

SOFTWOOD LUMBER SUBSIDIES REPORT
TO THE CONGRESS

U.S. Department of Commerce

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I. Background and Reporting Methodology

On June 18, 2008, section 809(b) of Title VIII of the Tariff Act of 1930 (the Softwood Lumber Act of 2008) was enacted into law. Under this provision, the Secretary of Commerce is mandated to submit to the appropriate congressional committees a report every 180 days on any subsidies provided by countries exporting softwood lumber or softwood lumber products to the United States, including stumpage subsidies. This report is issued pursuant to this requirement.

As in past reports, for this, the 28th Softwood Lumber Subsidies Report to Congress, we are relying on a six-month period (*i.e.*, July 1, 2021, through December 31, 2021) to identify the countries subject to review. Given the large number of countries that export softwood lumber and softwood lumber products to the United States, it is impractical to find subsidy information for every country that exports softwood lumber or softwood lumber products to the United States.¹ Instead, to provide a report that reflects subsidies which have a significant impact on the U.S. softwood lumber industry, we analyzed U.S. imports of softwood lumber and softwood lumber products to determine which countries were the largest exporters of such products to the United States. Based on data published by the United States International Trade Commission Tariff and Trade DataWeb, we have included in this report subsidies provided by Brazil, Canada, Germany, Romania, and Sweden, the only countries with exports accounting for at least one percent of total U.S. imports of softwood lumber by quantity, as classified under Harmonized Tariff Schedule of the United States (HTSUS) codes 4407.1001, 4407.1100, 4407.1200, 4407.1905, 4407.1906, 4407.1910, during the period July 1, 2021, through December 31, 2021.²

Under U.S. countervailing duty (CVD) law, a subsidy will be found if a government authority: (i) provides a financial contribution; (ii) provides any form of income or price support within the meaning of Article XVI of the GATT 1994; or (iii) makes a payment to a funding mechanism to provide a financial contribution to a person, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments, and a benefit is thereby conferred. *See* section 771(5)(B) of the Tariff Act of 1930, as amended (the Act). Because the statute does not impose a limitation on the subsidies subject to the reporting requirement, this report, like previous reports, includes subsidy programs, some of which may have expired. *See* section 809(b) of the Act.

II. Identification of Subsidies

The U.S. government investigates and monitors the provision of subsidies by other countries through various means, including the enforcement of U.S. trade laws, participation at the World Trade Organization (WTO), the implementation of bilateral trade agreements, as well as public comment. Therefore, we examined subsidies identified in those areas, specifically: (A) CVD investigations and reviews; (B) WTO reporting by member countries and WTO monitoring; (C) subsidies identified in the course of enforcing bilateral agreements regarding softwood lumber

¹ For the period July 1, 2021, through December 31, 2021, 50 countries exported softwood lumber and softwood lumber products to the United States.

² During the period, Canada accounted for 86.04 percent, Germany 5.15 percent, Brazil 1.50 percent, Sweden 1.36 percent, and Romania 1.32 percent of total U.S. imports.

and softwood lumber products; and (D) comments from the public.

A. CVD Proceedings

To identify subsidies on softwood lumber or softwood lumber products provided by Canada, we analyzed the most recently completed CVD proceedings involving exports to the United States of softwood lumber or softwood lumber products from Canada and have included in this report any subsidies identified in relevant proceedings.³

On November 2, 2017, the Department of Commerce (Commerce) issued its final determination in the CVD investigation of certain softwood lumber products from Canada (*Lumber V*).⁴ We have included in this report the subsidies identified in *Lumber V Final Determination*. We have also included subsidies to softwood lumber production identified in the final results of the expedited review, the final results of the first and second administrative reviews, and the preliminary results of the third administrative review of *Lumber V*.⁵

Prior to *Lumber V*, in 2002, Commerce issued a CVD order on certain softwood lumber products from Canada (*i.e.*, *Lumber IV*).⁶ Because there are some subsidies that were identified in that proceeding (including the last administrative review of the *Lumber IV* order) that were not investigated in *Lumber V*, we have included subsidies that were found in the administrative review of *Lumber IV* covering the period April 2003 through March 2004.⁷ In 2006, the United States and Canada signed the Softwood Lumber Agreement (SLA), a bilateral accord between the United States and Canada, which resulted in the U.S. government terminating the *Lumber IV* order on imports of Canadian softwood lumber. On October 12, 2015, the SLA expired.

This report also includes subsidies that appear to be applicable to softwood lumber production

³ As stated above, this report presents public information on subsidies in place during the period July 1, 2021, through December 31, 2021, as identified in the following areas, specifically: (A) U.S. CVD proceedings; (B) WTO reporting by member countries and WTO monitoring; (C) subsidies identified in the course of enforcing bilateral agreements regarding softwood lumber and softwood lumber products; and (D) comments from the public.

⁴ See *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, 82 FR 51814 (November 8, 2017) (*Lumber V Final Determination*), and accompanying Issues and Decision Memorandum (IDM). Subsidies identified are unchanged in *Certain Softwood Lumber Products from Canada: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 83 FR 347 (January 3, 2018) (collectively, *Lumber V*).

⁵ See *Certain Softwood Lumber Products from Canada: Final Results of Countervailing Duty Expedited Review*, 84 FR 32121 (July 5, 2019) (*Lumber V Expedited Review Final Results*), and accompanying IDM; *Certain Softwood Lumber Products from Canada: Final Results of the Countervailing Duty Administrative Review; 2017-2018*, 85 FR 77163 (December 1, 2020) (*Lumber V First Review Final Results*), and accompanying IDM; and *Certain Softwood Lumber Products from Canada: Final Results of the Countervailing Duty Administrative Review; 2019*, 86 FR 68467 (December 2, 2021) (*Lumber V Second Review Final Results*), and accompanying IDM; and *Certain Softwood Lumber Products from Canada: Preliminary Results, Partial Rescission, and Preliminary Intent to Rescind, in Part, the Countervailing Duty Administrative Review; 2020*, 87 FR 6500 (February 4, 2022) (*Lumber V Third Review Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

⁶ See *Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products from Canada*, 67 FR 36070 (May 22, 2002) (*Lumber IV*).

⁷ See *Notice of Final Results of the Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada* 70 FR 73488 (December 12, 2005) (*Lumber IV 2nd Review Final Results*), and accompanying IDM.

that were found in two other CVD proceedings involving Canada: *Supercalendered Paper*⁸ and *Uncoated Groundwood Paper*.⁹

B. WTO Notifications and Monitoring

We identified two sources of information from the WTO: Subsidies Notifications and Trade Policy Reviews (TPR). The Subsidies Notifications is the primary source of information under the WTO framework for each member country's subsidy programs. WTO member countries are required to notify the WTO of specific subsidies, in accordance with Article 25 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). This portion of the SCM Agreement requires that members notify all specific subsidies, at all levels of government and covering all goods sectors, to the SCM Committee. Notifications are due every two years and are available on the WTO's website.¹⁰ Since the prior lumber subsidies report, there was a new subsidy notification from the European Union (EU) for Germany.¹¹

Pursuant to the WTO's TPR Mechanism, each WTO Member's trade policies and practices are subject to periodic review by the Membership. As part of each TPR, the WTO Secretariat and the Member under review each draft a report. The Secretariat Report provides information on each Member's subsidy programs. The frequency of each country's TPR varies according to its share of world trade. The EU is subject to review every two years. Canada and Brazil are subject to review every four years. The TPR documents for each Member are available from the WTO Secretariat and are available on the WTO's website.¹² None of these Members have undergone a TPR since the prior lumber subsidies report.

C. Monitoring and Enforcement Related to Bilateral Trade Agreements

We have also included in this report subsidies identified in the course of administering and enforcing the SLA.¹³

D. Public Comment

On April 20, 2022, Commerce published a notice in the *Federal Register* soliciting public comment on subsidies provided by Brazil, Canada, Germany, Romania, and Sweden on

⁸ See *Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination*, 80 FR 63535 (October 20, 2015) (*Supercalendered Paper Final Determination*), and accompanying IDM. Subsidies identified are unchanged in *Supercalendered Paper from Canada: Countervailing Duty Order*, 80 FR 76668 (December 10, 2015) (collectively, *Supercalendered Paper*); see also *Supercalendered Paper from Canada: Final Results of Countervailing Duty Expedited Review*, 82 FR 18896 (April 24, 2017) (*Supercalendered Paper Expedited Review Final Results*), and accompanying IDM. Subsidies identified are unchanged in *Supercalendered Paper from Canada: Amended Final Results of the Countervailing Duty Expedited Review*, 82 FR 25244 (June 1, 2017).

⁹ See *Certain Uncoated Groundwood Paper from Canada: Final Affirmative Countervailing Duty Determination*, 83 FR 39414 (August 9, 2018) (*Uncoated Groundwood Paper Final Determination*), and accompanying IDM.

¹⁰ http://www.wto.org/english/tratop_e/scm_e/scm_e.htm

¹¹ There were no new subsidy notifications for Brazil, Canada, and the EU for Romania and Sweden.

¹² http://www.wto.org/english/tratop_e/tpr_e/tp_rep_e.htm#bycountry

¹³ The SLA was particular to Canada. The United States does not currently have, or had in the past, a similar agreement involving softwood lumber or softwood lumber products from any other country.

softwood lumber or softwood lumber products for inclusion in this report.¹⁴ On May 20, 2022, Commerce received a comment filing from Conseil de l'industrie forestière du Québec and the Ontario Forest Industries Association, which is attached as an appendix.

III. Subsidies Provided

In each report issued to Congress, we listed all known subsidies provided by the exporting countries under consideration, identified using the methodology described above.¹⁵ The chart below shows which countries are included in each report.

Report	Austria	Brazil	Canada	Chile	France	Germany	Romania	Sweden
1		X	X	X		X		
2			X	X		X		
3		X	X	X		X		X
4			X	X				
5			X	X				
6			X	X				
7			X	X				
8			X					
9			X					
10			X					
11			X					
12			X	X				
13			X					
14			X	X				
15			X	X				
16			X	X				
17			X	X	X			
18			X					
19			X	X		X		
20		X	X			X		X
21		X	X			X		X
22		X	X			X		X
23		X	X			X		X
24		X	X			X		X
25		X	X			X		X
26		X	X			X	X	X
27	X	X	X			X	X	X
28*		X	X			X	X	X

*Current report.

¹⁴ See *Subsidy Programs Provided by Countries Exporting Softwood Lumber and Softwood Lumber Products to the United States; Request for Comment*, 87 FR 23496 (April 20, 2022).

¹⁵ Prior reports are posted on Commerce's website at <http://enforcement.trade.gov/sla2008/sla-index.html>.

CANADA

Below, we identify subsidies provided by Canada on softwood lumber and softwood lumber products through examinations of the most recently completed CVD proceedings, WTO notifications, and the implementation and enforcement of the SLA.

A. Subsidies Identified in CVD Proceedings

Commerce determined that the following programs benefited Canadian softwood lumber producers in the *Lumber V Final Determination*; *Lumber V Expedited Review Final Results*; *Lumber V First Review Final Results*; *Lumber V Second Review Final Results*; *Lumber V Third Review Preliminary Results*; *Lumber IV 2nd Review Final Results*;¹⁶ *Supercalendered Paper Final Determination*; *Supercalendered Paper Expedited Review Final Results*; and *Uncoated Groundwood Paper Final Determination*.

