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May 20, 2022

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 (87 Fed. Reg. 23,496)*

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.¹

¹ See *Subsidy Programs Provided by Countries Exporting Softwood Lumber and Softwood Lumber Products to the United States; Request for Comment*, 87 Fed. Reg. 23,496 (Dept. of Commerce Apr. 20, 2022).

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.² The purpose for the Department’s Softwood Lumber Subsidies Reports expired on October 12, 2015 with the expiration of SLA 2006.³ Yet, the Department continues to solicit comments and to report to Congress. Central Canada last submitted comments on November 8, 2021 and does so again here.

EXECUTIVE SUMMARY

A. The Department’s Misalignment With Biden Administration Policy On Climate Change

According to President Joe Biden, the foremost policy of the United States today is the “whole-of-government approach” to climate change, including specifically international trade. Central to U.S. trade policy are countervailing duties on merchandise found to be benefiting in production or export from foreign government subsidies. Central to controlling and limiting climate change, however, is government intervention in the manufacturing process, often through financial support in exchange for environmentally focused remedial actions of private producers. The imposition of tariffs on green goods because governments have helped reduce greenhouse gas emissions or rewarded energy conservation cannot be reconciled with the international priority on climate change.

² See *Softwood Lumber Act of 2008*, P. 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. Dept. of Commerce, *Softwood Lumber Act of 2008*, available at <http://enforcement.trade.gov/sla2008/sla-index.html> (providing links to previous Reports to Commerce).

³ 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).

President Biden recognized the need for government engagement in combatting climate change in the first week of his Administration, declaring in an Executive Order that “climate considerations shall be an essential element of United States foreign policy and national security.”⁴ The Office of the U.S. Trade Representative (“USTR”) announced, “[t]o this end, the Administration is pursuing a new generation of trade policies that will more affirmatively promote the decarbonization necessary to limit global temperature increase to 1.5 degrees Celsius.”⁵ Yet, to date, there is no “new generation of trade policies.”

Eleven months after President Biden’s Inauguration, the U.S. Department of Commerce expressly continued to countervail government policies in Central Canada (Ontario and Québec) aimed at combatting climate change and promoting forest sustainability. The Department said it did not care whether government programs served the challenge of climate change. It cared only about tariffs and protectionism:

“[W]hether the Government of Ontario and Government of Québec were able to realize energy efficiencies or advance their climate change policies are immaterial to Commerce’s examination. . . . Within a CVD proceeding, Commerce is charged with administering and enforcing the CVD law to all subsidies under examination equally, notwithstanding the purpose or secondary effects of a program.”⁶

The “whole-of-government” seems not to include the Department of Commerce. Nor does the Department consider value received by governments in exchange for suppressing and combatting climate change. Instead, the Department assigns no value to the achievement of these objectives.

⁴ Executive Order 14008 (“EO 14008”), “Tackling the Climate Crisis at Home and Abroad,” 86 Fed. Reg. 7,619 (Jan. 27, 2021).

⁵ Office of the U.S. Trade Representative, *2022 Trade Policy Agenda and 2021 Annual Report* (Mar. 2022) (“*USTR 2022 Agenda and 2021 Annual Report*”), at 4, available at [https://ustr.gov/sites/default/files/2022%20Trade%20Policy%20Agenda%20and%202021%20Annual%20Report%20\(1\).pdf](https://ustr.gov/sites/default/files/2022%20Trade%20Policy%20Agenda%20and%202021%20Annual%20Report%20(1).pdf)

⁶ *Certain Softwood Lumber Products Final Results of the Countervailing Duty Administrative Review, 2019*, 86 Fed. Reg. 68,467 (December 2, 2021) as amended by 87 Fed. Reg. 1,114 (January 10, 2022) and accompanying Issues and Decision Memorandum at 42 (Nov. 23, 2021) (“AR2 IDM”).

Secretary of Commerce Gina Raimondo personally, in May 2022, confirmed her Department's detachment from the declared policy of her President. She addressed specifically the alleged subsidies to softwood lumber from Canada: "The Canadian government, through various mechanisms, subsidizes the lumber and lumber producers in ways that are just unfair to American producers."⁷ She offered no recognition of the positive environmental and climate change intentions and achievements of various programs she characterized as "just unfair to American producers," many of which are identical to programs lumber companies use in the United States for energy conservation.

B. The Threat To Continental Commitments To Forests, The Environment And Indigenous Rights

Commerce's rejection of President Biden's policy and agenda through supposed adherence to the trade laws is matched by its rejection of commitments consistent with the President and inscribed in the United States-Mexico-Canada Trade Agreement ("USMCA"). In Article 24.23 the Parties "acknowledge the importance of: ...the conservation and sustainable management of the forests for providing environmental, economic, and social benefits for present and future generations."⁸ The USMCA also specifically recognizes the right of a Party to take or maintain any "measure it deems necessary to fulfill its legal obligations to indigenous peoples."⁹ But in *Softwood Lumber*, the Department countervails Québec's Paix des Braves, through which Québec "fulfill{s} legal obligations to indigenous peoples," while also countervailing government contributions to the costs of conservation programs promoting "sustainable management of the forests."

⁷ "Raimondo: Suspension of lumber duties not 'on the table,'" *Inside U.S. Trade*, May 16, 2022, available at <https://insidetrade.com/trade/raimondo-suspension-lumber-duties-not-table>.

⁸ USMCA, Art. 24.23.2(a).

⁹ USMCA, Art. 32.5.

C. Undercutting Clean And Efficient Energy

The Infrastructure Investment and Jobs Act of 2021 – touted as a top accomplishment by the Administration – requires electric utilities to “promote the use of demand-response and demand flexibility practices by commercial, residential, and industrial consumers to reduce electricity consumption during periods of unusually high demand.”¹⁰ The same legislation paid up to \$60 million over five years “for the purposes of creating incentives for increased use of biomass from National Forest System lands. . . .”¹¹ Yet, the Department countervails programs in Québec and Ontario that aim to achieve similar results, including demand response contracts and biomass energy purchases from the private sector.

The Biden Administration is also promoting the development of green technology. Under Executive Order 14057, President Biden committed the U.S. Government, “[as] the single largest land owner, energy consumer, and employer in the Nation,” to pursue procurement and other policies that “catalyze private sector investment and expand the economy and American industry by transforming how we build, buy, and manage electricity, vehicles, buildings, and other operations to be clean and sustainable.”¹² The Department, in a now familiar pattern, countervails private-public partnerships in Central Canada that seek to foster innovation in response to the climate crisis.

D. Doublespeak On Sustainable Forests And Environmental Justice

President Biden, in November 2021, announced “a new plan to conserve global forests, which will bring together a full range of U.S. government tools — diplomatic, financial, and policy

¹⁰ Infrastructure Investment and Jobs Act (“IIJA”), P.L. 117-58, § 40104(a), 135 Stat. 429, 930-31, Nov. 15, 2021. The law establishes specific steps and timelines that public and private utilities are to undertake in meeting these goals.

¹¹ *Id.* at 1408.

¹² Executive Order 14057 (“EO 14057”), “Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability,” 86 Fed. Reg. 70,935 (Dec. 13, 2021).

— to halt forest loss, restore our critical carbon sinks, and improve land management.”¹³ In April 2022, the Administration took another step forward when the President signed Executive Order 14072 to strengthen America’s forests, build wildfire resistance, and combat deforestation on a world-wide basis.¹⁴ The Executive Order committed to using forestry policies to “honor Tribal treaty rights,”¹⁵ and expressed support for the economic development of the “sustainable forest product sector, including innovative materials,” as part of the President’s larger plan for strengthening forests.¹⁶

Commerce, persistently and contrary to the President’s agenda, rejects the idea of “global forests” and, therefore, application of President Biden’s Glasgow commitments. Commerce rejects all government engagement for sustainable forestry management in Canada. USTR’s leadership, which asserted “[w]hat we do here at home must be reflected in what we do abroad,”¹⁷ seems to have made no impression on Commerce.

Secretary of Energy Jennifer Granholm recently and, extraordinarily, airing a difference between Cabinet departments, expressed her “deep concern” over Department of Commerce policies, particularly a new anti-circumvention investigation, that are undermining the development of the U.S. solar sector which depends upon imports.¹⁸ She recognized publicly

¹³ The White House, “Remarks by President Biden at the ‘Action on Forests and Land-Use Event,’” Speeches & Remarks, Glasgow, Scotland, Nov. 2, 2021 (“Glasgow Speech”), available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/11/02/remarks-by-president-biden-at-the-action-on-forests-and-land-use-event/>.

¹⁴ See Executive Order 14072 (“EO 14072”), “Strengthening the Nation’s Forests, Communities, and Local Economies,” 87 Fed. Reg. 24,851 (Apr. 27, 2022).

¹⁵ *Id.* at 24,851.

¹⁶ *Id.* at 24,852.

¹⁷ Remarks from Ambassador Katherine Tai delivered at the Center for American Progress, Apr. 15, 2021 (“Tai Apr. 15, 2021 Speech”), available at <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/april/remarks-ambassadaor-katherine-tai-trade-policy-environment-and-climate-change>.

¹⁸ Zack Budryk, “Biden energy chief voices ‘deep concern’ about tariff impact on US solar goals,” *The Hill*, Apr. 28, 2022, available at <https://thehill.com/policy/energy-environment/3470388-granholm-voices-deep-concern-about-potential-tariff-impact-on-solar-goals/>.

the inconsistency of Commerce’s interpretation of the trade laws with policies combatting climate change.

In a letter to President Biden on May 16, 2022, a bipartisan group of governors from eighteen states and one territory, citing Secretary Granholm’s public criticism of Commerce, wrote that the solar panel investigation “has created market uncertainty that threatens thousands of clean energy jobs and the deployment of solar projects across the nation.”¹⁹ Declaring that solar power is “a key piece of our collective push for domestic energy security and independence,” the governors reported that “almost immediately, solar prices have jumped because of dramatic drops in solar product imports, threatening the livelihoods of more than 230,000 American workers who rely on solar jobs and raising energy costs on families.”²⁰

What is true for *Solar Panels* is true for *Softwood Lumber*. Commerce’s actions in both instances involve unnecessarily narrow Commerce interpretations of the trade law that harm the battle against climate change broadly and for the long term while immediately damaging the American economy.

