

---

<sup>50</sup> 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.

<sup>51</sup> See Panel Report, *United States – Countervailing Duty Measures on Softwood Lumber from Canada*, WT/DS533/R (Aug. 24, 2020), available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds533\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds533_e.htm).

the Department's analysis and conclusions. The panel reached the ultimate conclusion that the countervailing duty order is inconsistent with the rules of international trade and that the United States has no basis to collect 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 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 Commerce 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: “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 . . .”<sup>52</sup> Only through deployment of an unlawful benchmark has Commerce found that the Québec Act does not achieve its purpose.<sup>53</sup>

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 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.<sup>54</sup> 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

---

<sup>52</sup> Québec’s Sustainable Forest Development Act, Chapter A-18.1, 1, 1, 1, *available at* <http://legisquebec.gouv.qc.ca/en/showdoc/cs/a-18.1>.

<sup>53</sup> See *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, 82 Fed. Reg. 51,814 (Dep’t of Commerce, Nov. 8, 2017) and accompanying Issues and Decision Memorandum at Comments 35, 37, 39-40.

<sup>54</sup> See Marshall Report, *supra* n. 25.



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 whose floor is 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.

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.<sup>55</sup> 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.

---

<sup>55</sup> 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 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 the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures," according to Section 129(b)(1) of the Uruguay Round Agreements Act, "the Trade Representative shall consult with the administering authority and the congressional committees on the matter." Even further, under Section 129(b)(2), the U.S. Trade Representative may direct Commerce to issue a determination "not inconsistent with the findings of the panel or the Appellate Body." There is no public record that any consultation has taken place since the WTO report was issued in August 2020 or that USTR ever directed Commerce to make a determination that would bring the United States into compliance with its international obligations.<sup>56</sup> Such actions are even more pressing given the incongruence between the countervailing duties and the Administration's commitment to fight climate change. The Commerce Report to Congress to which these Central Canada comments will be appended

---

<sup>56</sup> Indeed, USTR and Commerce have used the current impasse at the WTO Appellate Body to prolong the dispute and avoid taking any action to remedy the underlying WTO inconsistency of the countervailing duties on softwood lumber from Canada.

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 to Congress 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.<sup>57</sup> 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 mentions softwood lumber marketing program subsidies, but some of these programs no longer exist (for example, the VWP expired in March 2011),<sup>58</sup> 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.<sup>59</sup>

---

<sup>57</sup> See *Certain Softwood Lumber Products from Canada: Preliminary Affirmative Countervailing Duty Determination*, 82 Fed. Reg. 19,657 (Dep't of Commerce, Apr. 7, 2017) accompanying Preliminary Decision Memorandum at Appendix II; see also *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, 82 Fed. Reg. 51,814 (Dep't of Commerce, Nov. 7, 2017) and accompanying Issues and Decision Memorandum at Appendix II.

<sup>58</sup> U.S. Dep't of Commerce, *Softwood Lumber Subsidies Report to the Congress* (June 2019) at 29.

<sup>59</sup> June 2020 Softwood Lumber Subsidies Report to the Congress *supra* n. 44 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 American tree farmers as outright grants.

The Department also omits key information about past trade remedy actions against alleged Canadian subsidies. It 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 from Canadian imports. An injury or threat of injury determination is required to find a subsidy countervailable. The Department's omission appears designed to avoid conveying a positive impression of the Canadian programs at issue in that case.

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."<sup>60</sup> 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.

---

<sup>60</sup> *Id.* 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 similar to those used 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.<sup>61</sup> 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.<sup>62</sup> The U.S. Government is such an advocate of demand-side management for electricity grid efficiency that it is exporting the model through funding from the U.S. Agency for International Development (USAID).<sup>63</sup>

---

<sup>61</sup> *Demand Response Compensation in Organized Wholesale Energy Markets*, 76 Fed. Reg. 16,658, 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.”).

<sup>62</sup> *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”).

<sup>63</sup> See, e.g., USAID & ICF, “Electricity Tariffs in Ghana” (Mar. 2017), available at [https://www.icf.com/-/media/files/icf/projects/eecdp/ghana\\_project\\_summary.pdf](https://www.icf.com/-/media/files/icf/projects/eecdp/ghana_project_summary.pdf); USAID & ICF, “Demand Side Management Support in Tanzania” (Mar. 2017), available at [https://www.icf.com/-/media/files/icf/projects/eecdp/tanzania\\_project\\_summary.pdf](https://www.icf.com/-/media/files/icf/projects/eecdp/tanzania_project_summary.pdf)

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.<sup>64</sup> The statute permits countervailing only the purchase of goods for more than adequate remuneration.<sup>65</sup> 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 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.

---

<sup>64</sup> 19 U.S.C. § 1677(5)(E).

<sup>65</sup> 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).

#### **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.<sup>66</sup> Additionally, the Department has initiated investigations on log export restraint programs that it has previously found not countervailable.<sup>67</sup> 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.<sup>68</sup> 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."<sup>69</sup> The

---

<sup>66</sup> See Section III *supra*.

<sup>67</sup> *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).

<sup>68</sup> 19 U.S.C. § 1671a(b)(1).

<sup>69</sup> 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).



Department's "other assistance" practice has been found by the WTO Appellate Body to be contrary to the commitments the United States made under the WTO Agreements.<sup>70</sup>

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 threats that adverse inferences will be applied.

The WTO Appellate Body in 2020 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 ("SCM Agreement").<sup>71</sup> The Appellate Body admonished the Department of Commerce, finding that under the SCM Agreement, the Department "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.<sup>72</sup> 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.<sup>73</sup>

---

<sup>70</sup> Appellate Body Report, United States — Countervailing Measures on Supercalendered Paper from Canada, WT/DS505/AB/R (adopted Mar. 5, 2020), pp. 32-34.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

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.<sup>74</sup> 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."<sup>75</sup> 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.

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.<sup>76</sup> The law, however, remains unchanged: Congress requires petitioners to make detailed, informed, and specific allegations.<sup>77</sup> 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, Commerce should interpret U.S. law in a manner consistent with the standard introduced by the Biden Administration: foreign government efforts to arrest climate change

---

<sup>74</sup> 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).

<sup>75</sup> *Id.*

<sup>76</sup> See *Certain Softwood Lumber Products from Canada: Certain New Subsidy Allegations*, C-122-858 (Aug. 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).

<sup>77</sup> 19 U.S.C. § 1671a(b)(1).

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 combat climate change would confirm that there are no countervailable subsidies making for unfair competition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "E. Feldman". The signature is fluid and cursive, with a large initial "E" and a long, sweeping underline.

Elliot J. Feldman  
Michael S. Snarr  
Ronald J. Baumgarten

Counsel to The Conseil de l'industrie forestière du Québec  
and The Ontario Forest Industries Association