Subsidies Identified in *Lumber IV* and *Lumber V*

- Provincial Stumpage Programs (provision of standing timber for less than adequate remuneration (LTAR))
 1. Alberta
 2. British Columbia
 3. Manitoba
 4. New Brunswick
 5. Ontario
 6. Québec
 7. Saskatchewan

In Canada, the vast majority of standing timber used by softwood lumber producers originates from lands owned by the Crown. In the *Lumber IV 2nd Review Final Results*, *Lumber V Final Determination*, *Lumber V First Review Final Results*, *Lumber V Second Review Final Results*, and *Lumber V Third Review Preliminary Results*, Commerce found that the provincial governments provided a countervailable subsidy to softwood lumber producers by selling the key input for softwood lumber production, timber, to the Canadian producers in each of the provinces listed above for LTAR.¹⁷ Each of the Canadian provinces has established programs through which it charges certain license holders “stumpage” fees for standing timber harvested from Crown lands.

- British Columbia (BC) Log Export Restraints

¹⁶ During the conduct of the *Lumber IV* investigation and three subsequent administrative reviews, Commerce investigated a large number of programs, not all of which were in use, or evaluated, during the second administrative review. Because the second administrative review was the most recently completed administrative review of the *Lumber IV* order, we have used it as the most current and accurate measure of our findings in *Lumber IV*.

¹⁷ See *Lumber IV 2nd Review Final Results* IDM at 8-16; see also *Lumber V Final Determination* IDM at 9-10; *Lumber V First Review Final Results* IDM at 12-14; *Lumber V Second Review Final Results* IDM at 11-12; and *Lumber V Third Review Preliminary Results* PDM at 12-43.

The Forest Act states that all timber harvested in BC is required to be used or manufactured in BC into wood products. Logs cannot be exported unless they meet certain criteria, the most common of which is that they are surplus to the needs of the BC timber processing industry. The Government of BC (GOBC) requires private log suppliers to offer logs to BC mill operators, and they may export the logs only if there are no purchasers in the province. The GOBC's actions require private suppliers of BC logs to sell to, and satisfy the demands of, BC consumers, including mill operators. The export exemption process discourages log suppliers from considering opportunities in the export market by encumbering their ability to export, especially where there is uncertainty as to whether their logs may be found to be surplus to the requirements of BC mills.¹⁸

- Non-Stumpage Programs Determined To Confer Subsidies

Programs Administered by the Government of Canada (GOC)

1. Canada—New Brunswick Job Grant Program

This program is part of a joint effort between the GOC and its provinces and territories, under six-year agreements, in which the GOC provides federal funding to provincial or territorial governments for the purposes of increasing labor market participation of groups that are underrepresented in Canada's labor force and enhancing the employability and skills of Canada's labor force. The New Brunswick aspect of the program was launched in January 2015 pursuant to the Canada-New Brunswick Job Fund Agreement, and is administered by the Department of Post-Secondary Education, Training and Labour (PETL). The Government of New Brunswick (GONB) designed the program, and the GOC contributes two-thirds of the eligible training costs, up to a maximum amount of C\$10,000 per participant, per fiscal year (FY).¹⁹

2. Canada-Alberta Job Grant Program/Alberta Workforce Development Agreement

The Canada-Alberta Job Grant is a federal-provincial partnership administered by the Alberta Ministry of Labour and Immigration. The GOC provides funding to the GOA to increase participation in the labor force by helping workers develop essential skills. The program was originally funded through the Canada-Alberta Job Fund Agreement, an agreement between the GOC and the GOA. The agreement was subsequently replaced in 2018 by the Canada-Alberta Workforce Development Agreement. Employers in Alberta determine the type of training necessary for new and existing employees, and are required to use a third-party training provider to deliver formal training. Under the program, the GOC provides up to \$10,000 for existing employees and up to \$15,000 for unemployed trainees per fiscal year. To be eligible for funding under the program, a business must be operating in the province of Alberta.²⁰

¹⁸ See *Lumber V Final Determination* IDM at 10-11; see also *Lumber V First Review Final Results* IDM at 14; *Lumber V Second Review Final Results* IDM at 13; and *Lumber V Third Review Preliminary Results* PDM at 44-45. A similar subsidy is found relating to Wood Residue Export Restriction in *Uncoated Groundwood Paper Final Determination*, see "Wood Residue Export Restraint," below.

¹⁹ See *Lumber V Final Determination* IDM at 11.

²⁰ See *Lumber V Second Review Final Results* IDM at 13.

3. Accelerated Capital Cost Allowance (ACCA) for Class 29 and Class 53 Assets

Class 29 assets are machinery used in manufacturing and processing operations. Under the ACCA program, Class 29 assets can be fully depreciated at an accelerated rate, over three years, and the amount of depreciation can be claimed as a deduction to reduce the taxpayer's taxable income. Canada's Income Tax Act (ITA) provides for deductions from taxable income for the capital cost of property. Canada's Income Tax Regulations (ITR) further specify that tax deductions for depreciation of Class 29 assets are permissible deductions under the ITA; however, the ITR's definition of manufacturing and processing explicitly excludes certain industries from benefitting from this deduction. The ACCA for Class 53 Assets operates in a manner that is nearly identical to the Class 29 program. However, the Class 53 program involves property covered by Class 29 but acquired after 2015 and before 2026. Commerce is treating the tax savings provided under Class 29 and Class 53 as falling under a single program.²¹

4. Apprenticeship Job Creation Tax Credit (AJCTC)

The AJCTC allows employers to claim a tax credit of 10 percent of wages for qualifying apprentices in the first two years of employment, up to a maximum of C\$2,000 per apprentice per year. A qualifying apprentice is someone working in a prescribed trade in the first two years of their apprenticeship contract. This contract must be registered with the federal government or a provincial or territorial government under an apprenticeship program designed to certify or license individuals in the trade. To qualify for a tax credit under the program, the apprentice must be working in one of the 56 "Red Seal Trades."²²

5. Atlantic Investment Tax Credit (ITC)

This program is administered by the Canada Revenue Agency (CRA) and was implemented in 1977. It provides a credit against federal income tax owed, and its purpose is to encourage investment in the Atlantic Region of Canada. It is available to businesses in the Atlantic Region of Canada, which encompasses the provinces of Newfoundland and Labrador, New Brunswick, Nova Scotia, Prince Edward Island, and Québec's Gaspé Peninsula. Taxpaying companies in the Atlantic Region can earn an ITC equal to 10 percent of the value of investments that the company has made in qualified property located in the Atlantic Region that is to be used in certain sectors. Qualified property includes machinery and equipment used for manufacturing, and for farming, logging, and fishing. The ITC can be earned in the year that the qualifying property is first put into use, regardless of the acquisition date. The ITC is available to be applied against federal taxes payable three years back and 20 years forward.²³

²¹ See *Lumber V Final Determination* IDM at 13-14; see also *Lumber V Expedited Review Final Results* IDM at 7-8; *Lumber V First Review Final Results* IDM at 24; *Lumber V Second Review Final Results* IDM at 20; and *Lumber V Third Review Preliminary Results* PDM at 66-67.

²² See *Lumber V Final Determination* IDM at 14; see also *Lumber V First Review Final Results* IDM at 24.

²³ See *Lumber V Final Determination* IDM at 14; see also *Lumber V Expedited Review Final Results* IDM at 8; *Lumber V First Review Final Results* IDM at 25; *Lumber V Second Review Final Results* IDM at 21; and *Lumber V Third Review Preliminary Results* PDM at 68.

6. Scientific Research and Experimental Development (SR&ED) Tax Credit

The GOC provides a tax credit on companies' eligible research and development expenditures, such as salary and wages, materials, overhead, and contracts. During 2015, the tax credit was available at a standard rate of 15 percent of the cost of these expenditures. An enhanced rate of 35 percent was offered to small Canadian businesses. There is no application to receive this tax credit; rather it is claimed on Form T661 of the taxpayer's federal tax return.²⁴

7. Atlantic Canada Opportunities Agency (ACOA) Loans – Atlantic Innovation Fund (AIF)

The ACOA was established by the GOC to support and promote opportunity for economic development of the Atlantic Region of Canada, pursuant to the Atlantic Canada Opportunities Agency Act. The AIF program is administered by ACOA and was established by the GOC in 2000 with the following objectives: (1) to increase activity in and to build capacity for innovation, research and development (R&D) which leads to technologies, products, processes, or services which contribute to economic growth in Atlantic Canada; (2) to increase the capacity for commercialization of R&D outputs; (3) to strengthen the region's innovation capacity by supporting research, development and commercialization partnerships and alliances among private sector firms, universities, research institutions, and other organizations in the Atlantic System of Innovation, and to increase their critical mass; and (4) to maximize benefits from the national R&D programs. Under the AIF, recipient companies operating in the Atlantic Region of Canada can receive transfer payments that are conditionally repayable, repayable, or non-repayable.²⁵

8. Western Economic Diversification Program (WDP): Grants and Conditionally Repayable Contributions

Introduced in 1987, the Western Economic Diversification Program (WDP) is administered by the GOC's Department of Western Economic Diversification headquartered in Edmonton, Alberta, whose jurisdiction encompasses the four western provinces of Alberta, British Columbia, Manitoba, and Saskatchewan. The program supports commercial and non-commercial projects that promote economic development and diversification in the region.

During the 2003-2004 period covered by the most recently completed administrative review of the *Lumber IV* order, the WDP provided grants to softwood lumber producers or associations with two "sub-programs," *i.e.*, the International Trade Personnel Program (ITPP) and "Other WDP Projects." Under the ITPP and "Other WDP Projects," companies were reimbursed for certain salary expenses in Alberta, British Columbia, Manitoba, and Saskatchewan.²⁶

²⁴ See *Lumber V Final Determination* IDM at 14; see also *Lumber V Expedited Review Final Results* IDM at 9; *Lumber V First Review Final Results* IDM at 26; *Lumber V Second Review Final Results* IDM at 21; and *Lumber V Third Review Preliminary Results* PDM at 68-69.

²⁵ See *Lumber V Final Determination* IDM at 18; see also *Lumber V Third Review Preliminary Results* PDM at 78.

²⁶ See *Lumber IV 2nd Review Final Results* IDM at 16-17.

9. Natural Resources Canada (NRCan) Softwood Marketing Subsidies

In 2002, the GOC approved a total of C\$75 million in grants to target new and existing export markets for wood products and to provide increased research and development to supplement innovation in the forest products sector. This total was allocated to three sub-programs: Canada Wood Export Program (Canada Wood), Value to Wood Program (VWP), and the National Research Institutes Initiative (NRII). The programs were placed under the administration of NRCan, a part of the Canadian Forest Service.

The VWP is a five-year research and technology transfer initiative supporting the value-added wood sector through partnerships with academic and private non-profit entities. During the 2003-2004 period of review of *Lumber IV*, NRCan entered into research contribution agreements with Forintek Canada Corp. (Forintek) to do research on efficient resource use, manufacturing process improvements, product development, and product access improvement. The VWP is still available. See “Subsidies Identified from Canada’s WTO Notification” for additional information.