The Department’s policies also undercut the Biden Administration’s objective of promoting environmental justice. According to President Biden’s Environmental Protection Agency (“EPA”), “the most severe harms from climate change fall disproportionately upon underserved communities who are least able to prepare for, and recover from, heat waves, poor air quality, flooding, and other impacts.”²¹ All those problems are relieved to some degree by sustainable forestry and energy conservation. Commerce performs a disservice to

¹⁹ Letter from U.S. Governors to President Biden on Solar Circumvention Investigation, May 16, 2022, at p. 1 (“Governors’ May 16 Letter”), available at https://insidetrade.com/sites/insidetrade.com/files/documents/2022/may/wto2022_0318a.pdf.

²⁰ *Id.*

²¹ “EPA Report Shows Disproportionate Impacts of Climate Change on Socially Vulnerable Populations in the United States,” EPA Press Release, Sept. 2, 2021 (“EPA Report Press Release”), available at <https://www.epa.gov/newsreleases/epa-report-shows-disproportionate-impacts-climate-change-socially-vulnerable>.

environmental justice when it discourages foreign governments from pursuing policies combatting climate change.

E. Inflation And The Costs Of Housing

Over 10,000 members of the National Association of Home Builders (“NAHB”) wrote to President Biden in April 2022 expressing concern that “[a]n unexpectedly quick rise in interest rates, rising home prices and rents, and escalating lumber and material costs have significantly decreased housing affordability conditions, particularly for entry-level buyers and renters.”²² The builders charged that “[t]ariffs on Canadian lumber shipments. . . are further fueling this price volatility and acting as a tax on American home buyers at a time when housing affordability is already at a more than 10-year low.”²³ The Biden Administration could take a major step to alleviate pressures on housing prices, but the Secretary of Commerce made all too clear her desire to keep the softwood lumber duties in place.

F. Supposed Adherence To The Law Is A Poor Excuse

Commerce excuses its conduct by asserting that it “is charged with administering and enforcing the CVD law to all subsidies under examination equally, notwithstanding the purpose or secondary effects of a program.”²⁴ Commerce has decided, however, that all alleged subsidies are “grants,” that governments receive nothing in exchange for their interventions to assure sustainable forestry, energy conservation, the reduction of greenhouse gases, and respect for agreements with indigenous peoples. Commerce’s refusal to recognize reciprocity is contrary to the law. “Grants” are gifts, payment for nothing in exchange. Commerce recognizes governments are receiving in exchange fulfillment of policies for sustainability and energy conservation but assigns the achievement of climate change objectives no value. Commerce

²² Letter to President Joseph R. Biden from the National Association of Homebuilders, Apr. 27, 2022 (“NAHB Apr. 27, 2022 Letter to President Biden”), available at <https://www.nahb.org/-/media/NAHB/advocacy/docs/top-priorities/biden-letter-april-2022.pdf>

²³ *Id.*

²⁴ AR2 IDM at 42.

could align itself with the policies and agenda of the President, and with international undertakings pursuant to the USMCA, merely by following the law and recognizing that, where there is reciprocal value, there are no gifts.

I. INTRODUCTION

As Central Canada noted in November 2021, 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. President Biden’s Executive Order on “Tackling the Climate Crisis at Home and Abroad,” issued at the very start of his Administration, promised that “climate considerations shall be an essential element of United States foreign policy and national security.”²⁵ President Biden pledged to “work with other countries and partners, both bilaterally and multilaterally, to put the world on a sustainable climate pathway.”²⁶ Yet, Commerce’s actions in the *Softwood Lumber* countervailing duty case contradict the President’s commitment.

The United States cannot meet domestic demand for softwood lumber. Canada has long supplied around 28 percent of U.S. demand, and often closer to 33 to 35 percent.²⁷ Housing remains a principal driver of the U.S. economy,²⁸ and access to housing is a core concern for social and economic justice. The Biden Administration now recognizes that global forestry (with emphasis on the Amazon) is central to the survival of the planet,²⁹ and that the

²⁵ EO 14008, 86 Fed. Reg. at 7,619.

²⁶ *Id.*

²⁷ See Katie Hoover & Ian Fergusson, “Softwood Lumber Imports from Canada: Current Issues,” CRS Report, Apr. 12, 2018, at 3-4,15, available at <https://sgp.fas.org/crs/misc/R42789.pdf>. Canada has accounted for 95 percent of U.S. lumber imports since 1965. See *id.* at 3.

²⁸ See National Association of Home Builders, “Housing’s Contribution to Gross Domestic Product,” available at <https://www.nahb.org/news-and-economics/housing-economics/housings-economic-impact/housings-contribution-to-gross-domestic-product> (noting that the housing sector’s contribution to GDP stands at around 15-18 percent).

²⁹ See, e.g., EO 14072, 87 Fed. Reg. at 24,853.

cost of building materials is central to the availability of housing. And yet, the two principal agencies charged with international trade – Commerce and USTR – have been doing nothing to support the climate change mission (and, therefore, the Biden Administration’s ambitions for social and environmental justice) and, to the contrary, quite a lot to harm both.

Many of Commerce’s decisions to countervail Canadian programs designed to address climate change and to assure sustainable forestry are inconsistent with the letter and spirit of the promises the United States made to Canada under the United States-Mexico-Canada Agreement (“USMCA”). The United States, in the prosecution of the *Softwood Lumber* case, also has obstructed the USMCA’s dispute resolution system, thereby prolonging unlawful Commerce practices by leaving them unchallenged through judicial review. Commerce has acted with impunity, ignoring President Biden’s climate and trade policies in favor of unbridled protectionism.

The obstruction of domestic or bilateral review of Commerce policies and actions complements defiance of international dispute resolution. The United States has refused to accept and comply with a World Trade Organization (“WTO”) panel report from the summer of 2020 that found almost every aspect of the *Softwood Lumber* countervailing duty final determination in the investigation inconsistent with the United States’ international obligations.

Central Canada, in its comments of November 8, 2021, reviewed each of the programs Commerce still is countervailing that are related, even tangentially or marginally, to softwood lumber from Canada (because many relate only to the production of paper, not lumber). Commerce policy and practice have added programs but not changed course or direction for any of them. Therefore, these comments,³⁰ for the period of July 1 to December 31, 2021,

³⁰ These comments may be the last in this format because Congress is considering legislation that may repeal the Softwood Lumber Act of 2008, including the subsidy reporting requirement. See America COMPETES Act, H.R.4521, § 102502.

recall what Central Canada already has described in more detail in prior comments – the many reasons why Canadian softwood lumber is not subsidized and why there should be no countervailing duties imposed.³¹ – but are focusing on three newer issues:

(1) Commerce has ignored continental commitments in the USMCA by continuing to countervail Canadian federal and provincial programs that are combatting climate change, promoting sustainable forestry, and respecting indigenous peoples, thereby also contradicting and undermining the Biden Administration’s own policy to subordinate trade to protection for the planet, a commitment to indigenous peoples, and the promotion of environmental justice;

(2) Commerce, along with USTR, has disregarded commitments the United States made for dispute resolution under both the North American Free Trade Agreement (“NAFTA”) and its successor, USMCA, and the WTO Agreements, depriving Canadian parties of a fair hearing, abusing the bilateral and multilateral dispute settlement systems, and generally failing to adhere to continental and international obligations; and

(3) Commerce’s tariffs on softwood lumber artificially and substantially raise lumber prices, thus fueling already record inflation, increasing the cost of housing, and putting homes out of reach for millions of Americans.

II. COMMERCE’S POLICIES EFFECTIVELY DENY U.S. GOVERNMENT COMMITMENTS UNDER THE USMCA

A. The United States Has Assumed Obligations Under The USMCA For Sustainable Forestry And Respect For Indigenous Peoples

The United States, independent of Biden Administration policy and pursuant to the USMCA, has a commitment to sustainable forestry and the promotion and protection of indigenous peoples, common objectives specifically identified in the continental agreement. Yet, Commerce continues to countervail foreign government programs designed for environmental protection, forest sustainability, and the promotion of indigenous culture and

³¹ See Attachment, Part V.

economic prosperity. Commerce must interpret the Tariff Act in conformity with USMCA objectives and obligations.³²

The Department, relying on an erroneous and unnecessarily protectionist analysis, has rejected this interpretation, distorted the law, and found countervailability of Canadian programs where there was and is none – not once but, now, three times.³³

The USMCA Parties, in reference to their international trade relationship, agreed to:

RECOGNIZE their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, and protect legitimate public welfare objectives, such as health, safety, environmental protection, conservation of living or non-living exhaustible natural resources, integrity and stability of the financial system, and public morals, in accordance with the rights and obligations provided in this Agreement; ...

PROMOTE high levels of environmental protection, including through effective enforcement by each Party of its environmental laws, as well as through enhanced environmental cooperation, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices; {and}

RECOGNIZE the importance of increased engagement by indigenous peoples in trade and investment. . . .³⁴

The United States, Canada, and Mexico preserved each country’s sovereign right to “protect legitimate public welfare objectives . . . through mutually supportive trade and environmental policies and practices.” Instead, Commerce’s decisions in the *Softwood Lumber* case infringe on the sovereignty of Canadian federal and provincial governments by penalizing government programs that promote environmental protection, sustainable forestry and indigenous people’s rights. Commerce, thus, denies what the United States recognized as an “inherent right,” undermining the shared global goal of combatting climate change. And

³² See, e.g., *Murray v. Schooner Charming Betsy*, 6 US 64 (1804).

³³ The Preliminary Results in the third administrative review of the countervailing duty order commit the same errors. See *Certain Softwood Lumber Products From Canada: Preliminary Results, Partial Rescission, and Preliminary Intent To Rescind, in Part, the Countervailing Duty Administrative Review, 2020*, 87 Fed. Reg. 6,500 (Feb. 4, 2022) and accompanying Preliminary Decision Memorandum (Jan. 28, 2022) (“AR3 PDM”). The fourth administrative review is just getting underway.

³⁴ USMCA, Preamble.