The NRII is a two-year program that provides salary support to three national research institutes: Forest Engineering Research Institute of Canada (FERIC), Forintek, and Pulp & Paper Research Institute of Canada. In the 2003-2004 administrative review of *Lumber IV*, Commerce found that FERIC’s research covers harvesting, processing, and transportation of forest products, silviculture operations, and small-scale operations and, thus, government-funded R&D by FERIC benefits, *inter alia*, producers of softwood lumber. Similarly, Commerce found that Forintek’s operations are done in collaboration with the GOC under NRII, which pertain to resource utilization, tree and wood quality, and wood physics.²⁷ The NRII is periodically reinstated.²⁸

10. Federal Logging Tax Credit (FLTC)

The FLTC is a non-refundable tax credit administered by the CRA that can be used to offset federal income taxes payable for the year. To claim the FLTC with respect to logging taxes paid during the year, taxpayers must have federal income taxes payable for the year. The FLTC is provided for under subsection 127(1) of Part 1 of the Canada Income Tax Act. Eligibility for the FLTC is limited to taxpayers paying provincial logging tax that has been declared by regulation to be a tax of general application on income from logging operations.²⁹

11. Temporary Initiative for the Strengthening of Québec’s Forest Economies (TISQFE)

The TISQFE was created in 2010, by the Canada Economic Development of Québec Regions (CED) to strengthen and increase economic activity in areas of Québec affected by the forestry

²⁷ The area of wood science is concerned with the physical and mechanical properties of wood and the factors which affect them.

²⁸ See *Lumber IV 2nd Review Final Results* IDM at 17-18.

²⁹ See *Lumber V Expedited Review Final Results* IDM at 8; see also *Lumber V First Review Final Results* IDM at 25; and *Lumber V Second Review Final Results* IDM at 21.

crisis to create and preserve jobs. The CED, a federal government agency, was created in 2005 to promote the long-term economic development of Québec, where slow growth is prevalent. The CED was authorized to implement the TISQFE through the *Economic Development Agency of Canada for the Regions of Québec Act*. The TISQFE provides grants and “repayable contributions,” *i.e.*, interest-free loans, to entities located in communities dependent on the forest industry.³⁰

12. Sustainable Development Technology Canada (SDTC)

The Parliament of Canada established the Canadian Foundation for SDTC in 2001, as a non-profit corporation to fund sustainable development technology demonstration projects in Canada. SDTC is funded by the GOC through the government agency known as Innovation, Science and Economic Development of Canada. Projects eligible for funding must develop or demonstrate new technologies to promote sustainable development, including technologies to address issues related to climate change and the quality of air, water and soil.³¹

13. Capital Cost Allowance (CCA) for Class 1 Assets

Class 1 assets, listed in Schedule II of the ITR, include most buildings acquired after 1987 and the cost of certain additions or alterations made after 1987. Buildings classified under Class 1 are usually depreciated at the CCA rate of four percent. However, if at least 90 percent of the floor space of an eligible non-residential building is used for the manufacturing or processing of goods for sale or lease, a taxpayer may apply for an additional six percent deduction (for a total depreciation rate of 10 percent). Further, if the eligible non-residential building does not qualify for the additional six percent CCA, it may still qualify for an additional two percent deduction (for a total depreciation rate of six percent).³²

14. CCA for Class 43.2 Assets

The Class 43.2 CCA provides an accelerated depreciation for specified clean energy generation and energy conservation property. Class 43.2 assets, listed in Schedule II of the ITR, include certain capital costs of systems that produce energy by using renewable energy sources or waste, or conserve energy by using fuel more efficiently, which were acquired after February 22, 2005, and before 2025. Equipment classified under Class 43.2 are depreciated at the CCA rate of 50 percent per year on a declining balance basis, rather than a 30 percent rate on a declining basis under Class 43.1.³³

³⁰ See *Lumber V Expedited Review Final Results* IDM at 11.

³¹ See *Lumber V First Review Final Results* IDM at 14; see also *Lumber V Third Review Preliminary Results* PDM at 46-47.

³² See *Lumber V First Review Final Results* IDM at 25; see also *Lumber V Second Review Final Results* IDM at 20-21; and *Lumber V Third Review Preliminary Results* PDM at 67-68.

³³ See *Lumber V Second Review Final Results* IDM at 21.

Programs Administered by the Government of Alberta (GOA)

1. Bioenergy Producer Credit Program (BPCP) / Bioenergy Producer Program (BPP)

The BPCP encourages investment in bioenergy production capacity in Alberta to reduce reliance on fossil fuels, support Alberta's Renewable Fuels Standard, and create value-added opportunities with economic benefits. The program provides funding for production of various types of biofuels for electricity and heat, produced from biomass, such as hog fuel. The 2011-2016 BPCP commenced on April 1, 2011, and was terminated on March 31, 2016, and a similar short-term replacement program, BPP, was established on October 25, 2016. The BPP builds upon the previous BPCP and provides transitional support to the bioenergy sector.

Provided the applicant applied during an open call for applications and met the program eligibility criteria, an applicant would be approved under BPCP 2011-2016. The payments under the BPCP were made on a quarterly basis, and if a company initially met the guidelines to receive BPCP payments and continued to meet the guidelines going forward, then the company could continue to expect to receive payments under BPCP until the program ended in 2016.³⁴

2. Alberta Tax-Exempt Fuel Program for Marked Fuel

The Marked Fuel Tax Exemption program, which is part of the GOA's larger Tax-Exempt Fuel Use program, provides a tax exemption of nine cents per liter to eligible companies and municipalities when fuel is used in unlicensed vehicles, machinery, and equipment for qualifying off-road activities. Eligibility for this program is limited in Alberta's *Fuel Tax Regulation* to those entities that have a valid fuel tax exemption certificate. Only consumers that intend to purchase marked fuel for specific purposes or uses set forth in section 8(3) of the *Fuel Tax Regulation* are eligible for a fuel tax exemption certificate to purchase marked fuel.³⁵

3. SR&ED – GOA

The SR&ED tax credit for expenditures on R&D was enacted by the GOA to encourage Alberta companies to conduct more R&D and to make Alberta a more attractive location for knowledge-intensive companies.

The GOA reports that the SR&ED-GOA credit applies to eligible R&D expenditures. The credit is available for all expenditures incurred by corporations in Alberta after December 31, 2008, that are also eligible for the SR&ED-GOC credit, which is a program addressed separately above. The SR&ED-GOA tax credit is calculated according to sections 26.6 through 26.91 of the Alberta Corporate Tax Act, equal to 10 percent of a company's eligible expenditures up to C\$4 million, for a maximum credit of C\$400,000 per tax year. Once corporations show that

³⁴ See *Lumber V Final Determination* IDM at 11; see also *Lumber V First Review Final Results* IDM at 15.

³⁵ See *Lumber V Final Determination* IDM at 14-15; see also *Lumber V First Review Final Results* IDM at 26; and *Lumber V Second Review Final Results* IDM at 22.

their expenditures were incurred in Alberta and are eligible for the federal SR&ED tax credit, such corporations can claim the provincial tax credit.³⁶

4. Alberta Bio Future (ABF)

The ABF is administered by the provincial government corporation, Alberta Innovates. Alberta Innovates was established pursuant to the *Alberta Research and Innovation Act* and the *Alberta Public Agencies Governance Act*. Launched in March 2015, the ABF provides grants in three strategic priority areas: (1) research and innovation, (2) product and technology commercialization, and (3) equipment utilization. The program focuses on projects that enhance value to biomass in agriculture and forestry and create new bio-industrial products and bio-industrial technologies.³⁷

5. Alberta Property Tax – Economic Obsolescence Allowance (EOA)

Property tax abatement benefits are provided in the form of property tax allowances reflecting diminished economic value for certain facilities and relate to the value for property tax purposes only. The depreciation for machinery and equipment in Alberta is governed by the Alberta Machinery & Equipment Minister’s Guidelines. The Guidelines provide that an assessor may adjust for additional depreciation provided acceptable evidence of such loss in value exists for any depreciation not reflected in normal schedules. This additional depreciation is commonly referred to as economic obsolescence. Each individual property tax abatement is determined through discussions with municipal assessors.³⁸

6. Schedule D Depreciation

Under Alberta’s property assessment and taxation system, the value of a property determines the amount of property tax owed, and valuation assessments of industrial property take place annually. Regulations in the Municipal Government Act detail how Schedule D depreciation allows additional depreciation to be factored into the valuation of the industrial property. Such allowances are limited to highly unusual site-specific circumstances such as catastrophic physical failure and are only allowed on a case-by-case basis when evidence is documented and approved by the assessor.³⁹

7. Custom Energy Solutions (CES) Program

The CES program is administered by Energy Efficiency Alberta, a crown corporation established under the 2016 *Energy Efficiency Alberta Act*. The CES program offers financial incentives designed to improve the energy efficiency of industries with high energy needs. Commercial, institutional, and industrial organizations that emit more than 5,000 tons, but less than 100,000

³⁶ See *Lumber V Final Determination* IDM at 15; see also *Lumber V First Review Final Results* IDM at 26; *Lumber V Second Review Final Results* IDM at 22; and *Lumber V Third Review Preliminary Results* PDM at 69-70.

³⁷ See *Lumber V First Review Final Results* IDM at 15.

³⁸ See *Lumber V First Review Final Results* IDM at 27; see also *Lumber V Second Review Final Results* IDM at 23.

³⁹ See *Lumber V First Review Final Results* IDM at 27; see also *Lumber V Second Review Final Results* IDM at 22; and *Lumber V Third Review Preliminary Results* PDM at 70.

tons, of greenhouse gases (GHG) per year are eligible for funding. The CES Implementation Program provides technical support and funds for scoping audits and engineering studies to assess a facility's energy usage in order to determine energy efficiency upgrades. This subprogram also offers financial support and incentives to implement the upgrades. The On-site Energy Manager Program provides funds that cover up to 90 percent of an on-site energy manager's first-year salary. The energy manager's role is to provide expertise to support decision-making for energy efficiency improvements.⁴⁰

8. Load Shedding Services for Imports

Load shedding is a system reliability tool deployed by an Independent System Operator (ISO) as a means to preserve system reliability when demand and supply electricity imbalances create frequency drops that threaten the system. Alberta's ISO is the Alberta Electric System Operator (AESO). To restore balance when generation and load demand are out of alignment, a system can either decrease the load demand or increase generation. However, Alberta's electric system does not have the ability to increase generation quickly enough to respond to a sudden loss of imported power generation. Thus, to decrease the load demand, the AESO trips the loads of electricity market participants that have made their facilities available to immediately disconnect from the electrical system. Market participants submit bids to make their facilities available for load tripping, and the AESO evaluates and selects providers on a competitive basis, from lowest to highest price. Customers that provide load shedding to AESO are compensated for the costs they incur during load tripping. The AESO pays load shedding providers based on the amount of availability offered and for the tripping of electricity pursuant to contracts between the AESO and the providers.⁴¹

9. Carbon Levy Rebate

The GOA imposes two tax regimes related to GHG emissions. The first regime, the Specified Gas Emitters Regulation (SGER), in effect since 2007, requires that companies that emit more than 100,000 tons of GHG per year, or Large Final Emitters (LFE), to either pay a per-ton fee for GHG emissions, purchase and use emissions offsets or performance credits, and/or reduce emissions below a specified level. The second regime, the provincial carbon levy, effective 2017, applies to all fossil fuel purchases. To avoid double taxing companies, the GOA exempted facilities subject to the SGER from the carbon levy. The GOA subsequently amended the SGER to allow certain facilities that were not subject to the SGER to opt in to the SGER and thus claim an exemption for the carbon levy. To be eligible to opt in, a facility must emit less than 100,000 tons of GHG per year and compete directly with an LFE that is subject to the SGER (*i.e.*, sell the same product). During the SGER opt-in approval process, facilities continue to purchase fuel with the carbon levy included. Once approved to opt in to the SGER, facilities are eligible to apply for a rebate of the total carbon levy paid.⁴²

⁴⁰ See *Lumber V Second Review Final Results* IDM at 13; see also *Lumber V Third Review Preliminary Results* PDM at 47-48.

⁴¹ See *Lumber V Second Review Final Results* IDM at 13.

⁴² See *Lumber V Second Review Final Results* IDM at 22.

Programs Administered by the GOBC

1. BC Hydro Power Smart: Energy Manager

BC Hydro, a government-operated electricity company which services a large portion of British Columbia's population, operates the BC Hydro Power Smart program to comply with British Columbia's Clean Energy Act. Power Smart funds are disbursed among programs for each of its three categories of customers: residential, commercial, and industrial. Within the industrial category, there are subprograms under which industrial customers may qualify for a variety of grants as incentives for companies to lower their electricity usage. Under the Energy Manager subprogram, BC Hydro provides funding in the form of wage subsidies to industrial customers to fund an employee dedicated to identifying energy conservation opportunities for a two-year term.⁴³

2. BC Hydro Power Smart: Load Curtailment

BC Hydro operates the BC Hydro Power Smart program to comply with British Columbia's Clean Energy Act. This program includes subprograms under which industrial customers may qualify for a variety of grants as incentives for companies to lower their electricity usage. From November 2015 to March 2016, BC Hydro undertook a pilot program to determine whether large industrial customers could curtail their load during times when the demand on BC Hydro's electricity system was at its peak. Under the Load Curtailment Pilot subprogram, BC Hydro paid customers on a monthly basis based on the number of megawatts (MW) bid into the program at a fixed dollar per MW price.⁴⁴

3. BC Hydro Power Smart: Incentives

BC Hydro operates the BC Hydro Power Smart program to comply with British Columbia's Clean Energy Act. This program includes subprograms under which industrial customers may qualify for a variety of grants as incentives for companies to lower their electricity usage. Under the Incentives subprogram, BC Hydro provides funding to support capital projects that achieve greater energy efficiency or displace the electrical load purchased from BC Hydro.⁴⁵

4. Lower Tax Rates for Coloured Fuel/BC Coloured Fuel Certification

The *Motor Fuel Act* of British Columbia permits the GOBC to charge different tax rates for clear and colored fuel. Colored fuel is taxed at a lower rate than clear fuel; however, certain conditions must be met to purchase colored fuel. In particular, purchasers must complete a Coloured Fuel Certification (FIN-430) certifying that they are eligible to purchase colored fuel and selecting on the form the reasons why, as colored fuel may only be used for certain authorized purposes. The authorized uses for colored fuel are primarily limited to off-highway

⁴³ See *Lumber V Final Determination* IDM at 11-12; see also *Lumber V First Review Final Results* IDM at 16; and *Lumber V Third Review Preliminary Results* PDM at 48.

⁴⁴ See *Lumber V Final Determination* IDM at 12.

⁴⁵ See *Lumber V Final Determination* IDM at 12; see also *Lumber V First Review Final Results* IDM at 16; and *Lumber V Second Review Final Results* IDM at 14.

applications under BC's *Motor Fuel Tax Act*. The form FIN-430 must be provided to any suppliers of colored fuel before making a purchase. Companies may then purchase colored fuel at the reduced motor fuel tax rate.⁴⁶

5. SR&ED—GOBC

The SR&ED tax credit is administered by the CRA on behalf of the GOBC. The program is designed to encourage R&D that will lead to new, improved, or technologically advanced products or processes. Corporations with permanent establishments in British Columbia that conduct qualifying SR&ED activities in British Columbia during a particular tax year may claim a BC tax credit on their qualifying expenditures.⁴⁷

6. Revitalization Property Tax Exemption – Quesnel

The city of Quesnel, in the province of British Columbia, passed a bylaw in September 2005 to establish the Revitalization Tax Exemption program. The bylaw established a revitalization area within the municipality providing tax exemptions for land, improvements, or both land and improvements. To be eligible under the bylaw, the landowner must own property classified as Class 4 “Major Industrial” or certain qualifying Class “Business and other” property or alter an existing Class 4 or Class 6 improvement. The construction or alteration must result in an increase in assessed value of the property of at least C\$16 million.⁴⁸

7. BC Hydro Electricity Purchase Agreements (EPAs)

BC Hydro is a vertically integrated electric utility that owns and operates more than 30 generating facilities, 78,000 kilometers of transmission and distribution lines, and approximately 300 substations to provide electricity service to approximately 1.9 million customers representing about 4 million people. BC Hydro, a provincial Crown corporation, purchases energy from independent power producers (IPPs) pursuant to long-term EPAs. Through its EPAs with IPPs, BC Hydro secures long-term supply with long-term price certainty, avoids market price volatility, and avoids project development risks.⁴⁹

8. Forestry Innovation Investment Program (FIIP)

The FIIP came into effect on April 1, 2002. On March 31, 2003, FIIP was incorporated as Forestry Innovation Investment Ltd. (FII). FII funds are used to support the activities of universities, research and educational organizations, and industry associations producing a wide range of wood products. FII's strategic objectives are implemented through three sub-programs

⁴⁶ See *Lumber V Final Determination* IDM at 15; see also *Lumber V First Review Final Results* IDM at 27; *Lumber V Second Review Final Results* IDM at 24; and *Lumber V Third Review Preliminary Results* PDM at 70-71.

⁴⁷ See *Lumber V Final Determination* IDM at 15; see also *Lumber V First Review Final Results* IDM at 28; and *Lumber V Second Review Final Results* IDM at 24.

⁴⁸ See *Lumber V Final Determination* IDM at 15-16.

⁴⁹ See *Lumber V Final Determination* IDM at 18; see also *Lumber V First Review Final Results* IDM at 33; *Lumber V Second Review Final Results* IDM at 27; and *Lumber V Third Review Preliminary Results* PDM at 79-80.

addressing: research, product development, and international marketing. FII grants support product development and international marketing for Canadian softwood lumber producers.⁵⁰

9. British Columbia Private Forest Property Tax Program

British Columbia's property tax system has two classes of private forest land – Class 3, “unmanaged forest land,” and Class 7, “managed forest land” – that incurred different tax rates from the 1990s through the 2003-2004 period of review. Various municipal and district (*a.k.a.*, regional) level authorities imposed generally lower rates for Class 7 than for Class 3 land. The tax program is codified in several laws, of which the most salient is the 1996 Assessment Act (and subsequent amendments). Section 24(1) of the Assessment Act contains forest land classification language expressly requiring that, *inter alia*, Class 7 land be “used for the production and harvesting of timber.”⁵¹

10. BC Employer Training Grant (ETG) / Canada – BC Job Grant

The BC ETG program is the successor program to the Canada – BC Job Grant program, which provides funding to increase participation in the labor force by helping workers develop necessary skills. In 2018, the GOBC replaced the Canada – BC Job Grant program with the BC ETG via the joint Workforce Development Agreement between the GOC and the GOBC, and the program continues to be administered by the Ministry of Advanced Education, Skills, and Training. The BC ETG successor program operates in effectively the same manner as the Canada – BC Job Grant program.⁵²

In prior reports, the Canada – BC Job Grant program was listed under “Subsidies Identified in *Uncoated Groundwood Paper*.”

11. Carbon Offset Grants

Under the *Climate Change Accountability Act*, the GOBC requires BC public sector organizations to achieve carbon neutrality from 2010 onwards. For qualified projects, the GOBC estimates a monetary value representing the amount of carbon reduction realized by a project and issues Offset Units representing that value to the BC Carbon Registry. Once Offset Units are issued to the BC Carbon Registry, the recipient company can freely transfer Offset Units to other parties or sell them to the GOBC, which purchases Offset Units to meet the carbon neutrality requirement for the provincial public sector.⁵³

12. Provincial Logging Tax Credit (PLTC) – British Columbia

⁵⁰ See *Lumber IV 2nd Review Final Results* IDM at 18.

⁵¹ See *Lumber IV 2nd Review Final Results* IDM at 18-19.

⁵² See *Lumber V First Review Final Results* IDM at 15; see also *Uncoated Groundwood Paper Final Determination* IDM at 12.

⁵³ See *Lumber V First Review Final Results* IDM at 16; see also *Lumber V Second Review Final Results* IDM at 14; and *Lumber V Third Review Preliminary Results* PDM at 48-49.

Taxpayers in Canada generally pay provincial and federal income taxes on their income. However, taxpayers in the forestry industry are also subject to provincial logging taxes based on their logging income, in addition to the provincial and federal income taxes on their total income. A portion of the tax (one third) is rebated through a credit against income tax owed to the GOBC, and the remainder (two thirds) is rebated through a credit against income tax owed to the GOC using the FLTC (*see* GOC section above). The FLTC and the GOBCs PLTC fully reimburse the respective taxpayer's net income tax on net logging income thus reducing the taxpayer's provincial logging tax to zero.⁵⁴

13. Industrial Property Tax Credit (IPTC)/School Tax Credit

The GOBC establishes the tax rates applicable to non-residential taxable property within the province. For properties classified under Class 4 – Major Industry, the tax collecting authority is required to apply the IPTC on the tax collection notice, and the taxpayer then pays the net amount. Industries eligible for property classification under Class 4 – Major Industry include coal mining, petroleum and natural gas, manufacturing of lumber products, chemicals, synthetic resins, cement, insulation, and glass, ship building, and cargo loading/storage. Pursuant to sections 119 and 120 of the *School Act*, the IPTC is set to 60 percent of the provincial school tax payable. This credit is automatically applied to all properties classified as Class 4 – Major Industry.⁵⁵

14. Training Tax Credit

Under the Industry Training Act, a tax credit is provided to employers participating in eligible apprenticeship programs administered through the Industry Training Authority. This BC tax credit functions as a corollary to the Apprenticeship Job Creation Tax Credit administered by the GOC.⁵⁶

15. Payments from BC Hydro to West Fraser Mills Ltd.

West Fraser performed work on certain project activities for BC Hydro related to energy production between 2011 and 2016. BC Hydro reimbursed West Fraser for expenditures related to the activities that West Fraser performed, or subcontracted to perform, for BC Hydro.⁵⁷

16. CleanBC Program for Industry – Industrial Incentive Program

The CleanBC Program for Industry, administered by the Ministry of Environment and Climate Change Strategy's Climate Action Secretariat, is funded via revenue from the provincial carbon tax to promote reductions in GHG emissions. The program is comprised of the subprogram CleanBC Industrial Incentive Program which returns a portion of the provincial carbon tax paid by industrial emitters to the companies that meet emissions-reporting requirements under the

⁵⁴ See *Lumber V First Review Final Results* IDM at 28; see also *Lumber V Second Review Final Results* IDM at 24.