Commerce contradicts the commitment to “recognize the importance of increased engagement by indigenous peoples in trade.”

USMCA Chapter 24 on the Environment contains provisions directly related to Québec's and Ontario's stewardship of Crown forests through stumpage and non-stumpage programs. The USMCA Parties “recognize the importance of conservation and sustainable use of biological diversity,”³⁵ and “each Party shall promote and encourage the conservation and sustainable use of biological diversity, in accordance with its law or policy.”³⁶

Article 24.23, which provides specifically for “Sustainable Forest Management and Trade,” is particularly relevant here. The Parties under this provision “acknowledge the importance of: ...the conservation and sustainable management of the forests for providing environmental, economic, and social benefits for present and future generations.”³⁷ They further “recognize that forest products, when sourced from sustainably managed forests, contribute to fulfilling global environmental objectives, including...conservation and sustainable use of resources, and green growth.”³⁸ And, “each Party commits to...maintain or strengthen government capacity and institutional frameworks to promote sustainable forest management.”³⁹

B. Contrary To USMCA Undertakings, Commerce Has Countervailed Programs Designed To Benefit The Environment, Sustainable Forestry, And Indigenous Peoples

Sustainable and environmentally conscientious forestry policies are implemented in Québec through the Partial Cut Investment Program (“PCIP”); the Investment Program for Forest Management (“PIAF”); the Côte-Nord Wood Residue Program; and the Investment

³⁵ USMCA, Art 24.15.1.

³⁶ USMCA, Art. 24.15.2.

³⁷ USMCA, Art. 24.23.2(a).

³⁸ USMCA, Art. 24.23.3.

³⁹ USMCA, Art. 24.23.4.

Program in Public Forests Affected by Natural or Anthropogenic Disturbances.⁴⁰ Rather than acknowledge the valuable services provided by forest product companies in Central Canada when they participate in these programs, Commerce has countervailed them in past segments of *Softwood Lumber*.⁴¹ and has preliminarily decided to do so again in the third administrative review.⁴²

The Department also has countervailed green programs that promote energy efficiency, contribute to the fight against climate change, and ensure sustainable development of the forests.⁴³ The Department's findings are not only in direct conflict with President Biden's statements and actions on protecting the environment,⁴⁴ but also appear to contravene promises under the USMCA. That agreement provides that "the Parties recognize the importance of trade and investment in environmental goods and services, including clean technologies, as a means of improving environmental and economic performance, contributing to green growth and jobs, and encouraging sustainable development, while addressing global environmental challenges."⁴⁵ These goals will not be achieved anywhere, including in the United States, without government engagement, yet Commerce penalizes foreign governments and corporations for helping to achieve them.

⁴⁰ Additional programs in Central Canada are likewise designed to promote sound forest resource management, including the Ontario Forest Roads Funding Program ("OFRFP"), Québec's Multi-Resource Road Cost Reimbursement Program ("MCRP"), and Rexforêt's and Hydro Québec's contracts with harvesters for road construction and maintenance in Crown forests.

⁴¹ See, e.g., AR2 IDM; *Certain Softwood Lumber Products Final Results of the Countervailing Duty Administrative Review, 2017-2018*, 85 Fed. Reg. 77,163 (December 1, 2020) and accompanying Issues and Decision Memorandum (Nov. 23, 2020) ("AR1 IDM"); *Certain Softwood Lumber Products from Canada Final Affirmative Countervailing Duty Determination*, 82 Fed. Reg. 51,814 (November 8, 2017) and accompanying Issues and Decision Memorandum (Nov. 2, 2017) ("Inv. IDM").

⁴² See AR3 PDM.

⁴³ Among these are demand response programs and biomass energy purchases in Ontario and Québec; Ontario's TargetGHG and Industrial Electricity Incentives Program ("IEI"); and Québec's Electricity Discount Program Applicable to Consumers Billed at L Rate ("EDL"), Industrial Systems Energy Efficiency Program ("ISEE"), and ÉcoPerformance.

⁴⁴ See Part II, *infra*.

⁴⁵ USMCA, Art. 24.24.1.

The USMCA Parties have agreed to “strive to facilitate and promote trade and investment in environmental goods and services,”⁴⁶ but Commerce already has countervailed programs dedicated to the efficiency of the power grid and the limitation of greenhouse gas emissions that otherwise contribute to climate change, including demand response programs and private-public partnerships. The Department has countervailed provincial purchases of biomass energy in a competitive energy market. In each instance, Québec and Ontario are using transactional mechanisms to encourage green growth and investment. Commerce treats such programs as a one-way flow of state largesse when, in fact, they all involve governments contracting with the private sector to accomplish agreed objectives of the USMCA Parties.

The USMCA Parties expressly recognized the importance of indigenous peoples to North America. The USMCA Chapter on Exceptions and General Provisions respects the rights of the Parties concerning relations with native populations: “Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, services, and investment, this Agreement does not preclude a Party from adopting or maintaining a measure it deems necessary to fulfill its legal obligations to indigenous peoples.”⁴⁷

Québec’s Paix des Braves (“PDB”) program is necessary to fulfill the legal obligations that the Government of Québec (“GOQ”) incurred with the Cree Nations for sustainable forestry and harvesting on Cree land. The policy enlists the support of private parties to assist in the sustainable use of the Cree forests. Yet, Commerce has not only penalized a program that serves the very goals the parties embraced in the USMCA,⁴⁸ but also has acted contrary to the Biden Administration’s own policies towards Native Americans.⁴⁹ Rather than respect those

⁴⁶ USMCA, Art. 24.24.2.

⁴⁷ USMCA, Art. 32.5.

⁴⁸ See USMCA, Arts. 24.2.4, 24.15.3, 32.5.

⁴⁹ See EO 14072 at 24,851-52; see also The White House, “Fact Sheet: Building a New Era of Nation-to-Nation Engagement,” Statements & Releases, Nov. 15, 2021, available at

commitments, as the United States promised under the USMCA, Commerce has continued to punish Québec and the Cree for fulfilling them.

Article 24.2.4 of the USMCA's Environment Chapter states: "the Parties recognize that the environment plays an important role in the economic, social, and cultural well-being of indigenous peoples and local communities, and acknowledge the importance of engaging with these groups in the long-term conservation of the environment." Similarly, "the Parties recognize the importance of respecting, preserving, and maintaining knowledge and practices of indigenous peoples and local communities embodying traditional lifestyles that contribute to the conservation and sustainable use of biological diversity."⁵⁰

Québec's PDB program, which requires expensive mosaic cutting, is an integral part of ensuring that the provincial government honors its commitments to the Cree Nation. Yet, the Department considers PDB contributions from the government to enable the program (assuring both revenue for the Cree and environmentally conscientious harvesting) to be nothing more than grants to harvesting companies.

U.S. countervailing duty law does not operate in a vacuum. USMCA forms the framework of the trade and investment relationships among the three Parties in North America. Commerce, like any other instrument of the U.S. Government, must hold itself to the U.S. commitment to respect the rights and obligations of Canada (and Mexico) as adopted in that agreement.

<https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/15/fact-sheet-building-a-new-era-of-nation-to-nation-engagement/> ("President Biden has used his office to protect Tribal lands and help mitigate the devastating effect of climate change on Native communities."); Felicia Fonseca, "Tribes welcome infusion of money in infrastructure bill," *PBS Newshour*, Nov. 18, 2021, available at <https://www.pbs.org/newshour/economy/tribes-welcome-infusion-of-money-in-infrastructure-bill> (reporting on \$11 billion in funding for Native America benefits in Infrastructure Investment and Jobs Act of 2021).

⁵⁰ USMCA, Art. 24.15.3.

III. COMMERCE’S ACTIONS ON SOFTWOOD LUMBER UNDERMINE THE BIDEN ADMINISTRATION’S ATTEMPT TO FIGHT CLIMATE CHANGE

A. Commerce Is Contradicting U.S. Policy That Purports To Encourage Foreign Governments To Combat Climate Change

President Biden, from his first day in office, launched a whole-of-government approach to mitigating climate change. He identified trade as a key component of this policy. Ambassador Katherine Tai, in her first speech as the new United States Trade Representative in April 2021, said: “What we do here at home must be reflected in what we do abroad.”⁵¹ 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.”⁵²

U.S. Secretary of Commerce Gina Raimondo has pursued internationally, at least symbolically, trade-related policies and actions to fight climate change. In October 2021, for example, she and Singapore Minister for Trade and Industry Gan Kim Yong signed a Memorandum of Understanding implementing a partnership for growth and innovation that, among other objectives, seeks to mobilize the public and private sectors in both countries on behalf of “clean energy and climate change solutions.”⁵³

More recently, under the new Indo-Pacific Economic Framework (“IPEF”), Commerce has taken the lead on several commercial “pillars,” including “infrastructure, clean energy, and

⁵¹ Tai Apr. 15, 2021 Speech, *supra* n. 17.

⁵² *Id.*

⁵³ U.S.-Singapore Partnership for Growth and Innovation: A Joint Statement by U.S. Secretary of Commerce Gina Raimondo and Singapore Minister for Trade and Industry Gan Kim Yong, Oct. 7, 2021, <https://www.commerce.gov/news/press-releases/2021/10/us-singapore-partnership-growth-and-innovation-joint-statement-us>.

decarbonization.”⁵⁴ The Department has solicited public comment to assist in the development of negotiating objectives to advance goals related to green energy and climate change, among others, through engagement with IPEF partners.

Despite Secretary Raimondo’s own visibility promoting the Administration’s climate change goals within the mandate of her Department, Commerce continues to penalize efforts north of the U.S. border that otherwise are fulfilling her mandate for environmental sustainability and reversal of climate change. The ongoing imposition of countervailing duties on Canadian softwood lumber -- because of Canadian federal and provincial support for sustainable forestry, reductions in greenhouse gas emissions, development of green energy production and efficient use of electricity -- exposes the Department’s primary commitment to sheltering domestic industry from legitimate foreign competition, contradicting the Administration’s claimed “international leadership” in the fight against climate change.⁵⁵ Commerce, after more than a year into President Biden’s term, continues effectively as a determined dissenter from the Administration’s whole-of-government commitment to subsume international trade within the mission to save the planet.

⁵⁴ *Request for Comments on Indo-Pacific Framework*, 87 Fed. Reg. 13,971 (Dept. of Commerce Mar. 11, 2022).

⁵⁵ Canadian lumber companies are not alone; Commerce’s decision to undertake an anti-circumvention investigation related to solar components has caused one U.S. utility to delay the imminent closure of a coal-power plant and postpone its replacement with solar-generated energy. See Keith Goldberg, “Utility Says Solar Tariff Probe Will Delay Coal Closures,” *Law360*, May 4, 2022, available at <https://www.law360.com/articles/1490235>. Even the Biden Administration’s Energy Secretary, Jennifer Granholm, expressed “deep concern” over the investigation at a recent meeting of the House Energy and Commerce Committee. Budryk, *supra* n. 18. Rep. Scott Peters, speaking at the hearing, noted that the case “could cost us 100,000 American solar jobs and jeopardize our common clean energy goals.” *Id.* Nineteen governors echoed the Energy Secretary in a May 16, 2022 letter to President Biden. See *Governors’ May 16 Letter*, *supra* n. 19. Commerce is again out of step, failing to understand the urgency of climate change and the policy of the Biden Administration.

B. Commerce’s Decision To Penalize Environmentally Friendly Energy And Emission-Control Programs In Central Canada Undermines The Fight Against Climate Change

Commerce’s approach to energy efficiency policies highlights the gap between rhetoric and reality in the Biden Administration’s fight against climate change. Public utilities all over the United States operate demand response programs, for example, which aim 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, compensating electricity consumers who accept disruption in their access to energy to promote system-wide conservation.⁵⁶ These programs reduce the need for utilities to undertake costly construction or upgrades of infrastructure that might be required only at moments of peak demand.⁵⁷

Both federal and state governments in the United States actively encourage the development and use of demand response programs.⁵⁸ The bipartisan Infrastructure Investment and Jobs Act of 2021 – frequently cited by the Biden Administration as among its landmark accomplishments – requires electric utilities to “promote the use of demand-response and demand flexibility practices by commercial, residential, and industrial consumers to reduce electricity consumption during periods of unusually high demand.”⁵⁹ In 2020, nearly 12 million

⁵⁶ As defined by the U.S. Energy Information Administration (“EIA”), “Demand response programs are incentive-based programs that encourage electric power customers to temporarily reduce their demand for power at certain times in exchange for a reduction in their electricity bills. Some demand response programs allow electric power system operators to reduce load directly while, in others, customers retain control. Customer-controlled reductions in demand may involve actions such as curtailing load, operating onsite generation, or shifting electricity use to another time period. Demand response programs are one type of demand-side management, which also covers broad, less immediate programs such as the installation of energy-efficient equipment in residential and commercial sectors.” Energy Information Administration, *Glossary*, available at <https://www.eia.gov/tools/glossary/index.php?id=D>.

⁵⁷ See Glen Andersen & Megan Cleveland, “Meeting Energy Needs with Demand Response,” National Conference of State Legislatures: Legisbrief, Vol. 27, No. 25, Jul. 2019, available at <https://www.ncsl.org/research/energy/meeting-energy-needs-with-demand-response.aspx>.

⁵⁸ See *id.*

⁵⁹ IJA, P.L. 117-58, § 40104(a), 135 Stat. at 930-31. The law establishes specific steps and timelines that public and private utilities are to undertake in meeting these goals.

residential, commercial, industrial, and transportation customers were enrolled in demand response programs in the United States, generating energy savings of 1.5 million MWh.⁶⁰

Provincial governments and utilities in Canada operate the same types of programs as in the United States.⁶¹ but, when it comes to Canada, Commerce treats the compensation for interruptions as a countervailable subsidy, ignoring entirely the service consumers provide to public utilities in support of energy conservation. Rather than interpret the law as intended -- the government purchase of services such as demand response are not countervailable because they involve government purchase of a service also highly valued in the United States⁶² -- Commerce erroneously considers payments under those programs as a type of “grant,”⁶³ as if the service interruptions the United States values so highly were of no value in Canada.

As another example, 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 and other companies with access to this resource. Commerce countervails these initiatives that diversify sources of green energy.⁶⁴

While treating Canadian contributions to the development of green energy as unfair subsidies, the United States at home recognizes and promotes the benefits of biomass energy. In 2020 alone, consumption of biomass (biofuels, wood and waste) comprised nearly 40 percent of all renewable energy consumption in the United States, more than hydropower, solar, or

⁶⁰ See EIA, *Electric Power Annual*, “Table 10.3: Demand Response: Yearly Energy and Demand Savings,” Oct. 29, 2021, available at https://www.eia.gov/electricity/annual/html/epa_10_03.html.

⁶¹ The countervailed demand response programs are Ontario’s Independent Electricity System Operation (“IESO”) Demand Response program; and Hydro Québec’s Interruptible Electricity Option (“IEO”) and Gestion de la demande de puissance (“GDP”) programs.

⁶² See 19 U.S.C. § 1677(5)(D), 5(E)(iv).

⁶³ See, e.g., AR2 IDM at 37-40; 311-14; 350-53.

⁶⁴ Commerce has countervailed Canadian firm Resolute’s biomass power purchasing agreements under Ontario’s IESO Combined Heat and Power III (“CHP III”) program and Hydro Québec’s Purchase Power Program 2011-01 (“PAE 2011-01”).

geothermal sources combined.⁶⁵ The Infrastructure Investment and Jobs Act of 2021 paid up to \$60 million over five years “for the purposes of creating incentives for increased use of biomass from National Forest System lands, including the Community Wood Energy Program and the Wood Innovation Grants Program.”⁶⁶ The Consolidated Appropriations Act of 2022 is making up to \$20 million in funding available for U.S. Forest Service grants to “create[] incentives for increased use of biomass from National Forest System lands.”⁶⁷ Yet, despite federal (and state) emphasis on the investment in and promotion of such renewable energy in the United States,⁶⁸ Commerce countervails utility purchases of biomass cogenerated power in Central Canada.

The biomass cogenerated power purchase agreements in Québec and Ontario are awarded through transparent competitive bidding generating market prices. The governments are paying for the biomass-sourced electricity at rates that are very competitive compared to those for the same types of electricity all over the North American continent, including in the United States.⁶⁹ The biomass cogenerated electricity supply agreements are contributing to the fight against climate change by diversifying energy production and reducing dependence on fossil fuels. The United States demands such diversification at home while penalizing it abroad.

⁶⁵ See EIA, “U.S. primary energy consumption by energy source, 2020,” available at <https://www.eia.gov/energyexplained/us-energy-facts/>.

⁶⁶ IJA, P.L. 117-58, 135 Stat. at 1408.

⁶⁷ Consolidated Appropriations Act of 2022, P.L. 117-103, Mar. 15, 2022, at 343. Sec. 432 of the Act calls for a harmonized U.S. government approach to the use of biomass energy and encourages “private investment throughout the forest biomass supply chain, including in – (i) working forests; (ii) harvesting operations; (iii) forest improvement operations; (iv) forest bioenergy production; (v) wood products manufacturing; or (vi) paper manufacturing.” *Id.* at 371.

⁶⁸ See, e.g., EIA, “Renewable Energy Explained: *Incentives*,” Nov. 5, 2021, available at <https://www.eia.gov/energyexplained/renewable-sources/incentives.php>.

⁶⁹ See, e.g., *Softwood Lumber from Canada: CVD Third Administrative Review; Resolute FP Canada’s Response to Initial Non-Stumpage Questionnaire*, Jun. 21, 2021, at 42-43 (Barcode: 4135365-01) (citing the Report by Merrimack Energy Group, Inc., Exh. RES-NS-PAE-2, as demonstrating the bids received by Hydro-Québec for the supply of biomass electricity “were very competitive, more so than in other markets throughout North America”).

President Biden in December 2021 signed Executive Order 14057, committing the U.S. Government, “[as] the single largest land owner, energy consumer, and employer in the Nation,” to pursue procurement and other policies that “catalyze private sector investment and expand the economy and American industry by transforming how we build, buy, and manage electricity, vehicles, buildings, and other operations to be clean and sustainable.”⁷⁰ Similarly, Ontario and Québec have been encouraging all industries to reduce greenhouse gas emissions and take other steps to fight climate change. In the forestry sector, the provincial governments have been supporting experiments and the implementation of results that reduce greenhouse gas emissions.⁷¹

While the President is ordering such developments in the United States, Commerce is discouraging these efforts in Canada, countervailing research costs and treating money for expenditures to reduce greenhouse gas emissions as countervailable subsidies to softwood lumber, notwithstanding that they contribute nothing to the costs of producing or manufacturing softwood lumber and notwithstanding that the United States itself finances similar experiments and programs.⁷² The result is the same: Commerce’s interpretation and enforcement of trade remedy law penalizes foreign manufacturers and the closest trading partner of the United States for scientific research and for participating in programs to counter the effects of climate change.

⁷⁰ EO 14057, 86 Fed. Reg. at 70,935; see also The White House, “FACT SHEET: President Biden Signs Executive Order Catalyzing America’s Clean Energy Economy Through Federal Sustainability,” Statements & Releases, Dec. 8, 2021, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/08/fact-sheet-president-biden-signs-executive-order-catalyzing-americas-clean-energy-economy-through-federal-sustainability/>.

⁷¹ Such programs include Ontario’s TargetGHG and Québec’s ÉcoPerformance and EDL.

⁷² See, e.g., The White House, “FACT SHEET: Biden-Harris Administration Races to Deploy Clean Energy that Creates Jobs and Lowers Costs,” Statements & Releases, Jan. 12, 2022, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/12/fact-sheet-biden-harris-administration-races-to-deploy-clean-energy-that-creates-jobs-and-lowers-costs/>; Kayla J. Grant & Merrill Kramer, “Key Energy Provisions in Biden Administration \$1.2 Trillion Infrastructure Investment and Jobs Act,” *National Law Review*, Nov. 17, 2021, available at <https://www.natlawreview.com/article/key-energy-provisions-biden-administration-12-trillion-infrastructure-investment-and>; U.S. Department of Energy (“DOE”), “DOE Announces \$100 Million for Transformative Clean Energy Solutions,” Press Release, Feb. 11, 2021, available at <https://www.energy.gov/articles/doe-announces-100-million-transformative-clean-energy-solutions>.