⁵⁵ See *Lumber V First Review Final Results* IDM at 28-29; see also *Lumber V Second Review Final Results* IDM at 23.

⁵⁶ See *Lumber V First Review Final Results* IDM at 29; see also *Lumber V Second Review Final Results* IDM at 24.

⁵⁷ See *Lumber V First Review Final Results* IDM at 17.

Greenhouse Gas Industrial Reporting and Control Act. Large industrial operations with facilities that emit more than 10,000 tons of carbon dioxide per year are eligible. To qualify for a payment, a large industrial facility must have an emissions intensity below the eligibility threshold and meet a performance-based threshold. The eligibility threshold is the maximum emissions intensity each industrial product or activity may reach. The performance-based threshold is an emissions intensity benchmark based on industry standards for the given sector. The program incentivizes cleaner operations by refunding up to 75 percent of the provincial carbon tax paid by such industrial facilities that meet the lower GHG emissions standards.⁵⁸

17. Class Managed Forest Lands Assessment Rates⁵⁹

The BC Assessment Authority (BCAA) classifies property and assesses property taxes throughout British Columbia. The BCAA classifies land and buildings into a number of classes, in which each class has a different taxation rate and is governed by a different section of the *Assessment Act*. The Class 7 Managed Forest Land classification applies to privately owned forest land for which certain forest management commitments (such as, reforestation activities, protection and preservation of water sources, and environmentally sound harvesting methods) have been made to the Managed Forest Council. Eligibility criteria include a minimum forest land size of 25 hectares, and landowners must harvest a certain percentage of the land. Pursuant to the *Taxation (Rural Area) Regulation*, a different tax rate is assigned to each property classification. Land and property under the Class 7 Managed Forest Land is assigned a rate of CAD \$0.46 per CAD \$1,000 of actual land value. The Class 5 Light Industry, defined as property used or held for extracting, manufacturing or transporting products, represents the most applicable alternative land classification for forestland if the province did not designate a separate classification solely for forestland. Class 5 properties have a rate of CAD \$3.10 per CAD \$1,000 of actual land value.⁶⁰

Programs Administered by the Government of Manitoba (GOM)

1. SR&ED – GOM

SR&ED-GOM, also known as the Research and Development Tax Credit is administered by the CRA. The GOM provides a tax credit of 20 percent of all eligible research and development expenditures to corporations with a permanent establishment in Manitoba. The Manitoba *Income Tax Act* defines eligible expenditures and provides the authority for the tax credit. Credits may be carried forward for 20 years and carried back for three years. Additionally, if the credit cannot be applied against taxes payable, 50 percent of the credit is refundable, with the remainder being eligible to be carried forward.⁶¹

⁵⁸ See *Lumber V Second Review Final Results* IDM at 23.

⁵⁹ The program is also known as the Property Tax Program for Private Forest Land.

⁶⁰ See *Lumber V Second Review Final Results* IDM at 23.

⁶¹ See *Lumber V Final Determination* IDM at 16.

2. Manufacturing and Processing Tax Credit

Manitoba's Manufacturing Investment Tax Credit (MITC) provides corporations with a 10 percent tax credit on purchases of qualified property to be used for manufacturing or processing that can be applied against corporate income tax payable in the year earned. Unused credits are eligible to be carried forward for 10 years and carried back three years. Furthermore, since 2013 this credit is 80 percent refundable. The MITC is administered by the CRA on behalf of the GOM. The Manitoba *Income Tax Act* provides for the MITC and defines qualifying property as property that is to be used by the corporation in Manitoba primarily for the manufacturing or processing goods for sale or lease.⁶²

Programs Administered by the GONB

1. New Brunswick Provision of Silviculture Grants

The *Crown Lands and Forest Act* specifies silviculture activities that qualify for reimbursement under a licensee's applicable Forest Management Agreement (FMA), including site preparation, pre-commercial thinning, planting, and plantation cleaning. The GONB reimburses licensees at pre-established rates for the activities.⁶³

2. New Brunswick License Management Fees (LMF)

Companies can receive payments in the form of LMFs from the GONB for non-silviculture activities required as part of their FMA for their license to harvest Crown-origin standing timber. Under the terms of its FMA, a company is obligated to perform certain management activities and reimbursed for the costs associated with these activities. The reimbursements are provided on a flat fee basis per cubic meter of standing timber harvested from the Crown land for which the company is a licensed tenure-holder. These payments are described as reimbursement for the responsibilities that companies undertake as the license holder. These responsibilities are outlined in the FMA, and they include road maintenance and construction costs, as well as the costs of administering all forestry-related activities, including submitting scale information (*i.e.*, reporting the volume harvested) to the GONB and conducting all invoicing of the sub-licensees on behalf of the GONB. The GONB establishes the rate at which it reimburses the company.⁶⁴

3. Financial Assistance to Industry Program (FAIP) – Payroll Rebate Grant

The FAIP provides funding from the GONB for viable capital expenditures, working capital, and workforce expansion to enable the establishment, expansion, or maintenance of companies in eligible industries. Assistance may be provided in the form of a loan guarantee, direct loan, payroll rebate, or non-repayable contribution. The payroll rebate program provides rebates on a percentage of salaries. The FAIP was previously administered by New Brunswick's Department

⁶² See *Lumber V Final Determination* IDM at 16.

⁶³ See *Lumber V Final Determination* IDM at 12; see also *Lumber V First Review Final Results* IDM at 17; *Lumber V Second Review Final Results* IDM at 14; and *Lumber V Third Review Preliminary Results* PDM at 49.

⁶⁴ See *Lumber V Final Determination* IDM at 12; see also *Lumber V First Review Final Results* IDM at 17; *Lumber V Second Review Final Results* IDM at 14; and *Lumber V Third Review Preliminary Results* PDM at 50.

of Economic Development. In April 2015, the former Invest NB and the Department of Economic Development were merged into Opportunities New Brunswick, a Crown corporation, pursuant to the Opportunities New Brunswick Act. Eligible industries include six priority sectors, although other industries may also receive assistance under the program. The priority sectors include value-added food, value-added wood, industrial fabrication, aerospace and defense, information & communications technology, and biosciences.⁶⁵

4. New Brunswick Workforce Expansion Program – One Job Pledge

The GONB reported that this program is administered under the Employment and Continuous Learning Services Branch of the GONB's Department of PETL. The One Job Pledge aspect of the New Brunswick Workforce Expansion Program provides financial assistance to eligible New Brunswick businesses in the form of wage subsidy rebates for new hires that are recent post-secondary graduates. The employer must create a new position for the new hire and must demonstrate that such a position would be sustainable after one year.⁶⁶

5. New Brunswick Workforce Expansion Program – Youth Employment Fund

The Youth Employment Fund was launched in April 2015 pursuant to the Employment Development Act and provides an entry point to long term employment for unemployed individuals between 18-29 years of age, who are then matched with eligible employers for a 26-week work experience. Under the program, which is administered by the Department of PETL, 100 percent of the employee's minimum wage for 30 hours a week will be paid to employers participating in the program.⁶⁷

6. New Brunswick Large Industrial Renewable Energy Purchase Program (LIREPP)

The New Brunswick Department of Energy and Resource Development and New Brunswick Power (NB Power), a Crown corporation, administers the LIREPP pursuant to the Electricity from Renewable Resources Regulation and with authority under the Electricity Act. The program has two main objectives: to (1) reach NB Power's mandate to supply 40 percent of its electricity from renewable sources by 2020 by buying energy from large industrial customers; and (2) bring large industrial enterprises' net electricity costs in line with the average cost of electricity in other provinces.

The LIREPP program is available to any large industrial company that produces renewable energy and owns and operates a facility that has an electrical energy requirement of not less than 50 Gigawatt hours (GWh) per year, that obtains all or a portion of its electricity on a firm basis (vs. interruptible basis) from NB Power, and that exports at least 50 percent of its primary products to another province or territory within Canada or outside the country.⁶⁸

⁶⁵ See *Lumber V Final Determination* IDM at 13.

⁶⁶ See *Lumber V Final Determination* IDM at 13; see also *Lumber V First Review Final Results* IDM at 18.

⁶⁷ See *Lumber V Final Determination* IDM at 13.

⁶⁸ See *Lumber V Final Determination* IDM at 16; see also *Lumber V First Review Final Results* IDM at 29; *Lumber V Second Review Final Results* IDM at 14-15; and *Lumber V Third Review Preliminary Results* PDM at 50.

7. New Brunswick R&D Tax Credit

This program provides a credit against GONB provincial taxes equal to 15 percent of eligible expenditures to carry out experimental development, applied research and basic research work, to any corporate or individual business taxpayers in New Brunswick. The objective of the program is designed to mirror the operation of the federal Scientific Research and Experimental Development Tax Incentive Program, and both programs are administered by the CRA. The provision of the credit is authorized under section 59 of the New Brunswick Income Tax Act. The credit is fully refundable; therefore, if the corporation did not owe provincial taxes, it can receive the credit in the form of a refund. Furthermore, because the credit is fully refundable, the eligible company receives the credit regardless of whether it has a tax obligation to which it can apply the credit (*i.e.*, regardless whether the company owes the GONB provincial tax).⁶⁹

8. GONB Gasoline & Fuel Tax Exemptions and Refund Program

Administered by the Revenue Administration Division of New Brunswick's Department of Finance pursuant to the Gasoline and Motive Fuel Tax Act, this program provides users with the option of receiving point-of-sale tax exemptions or applying for refunds of taxes paid for gasoline and motive fuel for consumers operating vehicles and equipment on non-public highways. Use of the program is limited to certain categories of consumers, including aquaculturists, farmers, silviculturists, producers of electricity for sale, persons consuming fuel in the preparation of food, lighting and heating of premises or heating of domestic hot water, wood producers, forest workers, manufacturers, mining or quarrying operators, and registered vessels operators.⁷⁰

9. Innov8

Launched in 2013, the Innov8 program (formerly known as the Technical Adoption and Commercialization Program) allows companies and the GONB to share costs associated with developing intellectual property, specialized software, hardware, equipment, or performing research and development or prototyping. Funding is available only to those projects that fall under Priority Growth sectors, which include the value-added wood sector.⁷¹

10. New Brunswick Property Tax Incentives for Private Forest Producers

Property owners in New Brunswick pay property taxes based on the GONB's assessed value of the property in accordance with the New Brunswick Assessment Act. Specifically, section 15 of the New Brunswick Assessment Act stipulates that, in general, all real property shall be assessed at its real and true value as of January 1st of the year for which the assessment is made.

⁶⁹ See *Lumber V Final Determination* IDM at 16-17; see also *Lumber V First Review Final Results* IDM at 29; and *Lumber V Second Review Final Results* IDM at 25; and *Lumber V Third Review Preliminary Results* PDM at 72.

⁷⁰ See *Lumber V Final Determination* IDM at 17; see also *Lumber V First Review Final Results* IDM at 30; *Lumber V Second Review Final Results* IDM at 25; and *Lumber V Third Review Preliminary Results* PDM at 71.

⁷¹ See *Lumber V Expedited Review Final Results* IDM at 6.