C. Commerce Does Not Own Alone The Problem: Where Is USTR?

Ambassador Tai has underscored USTR's apparent allegiance to President Biden's climate change agenda, at least rhetorically. As USTR stated in the *2022 Trade Policy Agenda and 2021 Annual Report*:

{T}he Biden Administration understands trade is an indispensable tool in addressing the climate crisis. The traditional approach to climate and environmental issues within trade has primarily focused on advancing levels of environmental protection for our trading partners. The Biden Administration will continue this work and strive to strengthen and expand those commitments, but we also recognize that this singular approach will not achieve our climate goals. To this end, the Administration is pursuing a new generation of trade policies that will more affirmatively promote the decarbonization necessary to limit global temperature increase to 1.5 degrees Celsius.⁷³

The United States, as indicated by USTR, demands that imports be produced with the benefit of climate change measures but not with any benefit of foreign government investments in those measures. It is a standard not applied to American producers and assumes that the private sector abroad must carry the entire burden of reducing a global carbon footprint.⁷⁴

Despite its public statements, USTR has not emerged as a leader connecting international trade to climate change policies, whether in negotiations to conclude the WTO Environmental Goods Agreement; in formulating green-friendly subsidy rules; or in developing other positive, trade-based solutions to meet climate-related goals.⁷⁵ The Administration's "Build Back Better" bill, to the contrary, incorporated provisions for an electric vehicle tax credit

⁷³ *USTR 2022 Agenda and 2021 Report*, *supra* n. 5, at 4.

⁷⁴ See, e.g., 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 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.").

⁷⁵ See, e.g., William A. Reinsch, Emily Benson, & Catherine Puga, *Environmental Goods Agreement: A New Frontier or an Old Stalemate?*, CSIS Report, Oct. 28, 2021, available at <https://www.csis.org/analysis/environmental-goods-agreement-new-frontier-or-old-stalemate>; Alejandro de la Garza, "Biden Wants an American Solar Industry. But It Could Come at an Emissions Cost," *Time*, Feb. 10, 2022, available at <https://time.com/6146874/biden-solar-tariff-compromise/>.

that would penalize production of electric vehicles outside the United States.⁷⁶ Both Canada and Mexico have expressed alarm as the United States appears to use the hazards of climate change as punishment against imports rather than an incentive for clean foreign production.⁷⁷

D. The Forests Are The “Lungs Of Our Planet”: Sustainable Forestry Must Be Rewarded, Not Penalized

Sustainable forestry may be one of the most valuable things countries can do to combat climate change. According to one estimate, deforestation is responsible for around 25 percent of greenhouse gas emissions.⁷⁸ The Biden Administration has emphasized the importance of forests for mitigating climate change.

President Biden stressed at the Glasgow Climate Change Conference in November 2021 that “[c]onserving our forests and other critical ecosystems is indispensable — an indispensable piece of keeping our climate goals within reach...”.⁷⁹ He recognized that “[o]ur forests are also nature’s carbon capture, cycling CO₂ out of our atmosphere.”⁸⁰ After highlighting his Administration’s forestry accomplishments, the President announced “a new plan to conserve global forests, which will bring together a full range of U.S. government tools — diplomatic, financial, and policy — to halt forest loss, restore our critical carbon sinks, and improve land management.”⁸¹

⁷⁶ See Brian Platt, “‘Damaging’ EV Tax Credit Has Canada, Mexico Seeking United Front,” *Bloomberg*, Dec. 10, 2021, available at <https://www.bloomberg.com/news/articles/2021-12-10-damaging-ev-tax-credit-has-canada-mexico-seeking-united-front>.

⁷⁷ See *id.*

⁷⁸ See, e.g., Lauren Bennett, “Deforestation and Climate Change” (Climate Institute, Apr. 18, 2017), <http://climate.org/deforestation-and-climate-change/>

⁷⁹ Glasgow Speech, *supra* n. 13.

⁸⁰ *Id.*

⁸¹ *Id.*; see also U.S. State Department, Office of the Spokesperson, “Plan to Conserve Global Forests: Critical Carbon Sinks,” Fact Sheet, Nov. 3, 2021, available at <https://www.state.gov/plan-to-serve-global-forests-critical-carbon-sinks/>.

Five months later, in April 2022, the Biden Administration took another step forward when the President signed Executive Order 14072 (“EO 14072”) to strengthen America’s forests, build wildfire resistance, and combat deforestation on a world-wide basis.⁸² EO 14072 calls for increased domestic and international action to preserve and protect forests, which “play an irreplaceable role in reaching net-zero greenhouse gas emissions.”⁸³

The Biden Administration, as the EO notes, seeks to leverage billions of dollars through the Infrastructure Investment and Jobs Act to develop and implement effective wildfire mitigation strategies, science-based forest management, and other policies to promote the health of U.S. forests.⁸⁴ The EO calls for a particular focus on the development of “community-led local and regional economic development opportunities to create and sustain jobs in the sustainable forest product sector ... while supporting healthy, sustainably managed forests in timber communities.”⁸⁵ The EO also announced a goal of “support[ing] indigenous traditional ecological knowledge and cultural and subsistence practices.”⁸⁶ The Administration has committed to using forestry policies to “honor Tribal treaty rights.”⁸⁷

⁸² See EO 14072, 87 Fed. Reg. at 24,851.

⁸³ *Id.*

⁸⁴ See *id.* at 24,851-52. According to a White House Fact Sheet on EO 14072, “[a]s a critical down payment, the Bipartisan Infrastructure Law provides \$8 billion to fund forest and land management activities, and the FY 2022 Omnibus provides \$5.7 billion for wildland fire management and related risk mitigation and research. USDA and DOI are mobilizing \$5 billion from the Bipartisan Infrastructure Law for hazardous fuels reduction and other mitigation programs, such as a \$1 billion Community Wildfire Defense Grant program and \$600 million for firefighter pay....” The White House, “FACT SHEET: President Biden Signs Executive Order to Strengthen America’s Forests, Boost Wildfire Resilience, and Combat Global Deforestation,” Statements & Releases, Apr. 22, 2022, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/22/fact-sheet-president-biden-signs-executive-order-to-strengthen-americas-forests-boost-wildfire-resilience-and-combat-global-deforestation/>.

⁸⁵ EO 14072, 87 Fed. Reg. at 24,852-53.

⁸⁶ *Id.* at 24,851. As discussed in Part II, *supra*, the USMCA Parties recognized the need for policies to address the economic and social issues facing indigenous people. See, e.g., USMCA, Arts. 24.2.4, 24.15.3, 32.5. But while the Biden Administration is pursuing such policies unimpeded, Commerce continues to countervail similar programs north of the border.

⁸⁷ EO 14072, 87 Fed. Reg. at 24,851.

Internationally, EO 14072 requires the Secretary of State to work with trade agencies, including Commerce and USTR, to develop within one year a report on how the U.S. Government can combat global deforestation and promote sustainable land use through trade agreements, foreign assistance, and other mechanisms.⁸⁸ The Secretary of State has not yet divulged what might be in his report, but Ambassador Tai already has charted a course of punishing bad actors rather than encouraging or rewarding good conduct. USTR's approach, like Commerce's, is to wall out merchandise that may have benefitted from government engagement in climate change instead of encouraging foreign governments affirmatively to fulfill the Secretary of State's mandate.

The central problem here is that the United States prefers punitive, negative policies (such as putting a stop to illegal logging in Asia and South America). This perspective dominates policy and includes penalizing the very activities of foreign governments the United States claims it wants foreign governments to pursue. Reducing access to the U.S. market for goods not produced subject to American environmental rules or standards, reflected in proposals for a carbon border tax,⁸⁹ is a negative policy, especially when goods produced the "American" way also are penalized as being "subsidized."

The USMCA reflects the priority the countries of North America profess to place affirmatively on sustainable forestry. The three USMCA Parties understood specifically the link between timber harvesting and responsible environmental stewardship. The final USMCA provisions, which have no parallel in the now expired NAFTA, reflect that priority.⁹⁰ The United States, through the practices of the Department of Commerce, is not living up to the bargain.

The provinces of Central Canada are stewards of vast public forests. Their provincial policies are rooted in sound forest management. All public forests harvested in Central Canada

⁸⁸ *Id.* at 24,853-54.

⁸⁹ See Platt, *supra* n. 76.

⁹⁰ See Part II, *supra*.

are monitored to ensure sustainability.⁹¹ and the woodlands operations on Crown land are monitored to ensure compliance and success by independent certification bodies and government agencies. These certifications and adherence to strictly enforced federal and provincial laws 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 such programs in Central Canada where a government contributes to the achievement of sustainable forestry.⁹² Instead of learning from the Canadian experience, the United States penalizes with a demand that Canada stop doing what the United States now recognizes it should have been doing all along.

The GOQ, for example, frequently prescribes for forestry companies how they may cut, invariably inflating the harvesting cost. The Government, under programs such as the PCIP and PIAF, contributes to the high cost but, by law, never all of it. The forestry companies always must bear some of the inflated cost. Commerce countervails every penny the GOQ contributes to this cost. Private forest owners, especially in the United States, typically impose no such requirements for sustainable forestry, and President Biden is committing billions of dollars to offset similar costs in the United States (what Commerce would call “countervailable subsidies” if the U.S. were a net exporter rather than a needy importer) for both private forest owners and harvesters in federal forests.

The Biden Administration already has expressed support for the economic development of the “sustainable forest product sector, including innovative materials,” as part of the President’s larger plan for strengthening forests.⁹³ Yet Commerce, again, interprets the Tariff Act to punish the same kind of policies in Canada.

⁹¹ Monitoring is accomplished through the existing legislative framework for forest management, the Standard for Sustainable Forestry Initiative (“SFI”), or the Forest Stewardship Council (“FSC”).

⁹² See Part II, *supra*.

⁹³ EO 14072, 87 Fed. Reg. at 24,852. The Infrastructure Investment Jobs Act makes USDA funding available for “financial assistance, including a low-interest loan or a loan guarantee, to an entity seeking

Another example: under the Government of Québec’s Programme Innovation Bois (“PIB”), the provincial government provides research and development incentives for the creation of innovative forestry products using pulp and other materials. The program has nothing to do with lumber and everything to do with using regenerative materials. Commerce countervails the PIB as if the government incentives were subsidies to the manufacture or export of lumber.⁹⁴ Commerce not only has the wrong product. It also is attacking a measure that it favors at home.

E. Commerce’s Duties On Lumber Threaten To Intensify The Impact Of Climate Change On Marginalized Americans

The Biden Administration recognizes that climate change has exacerbated existing social and economic inequality.⁹⁵ The President’s whole-of-government approach, reflected in the Administration’s Justice40 Initiative, signals the importance of using government to address the particularly severe impact of climate change on poor and marginalized communities.⁹⁶ This

to establish, reopen, retrofit, expand, or improve a sawmill or other wood-processing facility in close proximity to a unit of Federal land [identified] as high or very high priority for ecological restoration.” IJA, P.L. 117-58, 135 Stat. at 1108. State and local governments are likewise involved in the development and promotion of the forest products sector. For example, CLAW Forestry Services, LLC recently announced that Mississippi state and Amite County governments were supporting its investment in a new sawmill in the southwestern part of Mississippi with money for “infrastructure improvements and site development.” Frank Corder, “CLAW Forestry locating sawmill operations in Southwest Mississippi,” *Y’all Politics*, Apr. 28, 2022, available at <https://yallpolitics.com/2022/04/28/claw-forestry-locating-sawmill-operations-in-southwest-mississippi/>.

⁹⁴ The Biden White House, contrary to Commerce, apparently sees merit in the promotion of sustainable forest products. See, e.g., EO 14072, 87 Fed. Reg. at 24,852 (calling for the development of “community-led local and regional economic development opportunities to create and sustain jobs in the sustainable forest product sector, including innovative materials....”).

⁹⁵ President Biden has promised that “Environmental justice will be at the center of all we do.” The White House, “Remarks by President Biden Before Signing Executive Actions on Tackling Climate Change, Creating Jobs, and Restoring Scientific Integrity,” Speeches & Remarks, Jan. 27, 2021, available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/27/remarks-by-president-biden-before-signing-executive-actions-on-tackling-climate-change->. EO 14088 on climate change included a measure that would direct 40 percent of benefits from clean energy investments to disadvantaged communities and established the White House Environmental Justice Advisory Council to provide advice and recommendations to the Chair of the Council on Environmental Quality (CEQ). See EO 14088, 86 Fed. Reg. at 7,629-30.

⁹⁶ See, e.g., Shalanda Young, Brenda Mallory, and Gina McCarthy, “The Path to Achieving Justice40,” Council on Environmental Quality Blogs, Jul. 20, 2021, available at <https://www.whitehouse.gov/ceq/news-updates/2021/07/20/the-path-to-achieving-justice40/> (“Justice40 is a whole-of-government effort to ensure that Federal agencies work with states and local communities to

priority presumably applies to international trade as to other areas of U.S. Government responsibility. As Ambassador Tai has stressed, “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.”⁹⁷

The U.S. Environmental Protection Agency (“EPA”), in October 2021, released a comprehensive study of impacts of climate change on socially vulnerable populations, including minorities (e.g., Blacks, Latinos, Asian and Pacific Islanders), the poor, the elderly, and the less educated.⁹⁸ According to the agency, “the analysis shows that the most severe harms from climate change fall disproportionately upon underserved communities who are least able to prepare for, and recover from, heat waves, poor air quality, flooding, and other impacts.”⁹⁹

The Biden Administration recognizes the injustice and disproportionate impact of climate change. It recognizes that sustainable forestry is central to arresting climate change and, therefore, to achieving the environmental justice it has promised. It is committing very substantial sums for government interventions for sustainable forestry and for energy conservation. Yet, the Commerce Department declares all such considerations irrelevant to its management of international trade. As Commerce concluded in the second administrative review:

Whether the Government of Ontario and Government of Québec were able to realize energy efficiencies or advance their climate change policies are immaterial to Commerce’s examination. . . . Within a CVD proceeding, Commerce is charged with administering and enforcing the CVD law to all subsidies under examination equally, notwithstanding the purpose or secondary effects of a program.¹⁰⁰

make good on President Biden’s promise to deliver at least 40 percent of the overall benefits from Federal investments in climate and clean energy to disadvantaged communities.”).

⁹⁷ See Tai Apr. 15, 2021 Speech at *supra* n. 17.

⁹⁸ See EPA, *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts*. U.S. Environmental Protection Agency, EPA 430-R-21-003 (2021) available at <https://www.epa.gov/cira/social-vulnerability-report>.

⁹⁹ EPA Report Press Release, *supra* n. 21.

¹⁰⁰ AR2 IDM at 42.

For Commerce, prosperity for American timber barons is more important than environmental justice, sustainable forestry, innovation, and energy conservation. And as long as USTR ignores or denies the authority of the 2020 WTO panel report overturning Commerce’s countervailing duty findings while impeding judicial review under NAFTA and the USMCA, this internal contradiction will undo the good intentions of the President. The challenge is not to “enforc[e] the CVD law . . . notwithstanding the purpose or secondary effects,” but rather to enforce the CVD law with full respect for the value of what governments are buying – environmental justice, sustainable forestry, innovation, and energy conservation.

IV. THE U.S. DEFENSE OF *SOFTWOOD LUMBER* TARIFFS HAS THREATENED THE RULE OF LAW AND ALLOWED COMMERCE’S PUNITIVE USE OF COUNTERVAILING DUTIES TO GO UNCHECKED

A. The United States Has Undermined Panel Review Under USMCA Chapter 10/NAFTA Chapter 19

The fifth round of the *Softwood Lumber* litigation began under NAFTA and has continued under the USMCA. The free trade agreements (“FTAs”) among North American partners differ in a critical aspect from other FTAs to which the United States is a Party. Starting with the Canada-United States Free Trade Agreement (“CUSFTA”) of 1988, the United States and Canada “replace[d] judicial review” of antidumping and countervailing duty determinations with binational panel review.¹⁰¹ (USMCA Chapter 10; NAFTA/CUSFTA Chapter 19.)

Canada views the dispute settlement system unique to the North American agreements as essential to safeguarding appeals against the bias of national courts and has insisted on binational panel review as a *sine qua non* of entering into trade agreements with the United States. The Trump Administration set a goal, however, of eliminating Chapter 19.¹⁰² Canada

¹⁰¹ USMCA, Art. 10.12.1; NAFTA, Art. 1904.1; CUSFTA, Art. 1904.1.

¹⁰² See M. Angeles Villarreal & Ian F. Fergusson, “NAFTA Renegotiation and the Proposed United States-Mexico-Canada Agreement (USMCA),” CRS Report, Feb. 26, 2019, p. 38, available at <https://crsreports.congress.gov/product/pdf/R/R44981/14>; see also USTR, *Summary of Objectives for the NAFTA Renegotiations*, July 17, 2017, at p. 14, available at <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf>. The Trump Administration

declined to sign any new agreement without it.¹⁰³ The United States ultimately relented but has acted in bad faith towards this provision of the international agreement ever since.

The Final Results of the original countervailing duty investigation were appealed under NAFTA Chapter 19 on November 17, 2017. The parties submitted briefs and supplemental authorities but, as of the date of these comments, a panel has yet to be selected for the countervailing duty final determination due to the U.S intransigence on the naming of panelists who are free of manifest conflicts of interest and, therefore, acceptable to both Parties. NAFTA sets a deadline for completion of panel review within 315 days of the request for review;¹⁰⁴ it has now been over four years.

The first and second administrative reviews have both come and gone. The Commerce determinations were appealed, this time under USMCA Chapter 10. Yet again, the United States has stonewalled the formation of adjudicating panels. Briefing is complete in the appeal of the first review and on an extended briefing schedule in the second. Both are still without panels. Every day that passes is another day where the Canadian parties are denied their “day in court” on findings related to pressing policy matters.¹⁰⁵ They are also additional days when a prohibitive cost of building materials has denied millions of Americans access to the housing market.

USMCA’s Chapter 10 is a meaningless gesture when the United States does not allow it to operate as the USMCA Parties intended. The absence of panel review has licensed Commerce to act with impunity, judging all government involvement in the market as

was more successful in eliminating another dispute resolution provision between Canada and the United States, NAFTA’s Chapter 11, for investor-state disputes.

¹⁰³ See Villarreal & Fergusson, *supra* n. 102, p. 38.

¹⁰⁴ See NAFTA Art. 1904.14 (now USMCA, Art. 10.12.14.).

¹⁰⁵ Canadian softwood lumber exports to the United States have been the subject of protracted legal disputes five different times, beginning in 1982. Never in this running battle have NAFTA panels (and those convened under the WTO or its predecessor the General Agreement on Tariffs and Trade (“GATT”)) upheld the Department of Commerce’s stumpage subsidy findings.

automatically countervailable without reference to international agreements and without reference to U.S. law. As the U.S. Court of International Trade (“CIT”) has explained, “The essential elements of “due process of law” are notice and opportunity to be heard and to defend in [an] orderly proceeding adapted to [the] nature of [the] case, and . . . require[] that every [litigant] have [the] protection of [a] day in court and [the] benefit of general law.”¹⁰⁶ By preventing panels from hearing and deciding appeals, the United States has denied Canadians (and American importers) due process of law and has protected Commerce’s continuing and unchecked conduct contrary to law.

B. The United States Has Placed Relief Under The WTO Dispute Settlement System Beyond Canada’s Reach

U.S. trade law implements the WTO Agreements as codified in the Uruguay Round Agreements Act. The WTO’s Dispute Settlement Understanding (“DSU”) establishes binding dispute settlement through panel and appellate review.¹⁰⁷ As part of the DSU, WTO Members, including the United States, agreed to certain general principles:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.¹⁰⁸

Canada exercised its rights under the DSU in the current dispute and prevailed before a WTO dispute settlement panel in a challenge to the countervailing duty final determination in the

¹⁰⁶ *Diamond Sawblades Mfrs. Coalition v. United States*, 33 Ct. Int’l Trade 1674, 1678 (2009) (quoting *Barnhart v. U.S. Treasury Dept.*, 588 F. Supp. 1432, 1438 (Ct. Int’ Trade 1984) (quoting *Black’s Law Dictionary* 449 (5th ed. 1979)).