However, section 17(2) of the New Brunswick Assessment Act also states that all land holdings classified as freehold timberland are to be assessed at a rate of C\$100 per hectare.⁷²

11. Subsidies Provided by Opportunities New Brunswick

This program was created to continue the economic development initiatives pursued by the Miramichi Regional Economic Development Innovation Fund. The funding for the latter expired in 2015 and new funding was approved under Opportunities New Brunswick until 2021. This program is focused on continuing to support economic opportunities in the Miramichi region by allocating funding to support new initiatives that can help diversify the local economy and create new jobs. The focus areas for funding are: Growth and Development Capital; Adoption of Information and Communication Technology; Research and Development; Improving Strategic Infrastructure; and Advanced Workforce Development. Under the program, an enterprise may receive up to C\$500,000 in funding towards the project.⁷³

12. New Brunswick Department of Trade and Infrastructure (DTI) Settlement

In 2017, DTI announced plans to close a road used to transport lumber by J.D. Irving, Limited (JDIL). JDIL had assisted with constructing and repairing the road under a 2008 agreement with DTI. When DTI announced the road closure, the GONB provided a reimbursement to JDIL as compensation for the costs JDIL incurred building the road.⁷⁴

Program Administered by the Government of Nova Scotia (GONS)

1. Nova Scotia Provision of Silviculture Grants

Under its silviculture program, the GONS provides funding for specific silviculture work to Registered Buyers (*i.e.*, entities that acquire more than 5,000 cubic meters of wood per year from private forestlands in Nova Scotia) which enter into a Forest Sustainability Agreement with the GONS' Department of Lands and Forestry (DLF). Under the agreement, the Registered Buyer submits invoices and claim forms to the DLF to document the silviculture work that was performed, and the DLF reimburses the company for eligible expenses.⁷⁵

⁷² See *Lumber V Expedited Review Final Results* IDM at 9; see also *Lumber V First Review Final Results* IDM at 30; *Lumber V Second Review Final Results* IDM at 25; and *Lumber V Third Review Preliminary Results* PDM at 72-73.

⁷³ See *Lumber V First Review Final Results* IDM at 18.

⁷⁴ See *Lumber V Second Review Final Results* IDM at 15.

⁷⁵ See *Lumber V First Review Final Results* IDM at 18; see also *Lumber V Second Review Final Results* IDM at 15.

Programs Administered by the Government of Ontario (GOO)

1. SR&ED – GOO

Under Ontario's SR&ED program, a qualifying corporation (*i.e.*, one with a permanent establishment in the province) can claim a non-refundable tax credit on eligible scientific research and experimental development expenditures (*e.g.*, salary and wages, materials, overhead, and contracts) performed in Ontario to reduce the corporation's income tax payable. The SR&ED tax credit is administered by the CRA, a federal agency, on behalf of the GOO.⁷⁶

2. Ontario Tax Credit for Manufacturing and Processing (OTCMP)

Provided under the *Ontario Taxation Act 2007*, the OTCMP supports activity in manufacturing and processing, farming, fishing, logging, and mining, as well as the generation of electrical energy for sale, or the production of steam for sale. During 2017 and 2018, OTCMP tax credit rate was 1.5 percent and the corporate tax rate was 11.5 percent. The OTCMP effectively reduced the Ontario corporate income tax rate on a corporation's income to 10 percent.⁷⁷

3. TargetGHG Industrial Demonstration Program

Designed in 2016, under Ontario's climate change action plan, TargetGHG helped the province meet its 2020 GHG reduction targets. TargetGHG was established through an agreement between the GOO and the Ontario Centres of Excellence (OCE), an independent, not-for-profit organization. The GOO provided funding to the OCE for the administration of the program. TargetGHG encouraged Ontario-based large industrial emitters, working with technology solution providers, to adopt and implement technologies to reduce their emissions and demonstrate the potential of those solutions for the broader marketplace. To each project, a maximum of C\$5 million could be granted and the funding recipient was the industrial emitter.⁷⁸

4. GOO Debt Forgiveness for Resolute FP Canada (Resolute) – Fort Frances Mill

In 2007, under the Ontario Forest Sector Prosperity Fund, Resolute's pre-bankruptcy predecessor, Abitibi Bowater Inc., and its wholly owned affiliate, Bowater Canadian Forest Products Inc. (together, Abitibi-Bowater), were approved for a C\$22.5 million grant under a Conditional Funding Agreement (CFA) for the construction of a biomass co-generation plant at the Fort Francis pulp and paper mill. The funding was conditional on the continuous operation of the mill for at least three years after the final grant disbursement, which was in March 2012. In May 2014, Resolute permanently closed the mill. Pursuant to the terms of the CFA, in October 2014, the Ministry of Natural Resources and Forestry of Ontario directed Resolute to repay the full amount of the grant. On June 29, 2017, through a Settlement and Release

⁷⁶ See *Lumber V First Review Final Results IDM* at 30.

⁷⁷ See *Lumber V First Review Final Results IDM* at 31; see also *New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures*, G/SCM/N/343/CAN (July 10, 2019) (*Canada N343*) at 62-63.

⁷⁸ See *Lumber V First Review Final Results IDM* at 19; see also *Lumber V Second Review Final Results IDM* at 16; and *Lumber V Third Review Preliminary Results PDM* at 53-54.

Agreement between Resolute and the GOO, Resolute was not required to repay the C\$22.5 million debt it owed to the Ontario government. There was a forgiveness of money owed when Resolute broke the terms of the CFA with the GOO.⁷⁹

5. Independent Electricity System Operator (IESO) Demand Response

IESO is a government-designated independent system operator that operates Ontario's electricity grid, administers the region's wholesale electricity markets, and provides reliability planning for the region's bulk electricity system. IESO, an agency of the Ontario Ministry of Energy, was created and its activities are governed by the Electricity Act of 1998. IESO administers the Demand Response (DR) program, whereby firms alter their electricity consumption patterns in exchange for availability payments. The purpose of the procurement of DR capacity is to ensure the reliability planning for the region's bulk electricity system by reducing the overall regional demand for electricity in response to IESO's reliability mandate.⁸⁰

6. GOO's Provision of IESO Industrial Electricity Incentives

IESO provides rebates to companies for meeting various contractual obligations to conserve energy, including energy operating, management, and metering plans. Recipients are limited to large industrial customers, including those classified under North America Industry Classification System code 321110 Sawmills and Wood Preservation.⁸¹

7. GOO Purchase of Electricity for MTAR under Combined Heat and Power III Purchase Power Agreements

Electricity providers that can produce renewable energy, such as biomass producers, sell biomass-cogenerated electricity to the Ontario power grid operated by IESO, for more than adequate remuneration.⁸²

8. IESO Retrofit

Implemented in 2015, the Retrofit is an electricity conservation program through which the IESO reimburses a portion of the cost of electrical efficiency upgrades that will reduce electricity consumption at commercial spaces, industrial facilities, institutional buildings, multi-family residential buildings, and agricultural facilities. Projects eligible for financial assistance under

⁷⁹ See *Lumber V First Review Final Results* IDM at 34; see also *Lumber V Second Review Final Results* IDM at 27; and *Lumber V Third Review Preliminary Results* PDM at 82-83.

⁸⁰ See *Lumber V First Review Final Results* IDM at 18; see also *Lumber V Second Review Final Results* IDM at 15; *Lumber V Third Review Preliminary Results* PDM at 51-52; and *Uncoated Groundwood Paper Final Determination* IDM at 14.

⁸¹ See *Lumber V First Review Final Results* IDM at 18-19; see also *Lumber V Second Review Final Results* IDM at 15-16; *Lumber V Third Review Preliminary Results* PDM at 52; and *Uncoated Groundwood Paper Final Determination* IDM at 14.

⁸² See *Lumber V First Review Final Results* IDM at 33; see also *Lumber V Second Review Final Results* IDM at 21; *Lumber V Third Review Preliminary Results* PDM at 80-81; and *Uncoated Groundwood Paper Final Determination* IDM at 18 (program name "GOO Purchase of Electricity for MTAR).

the Retrofit are those that provide sustainable and measurable reductions in peak electricity demand and consumption.⁸³

9. Ontario Forest Roads Funding Program (OFRFP)

As part of forest management operations, companies have agreements with the GOO to maintain certain eligible roads identified in the Forest Management Plan (FMP) on behalf of the Crown under the OFRFP. Specifically, harvesters of Crown timber incur obligatory road costs in order to meet a wide variety of provincial road construction and maintenance obligations. As part of the agreement, grant payments are made under the OFRFP as partial reimbursement for constructing and maintaining certain eligible roads. Recipients of the grants are limited to companies which have approved FMPs.⁸⁴

Programs Administered by the Government of Québec (GOQ)

1. Financial Aid for the Development of Private Woodlots⁸⁵

The program provides grants and technical assistance to certified forest producers to carry out logging activities in privately owned forests, with a view to protecting and enhancing registered forest land. Canada reported in recent WTO notifications that this program was created in the early 1970s under the authority of the *Ministère des Forêts, de la Faune et des Parcs*, and that it remains an ongoing program.⁸⁶ The maximum amount of financial assistance and the type of eligible work can change, depending on the cooperating regional agencies. Canada reported that the assistance is generally limited to 80 percent of the costs of eligible initiatives, but certain targeted work gets 100 percent funding, *i.e.*, first and second plantations, first commercial thinning of a plantation and first thinning of a natural stand. No aggregate value of assistance and identity of beneficiaries are provided in the notifications.⁸⁷

⁸³ See *Lumber V Second Review Final Results* IDM at 16.

⁸⁴ See *Lumber V First Review Final Results* IDM at 19; see also *Lumber V Second Review Final Results* IDM at 16; *Lumber V Third Review Preliminary Results* PDM at 52-53; and *Uncoated Groundwood Paper Final Determination* IDM at 14.

⁸⁵ While this program was included in the *Lumber V Final Determination*, it was found not to provide a benefit to the companies investigated. This program has also been notified to the WTO by Canada, most recently in *New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures*, G/SCM/N/372/CAN (July 8, 2021) (*Canada N372*) at 120-121; see also *New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures*, G/SCM/N/315/CAN (July 12, 2017) (*Canada N315*) at 47.

⁸⁶ See *Canada N315* at 47.

⁸⁷ See *New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures*, G/SCM/N/253/CAN (July 19, 2013) (*Canada N253*) at 48; see also *New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures*, G/SCM/N/284/CAN (July 9, 2015) (*Canada N284*) at 50; *Canada N315* at 47; and *Canada N343* at 68-69.