¹⁰⁷ See Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) (“Dispute Settlement Understanding” or “DSU”).

¹⁰⁸ DSU, Art. 3.2.

original investigation;¹⁰⁹ the United States, however, has done nothing to advance the “prompt settlement” of this dispute.¹¹⁰ Instead, the United States appealed to the WTO’s Appellate Body while paralyzing the Appellate Body from hearing the appeal.¹¹¹

Softwood lumber exported from Canada to the United States is not subsidized and is not unfairly traded, conclusions reconfirmed most recently in the 226-page decision of the impartial, international WTO panel on August 24, 2020. That panel 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.¹¹² 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, Commerce 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.¹¹³ The panel reached the ultimate conclusion that the countervailing duty order is inconsistent with the WTO Agreement on Subsidies and Countervailing Measures (“SCM Agreement”) and that the United States has no basis to collect cash deposits pursuant to such an order.

¹⁰⁹ See Panel Report, *United States – Countervailing Duty Measures on Softwood Lumber from Canada*, WT/DS 533/R (circulated Aug. 24, 2020) (“*DS533 Panel Report*”), available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds533_e.htm.

¹¹⁰ DSU, Art. 3.3 (“The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.”).

¹¹¹ See Alexander Panetta, “U.S. appeals softwood lumber ruling to very WTO body it’s accused of sabotaging,” *CBC News*, Sept. 28, 2020, available at <https://www.cbc.ca/news/world/us-wto-lumber-1.5741757>.

¹¹² See, e.g., *DS533 Panel Report* at ¶¶ 7.40, 7.74, 7.83, 7.111, 7.209.

¹¹³ See Attachment, Part V.B for a more detailed discussion .

The last Administration, which chose to appeal the panel report in DS533, understood that this move would delay indefinitely Canada's chance to obtain relief at the WTO. To protest alleged overreach by the Appellate Body, the Trump Administration blocked appointments needed to reach a quorum to decide appeals,¹¹⁴ thereby preventing the Appellate Body from hearing the U.S. appeal and the WTO Dispute Settlement Body from adopting the panel report. Nothing has changed in the first sixteen months of the Biden Administration.

In December 2021, the United States agreed to adopt an adverse WTO panel report in a dispute over U.S. antidumping and countervailing duties on olives from Spain, waiving appeal.¹¹⁵ The United States is now taking the appropriate steps under U.S. law to implement the WTO panel decision. These steps are being interpreted as expressions of good will toward the EU.¹¹⁶ The United States could express similar good will toward Canada, relying on the precedent of *Spanish Olives*, and accept and adopt the panel report in DS533. Instead, to date the United States has done nothing to resolve the dispute nor recognize Commerce's lack of good faith to the detriment of most consumers on the continent.

Even were the United States to continue its denial of due process for Canadian producers and American importers, it still could and should interpret the Tariff Act consistent with the WTO panel's findings. The U.S. Supreme Court has long recognized in the "*Charming Betsy* doctrine," dating from 1804, that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."¹¹⁷

¹¹⁴ See, e.g., Jennifer Hillman, "A Reset of the World Trade Organization's Appellate Body," Council on Foreign Relations, Jan. 14, 2020, available at <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body>.

¹¹⁵ See Action by the Dispute Settlement Body, *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, WT/DS577/9 (Dec. 21, 2021), available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/577-9.pdf&Open=True>.

¹¹⁶ See Alex Lawson, "WTO Dispute Roundup: US, EU Keep Playing Nice in Geneva," *Law360*, Jan. 25, 2022, available at <https://www.law360.com/articles/1458427/wto-dispute-roundup-us-eu-keep-playing-nice-in-geneva>.

¹¹⁷ 6 U.S. 64, 2 L. Ed. 208 (1804).

The Statement of Administrative Action for the Uruguay Round Agreements Act (“URAA SAA” or “SAA”) “represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round Agreements, both for purposes of U.S. international obligations and domestic law.”¹¹⁸ Congress ratified the SAA at 19 U.S.C. § 3511(a) and declared in 19 U.S.C. § 3512(d) that it is to be “regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.” Hence, the SAA expresses the common intent of the Executive and Legislative branches of the government to implement the United States’ obligations under the WTO Agreements in U.S. trade law.¹¹⁹ The SAA recognizes that, whereas WTO panel decisions are not binding, “a court could take judicial notice of the panel or Appellate Body report and consider the views of the panel if the court considered them to be persuasive....”¹²⁰

The DS533 Panel Report provides an interpretation of U.S. obligations under the SCM Agreement. Commerce is duty-bound under canons of statutory construction to interpret the Tariff Act consistent with the SCM Agreement. The DS533 Panel Report, striking down almost all Commerce decisions on *Softwood Lumber*, is persuasive authority for that interpretation.

V. COMMERCE’S DUTIES CONTRIBUTE TO RISING HOUSING COSTS AND INCREASED ECONOMIC HARDSHIP FOR AMERICANS

The price of lumber, as in previous reporting periods, continues to rise in North America, a primary source of the record-high inflation that imperils economic recovery from the Covid-19

¹¹⁸ URAA SAA, p. 1.

¹¹⁹ *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 635-36 (1952) (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty.”) (internal citation omitted).

¹²⁰ URAA SAA, p. 19.

pandemic. The duties on Canadian lumber are a primary source of the rising price of lumber. From September 2021 to May 2022, building material prices in the United States have risen 20.4 percent.¹²¹ The price of softwood lumber has risen 90.4 percent.¹²² The judicially unreviewed duties put housing purchases beyond the reach of many Americans in the middle class and a disproportionate number of minorities.¹²³ Higher rents are another byproduct of higher housing prices.¹²⁴

U.S. builders have continued to call the Administration's attention to the impact that the duties are having on the housing market. Over 10,000 members of the National Association of Home Builders ("NAHB") sent a letter to President Biden on April 27, 2022 sounding alarm about the recent "inflection point" in the housing market.¹²⁵ The NAHB expressed concern that "[a]n unexpectedly quick rise in interest rates, rising home prices and rents, and escalating lumber and material costs have significantly decreased housing affordability conditions, particularly for entry-level buyers and renters."¹²⁶

The builders drew particular attention to "unprecedented volatility in lumber prices that has raised the cost of a typical single-family home by more than \$18,600 since last August."¹²⁷ They specifically decried the "[t]ariffs on Canadian lumber shipments," which "are further fueling

¹²¹ See Katie Jensen, "Building Materials Prices Continue to Increase," *National Mortgage Professional*, Apr. 18, 2022, available at <https://nationalmortgageprofessional.com/news/building-materials-prices-continue-increase>

¹²² See *id.*

¹²³ See Aimee Picchi, "For most Americans, owning a home is now a distant dream," *CBS News*, Feb. 22, 2022, available at <https://www.cbsnews.com/news/real-estate-home-prices-middle-class-affordability-2022-02-23/>; Tobias Burns, "Black homeownership faces new obstacles in crowded property market," *The Hill*, Apr. 25, 2022, available at <https://thehill.com/policy/finance/3462980-black-home-ownership-faces-new-obstacles-in-crowded-property-market/>.

¹²⁴ See Katy O'Donnell, "The main driver of inflation isn't what you think it is," *Politico*, Mar. 18, 2022, available at <https://www.politico.com/news/2022/03/18/housing-costs-inflation-00015808> (noting a 17.6 percent jump in rent over the last year).

¹²⁵ See NAHB Apr. 27, 2022 Letter to President Biden, *supra* n. 22.

¹²⁶ *Id.* at 1.

¹²⁷ *Id.*

this price volatility and acting as a tax on American home buyers at a time when housing affordability is already at a more than 10-year low.”¹²⁸ The NAHB asked President Biden “to immediately suspend tariffs on softwood lumber imports from Canada and to move quickly to enter into negotiations with Canada to pursue a new, long-term softwood lumber agreement.”¹²⁹ The builders argued that “[f]ew things would have a more immediate impact on lumber markets than a swift resolution” to the *Softwood Lumber* dispute.¹³⁰ And few things could have a swifter impact on inflation.

Many Members of Congress have sounded the same objections as the NAHB to the larger economic consequences of the duties on softwood lumber. A bipartisan group of 95 House Members, representing urban and rural districts across the United States, sent a letter to Ambassador Tai in May 2021 decrying the high cost of lumber and calling for a negotiated settlement to the *Softwood Lumber* dispute to “help the economy recover” from the downturn due to the Covid-19 pandemic.¹³¹ Again, on December 20, 2021, a bipartisan group of 84 Representatives wrote to Secretary Raimondo stressing the inflationary effects of the lumber duties on U.S. housing prices, as well as their adverse impact on employment in the building

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 1-2. The NAHB has sent several letters to President Biden and Secretary Raimondo over the last year. See Letter to President Joseph R. Biden from 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> (asking the President 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” and urging removal of softwood lumber tariffs); *Administrative Review of Certain Softwood Lumber Products from Canada: Letter to Secretary Gina Raimondo by the National Association of Homebuilders*, C-122-858 (Oct. 6, 2021) (Barcode: 4171127-01); Letter to Secretary Gina Raimondo, by American Gas Association, National Association of Home Builders, National Association of REALTORS et. al. on 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> (reporting that tariffs from the *Softwood Lumber* dispute had raised the price of the average new home in the United States by \$24,000 and new apartments by \$9,000).

¹³¹ Office of U.S. Rep. Kevin Hern (D-OK-1), “Hern leads bipartisan letter to USTR Amb. Tai on lumber shortage,” Press Release, May 17, 2021, available at <https://hern.house.gov/news/documentsingle.aspx?DocumentID=346>

sector.¹³² The signatories, who represent a diverse mix of congressional districts, urged the parties to the dispute to come together to reach an agreement which, they argued, would remove uncertainty for homebuilders, provide job security for construction workers and assist in economic recovery.

The Preliminary Results of the third administrative review in February 2022 have continued the imposition of duties on softwood lumber without reference to the pleas of the NAHB and numerous Members of Congress. Commerce clings to the false notion that it is following the law when it ignores the value Canadian governments, directly, and the United States, indirectly, derive from investments in climate change, social and economic and environmental justice. This erroneous interpretation of laws intended to encourage fair competition is damaging the Administration that Commerce is supposed to be serving, and the country it is supposed to be defending. The tariffs are inflationary. They are a tax on Americans. They are raising prices and costing jobs and they expressly defy the President's policy goals to combat climate change while promoting sustainable forestry around the globe and the country's most essential environmental and economic needs.

VI. SUBSIDY ALLEGATIONS AND MARKET DISTORTIONS

The Department's Reports to Congress under the Softwood Lumber Act 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."¹³³ The Department,

¹³² See Letter from Rep. Hern and others to Secretary Gina Raimondo, Dec. 20, 2021, available at https://hern.house.gov/uploadedfiles/hern-higgins_lumber_letter_to_sec_raimondo.pdf?source=email. Senators have sent similar letters decrying the lumber tariffs, explaining their adverse impact on rising housing prices and pushing for a settlement. See, e.g., Letter from Senators Shaheen and Jerry Moran to Secretary Gina Raimondo, May 12, 2021, available at <https://www.moran.senate.gov/public/cache/files/2/b/2bc3bc03-54e2-4dd7-9213-2815edd8d81e/B85563D04ACD61ED95BC8ED48AA07185.ambtai-secraimondo-softwoodlumber-051221.pdf>.

¹³³ December 2021 Softwood Lumber Subsidy Report at p. 45.

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.¹³⁴ Second, the financial contribution must confer a benefit on the subject merchandise.¹³⁵ Third, the beneficial financial contribution must be specific to an enterprise or industry or group of enterprises or industries.¹³⁶ Fourth, the specific, beneficial financial contribution must cause a domestic industry to experience injury or be threatened imminently with injury.¹³⁷ This last condition – injury or threat of injury – is determined by the International Trade Commission, not the Department of Commerce.

Central Canada has explained repeatedly in prior comments (and in briefs to binational panels that still do not exist) why stumpage and non-stumpage programs in Canada are not countervailable subsidies under U.S. trade law. To impose duties on softwood lumber from Ontario, Québec, and other provinces, Commerce has misapplied the Tariff Act, flouted obligations under the WTO SCM Agreement, and disregarded a mountain of evidence.

One point, nonetheless, merits repetition. Commerce is not following the law and, with respect to climate change, it has adopted an extraordinary position: that following the law prohibits the Department from recognizing policies in other countries related to climate change.

An interpretation of the Tariff Act consistent with U.S. policies on climate change is available, lawful, and necessary. Only Commerce and USTR appear to be out of step with the

¹³⁴ See 19 U.S.C. § 1677(5)(B)(i).

¹³⁵ See 19 U.S.C. § 1677(5)(B).

¹³⁶ See 19 U.S.C. § 1677(5)(A).

¹³⁷ See 19 U.S.C. §§ 1671(a)(2)(A), 1671d(b), 1677(7).

Administration. Even the Secretary of Energy has expressed publicly dismay with the Commerce view of subsidies as they conflict with commitments on climate change.

When foreign governments buy and help develop or install green technologies or purchase services contributing to sustainable forestry, they are receiving something of value in exchange for their contribution (or their imposition of additional costs). Commerce insists these reciprocal arrangements are “grants.” “Grants” are gifts. Services in exchange nullify the notion of gifts. Commerce need only recognize reciprocity to conform with the law and align itself with the Biden Administration and the global alarm over climate change.

When the Secretary of Commerce complains that Canadian trade in softwood lumber is “unfair,” she is complaining that Canadian governments are participating in a global combat against climate change and that Canadian governments and private enterprises are cooperating in the existential challenge to save the planet. She is complaining that Canadians are doing what President Biden is calling upon Americans to do and what he has persuaded Congress to pay for.

VII. CONCLUSION

Commerce is countervailing programs that are not countervailable under the most conventional interpretations of the trade law while also contradicting the most important objectives of the U.S. government. Commerce continues to pursue policies that disregard obligations under the WTO and USMCA. Relying on an erroneous and unnecessarily protectionist analysis, Commerce distorts the law and disregards the evidence. A proper interpretation of the Tariff Act’s provisions on countervailable subsidies would result in an outcome consistent with the United States’ North American and international trade commitments and the Biden Administration’s own policies on climate change, sustainable forestry, inflation reduction, economic justice, affordable housing, and respect for indigenous peoples. The United States has an opportunity, starting with Commerce’s enforcement of the trade remedies law, to achieve an alignment of national and international priorities that promote sustainable,

climate-friendly growth and, specifically with reference to softwood lumber, protect the lungs of the planet. It is pointless, even destructive, to characterize a noble cause as unfair trade.

Congress has a role to play in this saga, and there is a need for Congress to play it.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'E. Feldman', written in a cursive style.

Elliot J. Feldman
Michael S. Snarr
Ronald J. Baumgarten
Tung A. Nguyen

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

ATTACHMENT

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.¹

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

¹ 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.² The purpose for the Department’s Softwood Lumber Subsidies Reports³ 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.”⁴ 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

² 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).

³ 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*).

⁴ 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.”⁵ 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.”⁶

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

⁵ 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>.

⁶ *Id.*

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

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.”⁸

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

⁷ 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/>.

⁸ 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,⁹ notwithstanding that they contribute nothing to the costs of producing or manufacturing softwood lumber and notwithstanding that

⁹ 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.¹⁰ 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.¹¹ 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.¹²

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

¹⁰ 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; 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>

¹¹ 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>.

¹² 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.¹³ 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.¹⁴

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

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

¹⁴ 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 unwilling¹⁵ to meet demand, especially during the Covid-19 building boom when people have been looking for more space in which to shelter.¹⁶ 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.

¹⁵ 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.

¹⁶ 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 \$9,000.¹⁷ 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.¹⁸ 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.¹⁹ NAHB urged the President to put an end to the counterproductive softwood lumber tariffs.

¹⁷ 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/>.

¹⁸ *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).

¹⁹ 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.

The Biden Administration recognizes that climate change has exacerbated existing social and economic inequality.²⁰ 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,²¹ 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

²⁰ 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.

²¹ 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.”²² 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

²² *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.²³ 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.²⁴

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.²⁵

²³ 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.”).

²⁴ 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>).

²⁵ 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.²⁶

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").

²⁶ 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.²⁷ The U.S. Forest Service and the Bureau of Land Management manage about 144.9 and 37.6 million acres of forest, respectively.²⁸ The Forest Service engages in land use and resource management, conducts timber sales, and generates revenue.²⁹ 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.”³⁰ 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.

²⁷ 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.”).

²⁸ *Id.* at 1.

²⁹ *Id.* at 4-6.

³⁰ 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.³¹ 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.³²

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.

³¹ 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/>.

³² 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.³³³⁴

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.³⁵

³³ 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; for Vermont, see S.351 (Act 138), enacted July 2, 2020.

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

³⁵ *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.³⁶ Decline in the U.S. housing market triggered the global recession of 2008.³⁷ 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

³⁶ 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).

³⁷ 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.”³⁸ Some builders refuse projects because of the price of lumber.³⁹

NAHB’s Randy Noel explains that certain factors compound the negative effect of increased lumber costs on construction.⁴⁰ 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.⁴¹ The price increases are also impacting small businesses and having spillover effects in building-related sectors such as concrete and lighting fixtures.⁴² 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

³⁸ 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>.

³⁹ 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/>.

⁴⁰ *Id.*

⁴¹ 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>.

⁴² 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.⁴³ 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."⁴⁴ 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

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

⁴⁴ 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.⁴⁵ Second, the financial contribution must confer a benefit on the subject merchandise.⁴⁶ Third, the beneficial financial contribution must be specific to an enterprise or industry or group of enterprises or industries.⁴⁷ Fourth, the specific, beneficial financial contribution must cause a domestic industry to experience injury or be threatened imminently with injury.⁴⁸ 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.⁴⁹ The last Administration systematically prevented the Appellate Body from convening to hear the

⁴⁵ 19 U.S.C. § 1677(5)(B)(i).

⁴⁶ 19 U.S.C. § 1677(5)(B).

⁴⁷ 19 U.S.C. § 1677(5)(A).

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

⁴⁹ 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.

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.⁵⁰

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, 2020.⁵¹

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

⁵⁰ 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.

⁵¹ 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.

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 . . .”⁵² Only through deployment of an unlawful benchmark has Commerce found that the Québec Act does not achieve its purpose.⁵³

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.⁵⁴ 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

⁵² 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>.

⁵³ 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.

⁵⁴ 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.⁵⁵ 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.

⁵⁵ 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.⁵⁶ 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

⁵⁶ 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.⁵⁷ 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),⁵⁸ 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.⁵⁹

⁵⁷ 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.

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

⁵⁹ 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."⁶⁰ 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.

⁶⁰ *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.⁶¹ 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.⁶² 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).⁶³

⁶¹ *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.”).

⁶² *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”).

⁶³ 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; 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

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

⁶⁴ 19 U.S.C. § 1677(5)(E).

⁶⁵ 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.⁶⁶ Additionally, the Department has initiated investigations on log export restraint programs that it has previously found not countervailable.⁶⁷ 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.⁶⁸ 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."⁶⁹ The

⁶⁶ See Section III *supra*.

⁶⁷ *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).

⁶⁸ 19 U.S.C. § 1671a(b)(1).

⁶⁹ 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.⁷⁰

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").⁷¹ 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.⁷² 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.⁷³

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

⁷¹ *Id.*

⁷² *Id.*

⁷³ *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.⁷⁴ 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."⁷⁵ 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.⁷⁶ The law, however, remains unchanged: Congress requires petitioners to make detailed, informed, and specific allegations.⁷⁷ 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

⁷⁴ 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).

⁷⁵ *Id.*

⁷⁶ 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).

⁷⁷ 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
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