2. Purchase of Electricity for More Than Adequate Remuneration (MTAR) under Purchase Power Program (PAE) 2011-01

Hydro-Québec is engaged in the generation of power from hydroelectric sources and the transmission, distribution, and sale of such power to wholesale and retail customers in Québec. Hydro-Québec has two separate, independent divisions: Hydro-Québec Production, which generates electricity to supply to the market and buys and sells electricity for its own account; and Hydro-Québec Distribution, which is responsible for the supply of electricity to customers in Québec. Under the PAE 2011-01, Hydro-Québec Distribution purchases electricity generated from biomass at a set contractual price.⁸⁸

3. Property Tax Refund for Forest Producers on Private Woodlands in Québec

Implemented in 1985 and administered by Revenu Québec, this property tax refund supports landowners investing in forest management on private lands. Private forest producers who are certified under the Sustainable Forest Development Act (SFDA) and hold a certificate issued from the Ministry of Forests, Wildlife and Parks (MFFP) can apply for a refund equal to 85 percent of the amount of property taxes paid in respect to each unit of assessment. Private forest producers are eligible for the property tax refund to the extent that the development expenses incurred for investment in forest management are greater than or equal to the amount of property taxes paid.⁸⁹

4. Credits for the Construction and Major Repair of Public Access Roads and Bridges in Forest Areas

Revenu Québec permits corporations that incurred expenses for the construction or major repair of eligible access roads or bridges in public forest areas to claim a refundable tax credit for a portion of the expenses on their income tax returns.⁹⁰

5. SR&ED – GOQ

Established in 1983, the SR&ED tax credit is designed to stimulate R&D by providing tax credits for salaries and wages for R&D work. If a taxpayer carries on a business in Canada and carries out R&D, or has R&D carried out on its behalf, in Québec, the taxpayer can claim a tax credit for the salaries and wages, or for the consideration paid in Québec. The rate for these tax credits is 30 percent for small and medium businesses (SMBs) and 14 percent for large corporations. SMBs and large corporations can claim R&D tax credits for eligible expenditures over C\$50,000 and C\$225,000, respectively.⁹¹

⁸⁸ See *Lumber V Final Determination* IDM at 18; see also *Lumber V First Review Final Results* IDM at 33; *Lumber V Second Review Final Results* IDM at 27; and *Lumber V Third Review Preliminary Results* PDM at 81-82.

⁸⁹ See *Lumber V Expedited Review Final Results* IDM at 9; see also *Lumber V First Review Final Results* IDM at 31. This program has also been notified to the WTO by Canada, most recently in *Canada N372* at 122-123.

⁹⁰ See *Lumber V Final Determination* IDM at 17; see also *Lumber V First Review Final Results* IDM at 31; and *Lumber V Second Review Final Results* IDM at 26.

⁹¹ See *Lumber V Final Determination* IDM at 17; see also *Lumber V First Review Final Results* IDM at 32; *Lumber V Second Review Final Results* IDM at 25; and *Lumber V Third Review Preliminary Results* PDM at 73.

6. Partial Cut Investment Program (PCIP)

Introduced in 2013, the PCIP reimburses harvesters for up to 90 percent of the increased costs associated with the MFFP mandate that certain areas be harvested applying a partial cut (*i.e.*, removing less than 50 percent of the volume of a stand). As indicated in the framework, the PCIP is intended for the forestry sector. Eligibility for the program is limited to Timber Supply Guarantee (TSG) holders; buyers on the open market; local forest delegates; forestry companies; and holders of forestry permits stipulated in section 73 of the SFDA.⁹²

7. MFFP Educational Grant: Forest Industry Support

On October 18, 2006, the GOQ approved the Forest Industry Support Program by Order 946-2006. This program, administered by the MFFP, assists forest industry promoters and companies in setting up projects by supporting market surveys, feasibility studies, mill diagnoses, and business plans. Entities eligible for assistance are cooperatives associated with a wood processing enterprise, Québec promoters and enterprises or a combination of such enterprises from the primary and secondary/tertiary wood processing industry, the primary and secondary/tertiary pulp and paper processing industry, and the uses of forest biomass in the setup of a project.⁹³

8. Immigrant Investor Program

On June 8, 2000, the GOQ approved the Immigrant Investor Program by Order 701-2000. The program is aimed at the economic development of Québec by providing financial assistance to Québec businesses by using income generated through investments made by immigrant investors. The program is administered by IQ Immigrants Investisseurs Inc., a subsidiary of a government corporation, Investissement Québec (IQ).⁹⁴

9. Tax Credit for an On-the-Job Training Period

In 1994, the GOQ established a tax credit for on-the-job training to encourage businesses to hire trainees to improve their professional skills. A corporation that hires a student or an apprentice, enrolled in a qualified training program, can claim a tax credit at a rate of 24 percent for: (1) the salary or wages paid to the student or apprentice; and/or (2) the salary or wages paid to an employee for the hours devoted to supervision of the students and apprentices. This tax credit can be refundable or non-refundable.⁹⁵

⁹² See *Lumber V Final Determination* IDM at 13; see also *Lumber V First Review Final Results* IDM at 19; *Lumber V Second Review Final Results* IDM at 16; *Lumber V Third Review Preliminary Results* PDM at 54; and *Canada N315* at 50.

⁹³ See *Lumber V Expedited Review Final Results* IDM at 7.

⁹⁴ See *Lumber V Expedited Review Final Results* IDM at 7.

⁹⁵ See *Lumber V Expedited Review Final Results* IDM at 10; see also *Lumber V Third Review Preliminary Results* PDM at 74-75.

10. City of Sainte-Marie Municipal Financial Assistance

Pursuant to paragraph 92.1 of the Municipal Power Act, the City of Sainte-Marie, Québec provides financial support to occupants that meet two criteria: (1) be the owner of an immovable property other than a residence; and (2) operate a private sector business. The assistance is a tax refund in the amount of municipal taxes paid to the City of Sainte-Marie. Specifically, the tax refund is equal to the “Welcome Tax” (*i.e.* the tax charged to a new occupant upon acquisition of property) owed to the City of Sainte-Marie.⁹⁶

11. PLTC – Québec

Taxpayers in Canada generally pay provincial and federal income taxes on their income. However, taxpayers in the forestry industry are also subject to provincial logging taxes based on their logging income, in addition to the provincial and federal income taxes on their total income. Revenu Québec separately maintains a logging tax equal to 10 percent of the taxpayer’s net income tax on net logging income if their net income for that year is more than C\$10,000. A portion of the tax (one third) is rebated through a credit against income tax owed to the GOQ, and the remainder (two thirds) is rebated through a credit against income tax owed to the GOC using the FLTC (*see* GOC section above). The FLTC and Québec’s PLTC fully reimburse the respective taxpayer’s net income tax on net logging income thus reducing the taxpayer’s provincial logging tax to zero.⁹⁷

12. MPPD – Q

The MPPD-Q program, implemented June 4, 2014, provides a reduction of the general tax rate for manufacturing corporations to improve the competitiveness of small and medium-sized enterprises (SME) in Québec. An SME whose manufacturing and processing activities account for more than 25 percent of its total activities may claim up to a four percent tax reduction under the MPPD-Q program. However, for the initial tax year that this program was in place (tax year 2014), the maximum reduction was two percent.⁹⁸

13. Additional Deduction for Transportation Costs of Remote Manufacturing SMEs

Introduced by the GOQ in 2014, this program takes into consideration the higher transportation costs associated with the remoteness of certain zones from Québec’s large urban centers and allows certain remote manufacturing SME’s to claim a tax deduction. The rate of the additional deduction a company can claim for a taxation year is one percent for “central zones,” three percent for “intermediate zones,” five percent for “remote zones” and seven percent for “special remote zones.” The rates are applicable on the company’s gross income and are subject to caps which vary based on regions.⁹⁹

⁹⁶ See *Lumber V Expedited Review Final Results* IDM at 10.

⁹⁷ See *Lumber V Expedited Review Final Results* IDM at 10-11.

⁹⁸ See *Lumber V Expedited Review Final Results* IDM at 11.

⁹⁹ See *Lumber V Expedited Review Final Results* IDM at 11.

14. Economic Diversification Fund for the Centre-du-Québec and Mauricie Regions

The GOQ established this Economic Diversification Fund (the Fund) via Decree 379-2013 of April 10, 2013, to promote the start-up and development of innovative enterprises and forward-looking industries in the center of Québec and Mauricie regions. Under the Fund, which had a C\$200 million budget for the 5-year period April 2013 – March 2018, financial assistance in the form of loans, loan guarantees, equity investments, and grants was provided. The Fund is administered by the Ministry of Economy, Science, and Innovation (MESI), a provincial government ministry, and IQ, a government corporation. MESI, which conducts an eligibility assessment of applicants, evaluates non-investment projects (*e.g.*, product or business development) and grant requests; IQ is responsible for evaluating projects when financial intervention is directed toward an investment project and makes disbursements under the Fund.¹⁰⁰

15. Working Capital and Investment Fund Program (RENFORT)

The RENFORT program was approved by the Council of Ministers (Order in Council 1139-2008) on December 10, 2008. RENFORT was established to authorize IQ to provide financial support in the form of loans or loan guarantees to companies that encountered difficulty obtaining financing in the wake of the financial crisis in late 2008. The program had an initial budget of C\$1 billion.¹⁰¹

16. Project Financing (UNIQ)

On January 11, 2011, IQ established the UNIQ, a project financing program, to support the economic development of Québec by providing financial intervention to commercial enterprises in the form of loan guarantees, guarantee of a financial commitment, long-term loan and equity loan, non-convertible debenture and subordinated debt.¹⁰²

17. Investment Program in Public Forests Affected by Natural or Anthropogenic Disturbances

The Investment Program in Public Forests Affected by Natural or Anthropogenic Disturbances, implemented in October 2014, allows for the performance of special interventions by Québec's MFFP when a natural or anthropogenic disturbance causes significant destruction of the forest, such as fire, wind-throw, or insect epidemics (*i.e.*, budworm), which increase the unit cost of harvesting because of the reduced per-hectare salvageable volume. Under the program, harvesters are compensated for the additional costs associated with performing salvage operations to preserve the health of the forest.¹⁰³

¹⁰⁰ See *Lumber V Expedited Review Final Results* IDM at 12.

¹⁰¹ See *Lumber V Expedited Review Final Results* IDM at 12.

¹⁰² See *Lumber V Expedited Review Final Results* IDM at 12.

¹⁰³ See *Lumber V First Review Final Results* IDM at 21; see also *Lumber V Second Review Final Results* IDM at 18; and *Lumber V Third Review Preliminary Results* PDM at 60.

In prior reports, the incentive for harvesting areas infested by spruce budworm was included under “Subsidies Identified in *Uncoated Groundwood Paper*” with the program title “Investment Program in Public Forests Affected by Natural or Anthropogenic Disturbance – Incentives for Harvesting Areas Infested by Spruce Budworm.”¹⁰⁴

18. Electricity Discount Program Applicable to Consumers Billed at Rate L

Under the March 2016 Québec Economic Plan, the GOQ implemented an electricity rate discount to encourage large industrial power consumers (*i.e.*, Rate L customers) to undertake eligible investments to reduce electricity demand through improved efficiency and productivity, to make use of production assets otherwise in disuse, and reduce GHG. Rate L applies to an annual contract with Hydro-Québec where the minimum billing demand is 5,000 kilowatts or more. Companies billed at Rate L that carry out eligible investment projects can receive assistance in the form of reduced electricity costs in their establishments. The reduced electricity costs allow for the reimbursement of up to 50 percent of the eligible costs of an investment.¹⁰⁵

19. Hydro-Québec’s New Demand-Side Management Program

The Gestion de la demande de puissance, as known as the GDP, is a demand response program. Under the GDP, commercial, institutional, and small and medium-sized companies are encouraged to reduced power demand during the winter peak demand periods. In exchange for curtailing power demand during the winter, Hydro-Québec provides to those electricity consumers grants in proportion to their power reduction.¹⁰⁶

20. Program Innovation Bois (PIB)

The March 2016 Québec Economic Plan announced budget allocations of \$22.5 million, over a five-year period, for the implementation of the PIB (also known as, the Wood Innovation Program) which is administered by MFFP. The program is open to companies registered in Québec that use or intend to use wood or wood biomass to develop or produce a new innovative product, develop or install a new transformation process, or build a pilot or demonstration plant to demonstrate a new technology’s feasibility.¹⁰⁷

21. Multi-Resource Road Cost Reimbursement Program (MCRP)

The MCRP, implemented on April 1, 2016, and administered by MFFP, provides reimbursements of up to 90 percent of the costs of construction, improvement, and repairs of multi-use public access roads in forest areas. Eligibility for the program is limited to supply

¹⁰⁴ See *Uncoated Groundwood Paper Final Determination* IDM at 15.

¹⁰⁵ See *Lumber V First Review Final Results* IDM at 22; see also *Lumber V Second Review Final Results* IDM at 19; and *Lumber V Third Review Preliminary Results* PDM at 62.

¹⁰⁶ See *Lumber V First Review Final Results* IDM at 23; see also *Uncoated Groundwood Paper Final Determination* IDM at 14.

¹⁰⁷ See *Lumber V First Review Final Results* IDM at 23; see also *Lumber V Second Review Final Results* IDM at 17; and *Lumber V Third Review Preliminary Results* PDM at 62-63.

guarantee holders, buyers of timber on the open market, holders of a forestry permit stipulated in section 73 of the SFDA, Rexforet, and holders of an over-the-counter contract for timber.¹⁰⁸

22. Refund of Fuel Tax Paid on Fuel Used for Certain Purposes and Stationary Purposes

Revenu Québec provides refunds of fuel taxes paid under two elements. The first element, Certain Purposes, allows businesses to receive a refund of the taxes paid on fuel used to operate motor vehicles used for farming, forest, or mining operations on private land or roads. The second element, Stationary Purposes, provides a tax refund for fuel required to operate the stationary equipment of a vehicle (*i.e.*, power shovels, cranes, drilling machines) used for commercial or public purposes.¹⁰⁹

23. Rexforêt Silviculture Works: Road Construction/Maintenance

Rexforêt, a Crown corporation, enters into reimbursement contracts with timber companies for the construction and maintenance of roadwork in Québec's public forest to allow Rexforêt staff access to forest tracts where perform silvicultural work is performed.¹¹⁰

24. Hydro-Québec Interruptible Electricity Option (IEO)

Hydro-Québec is a state-owned utility, whose sole shareholder is the GOQ. Hydro-Québec is mandated to supply power and to pursue energy conversion and conservation; as part of this mandate, it operates the Hydro-Québec IEO, which is designed to help Hydro-Québec meet increased power requirements during the winter period (*i.e.*, December 1 to March 31). All participants in this program must be able to curtail power on demand, or risk penalties assessed by Hydro-Québec. According to the GOQ, power curtailment allows Hydro-Québec to “free { } the connections with nearby networks, reducing the need for short-term markets and making it possible to act within two hours to ensure reliable management of the power capacity balance.” As payment for complying with Hydro-Québec interruption notices, the participants receive certain fixed and variable credits for the winter period.¹¹¹

25. Paix des Braves

In 2002, the GOQ and the Cree Nation of Québec established an agreement (*i.e.*, the Agreement Respecting a New Relationship Between the Cree Nation and the GOQ (the Agreement)) requiring forestry companies to conduct certain additional harvesting activities on “Paix des Braves” territories covered by the Agreement. Specifically, when harvesting on the territories covered by this agreement, forestry companies are required to perform the following additional

¹⁰⁸ See *Lumber V First Review Final Results* IDM at 23; see also *Lumber V Second Review Final Results* IDM at 18; and *Lumber V Third Review Preliminary Results* PDM at 63-64.

¹⁰⁹ See *Lumber V First Review Final Results* IDM at 32; see also *Lumber V Second Review Final Results* IDM at 26; and *Lumber V Third Review Preliminary Results* PDM at 76.

¹¹⁰ See *Lumber V First Review Final Results* IDM at 23-24.

¹¹¹ See *Lumber V First Review Final Results* IDM at 22; see also *Lumber V Second Review Final Results* IDM at 19; *Lumber V Third Review Preliminary Results* PDM at 61-62; and *Uncoated Groundwood Paper Final Determination* IDM at 15.

activities: (1) build additional roads; (2) cut in a patchwork of smaller blocks (*i.e.*, mosaic cutting); and (3) perform certain other activities as defined by Chapter 3 of the SFDA. In order for forestry companies to maintain their activities on these lands in spite of the increased costs, the GOQ initiated a program in 2015 which provides partial compensation to offset these costs (*i.e.*, costs not already covered by Section 120 of the SFDA) incurred when complying with the Agreement.¹¹²

26. Emploi-Québec Grants

Emploi-Québec is a department within the GOQ's Ministry of Work, Employment and Social Solidarity and is responsible for administering worker training grants under the Workforce Skills Development and Recognition Fund (FDRCMO) and the Manpower Training Measure (MFOR). FDRCMO funds projects related to skills development, primarily through French language courses. MFOR supports skill development for workers at risk of losing their jobs and to support low-skilled workers who want to improve basic training.¹¹³

27. Hydro-Québec's Industrial Systems Program/Energy Efficiency Program

Hydro-Québec is a utility wholly owned by the GOQ and is the sole entity responsible for the administration of the Industrial Systems Program. All of Hydro-Québec's electric energy efficiency programs for industrial businesses are known, collectively, as the Industrial Systems Program. Any individual or corporation that owns, operates, or occupies an industrial building in Québec associated with a goods-producing industry is eligible for the program. The two main components of this Industrial Systems Program are: (1) Retrofit; and (2) the New Plant, Expansion, or Addition of Production Lines. The purpose of the Industrial Systems Program is to reduce the average amount of electricity used per unit of production by the participants.¹¹⁴

28. EcoPerformance – MERN (TEQ)/Energy Efficiency Conversion Projects

The ÉcoPerformance program is administered by the GOQ's Ministry of Energy and Natural Resources (MERN). The ÉcoPerformance program was launched in October 2013, to provide financial assistance to businesses, institutions, and municipalities to reduce GHG emissions through the implementation of measures or projects. The applicants must satisfy the following criteria: (1) located in Québec; (2) consume fossil fuel; (3) invest more than 25 percent of project cost in the project; (4) reduce GHG; (5) meet energy rate of return requirements; and (6) respect ISO14064 for quantification of GHG reductions.¹¹⁵

¹¹² See *Lumber V First Review Final Results* IDM at 20; see also *Lumber V Second Review Final Results* IDM at 17; *Lumber V Third Review Preliminary Results* PDM at 56; and *Uncoated Groundwood Paper Final Determination* IDM at 16.

¹¹³ See *Lumber V First Review Final Results* IDM at 20; see also *Lumber V Second Review Final Results* IDM at 17; *Lumber V Third Review Preliminary Results* PDM at 56-58; and *Uncoated Groundwood Paper Final Determination* IDM at 16.

¹¹⁴ See *Lumber V First Review Final Results* IDM at 22; see also *Lumber V Second Review Final Results* IDM at 19; and *Uncoated Groundwood Paper Final Determination* IDM at 16.

¹¹⁵ See *Lumber V First Review Final Results* IDM at 21; see also *Lumber V Third Review Preliminary Results* PDM at 59; and *Uncoated Groundwood Paper Final Determination* IDM at 16.

29. Hydro-Québec Special L Rate for Industrial Customers Affected by Spruce Budworm

A highly destructive outbreak of the spruce budworm defoliated spruce-fir stands covering over 7 million hectares in Québec. Companies approached the GOQ requesting financial assistance in response to the increased costs required to harvest certain forests affected by this epidemic. In response, the GOQ and industry parties established a fixed rate reduction in electricity rates (*i.e.*, modify Hydro-Québec's L-rate price structure), through Hydro-Québec, to mitigate the increased electricity costs affecting all companies operating in the region.¹¹⁶

30. Fees and Dues Paid to a Research Consortium

Under the Federal Research Consortium, to enhance funding for non-profit private research centers, the GOQ provides a tax credit for a company's eligible R&D expenditures paid to a research consortium. If a taxpaying corporation conducts business in Canada and is a member of an eligible research consortium, it can claim a tax credit for fees and dues paid to the consortium. The rate for these tax credits is 14 percent for expenditures made with respect to a taxation year starting after December 2, 2014, which can increase to 30 percent for corporations with assets of C\$50 million or less for the previous taxation year. This increased rate is only applicable to the first C\$3 million of qualified expenditures. Corporations with assets of C\$50-75 million and C\$75 million or more in the previous taxation year can claim these tax credits for eligible expenditures over C\$50,000 and C\$225,000, respectively.¹¹⁷

31. Tax Credit for the Acquisition of Manufacturing and Processing Equipment in Québec

The GOQ provides a tax credit for investment in manufacturing or processing equipment. This credit was implemented in order to stimulate investments in such equipment and to support certain regions with struggling economies. To qualify for the tax credit, property must, among other things, be manufacturing or processing equipment, be hardware used primarily for manufacturing or processing, or have been acquired after March 20, 2012, for purposes of smelting, refining, or hydrometallurgy activities related to ore extracted from a mineral resource located in Canada. Where the qualified property was acquired after December 2, 2014, the tax credit for investment is calculated on the portion of eligible expenses that exceeds C\$12,500. The basic rate of the tax credit for investment is four percent. The rate is increased where the property is acquired to be used primarily in a resource region and based on the size of the business that acquires it.¹¹⁸

¹¹⁶ See *Lumber V First Review Final Results* IDM at 21; see also *Lumber V Second Review Final Results* IDM at 19; *Lumber V Third Review Preliminary Results* PDM at 60-61; and *Uncoated Groundwood Paper Final Determination* IDM at 17.

¹¹⁷ See *Lumber V First Review Final Results* IDM at 32; see also *Lumber V Second Review Final Results* IDM at 26; *Lumber V Third Review Preliminary Results* PDM at 75-76; and *Uncoated Groundwood Paper Final Determination* IDM at 11.

¹¹⁸ See *Lumber V Expedited Review Final Results* IDM at 9; see also *Lumber V Second Review Final Results* IDM at 26; *Lumber V Third Review Preliminary Results* PDM at 74; and *Uncoated Groundwood Paper Final Determination* IDM at 11.

32. Côte-Nord Wood Residue Program

Since July 2017, the Ministry of Forests, Wildlife, and Parks (MFFP) has administered the Côte-Nord Wood Residue Program to improve the profitability of Côte-Nord sawmills and the region's forest industry. The program supports projects to diversify market opportunities for wood residue in the Côte-Nord region; reduce the production of by-products from Côte-Nord sawmills; and reduce the transportation costs of by-products from Côte-Nord sawmills. The program is open to Québec companies that intend to use wood residue from the Côte-Nord region or intend to reduce the production of by-products from Côte-Nord sawmills.¹¹⁹

33. Private Forest Development Assistance Program (PAMVFP)

Since the 1970s, the PAMVFP has provided financial and technical assistance to private forest producers to carry out forest management activities in the private forests in Québec. The MFFP and its 17 regional agencies across Québec administer the program which is funded by the government, industry, and forest producers with the majority of the funds provided by the MFFP.

Only certified private forest producers, under section 130 of the SFDA, may use this program. Depending on a regional agency's policies, a payment under the PAMVFP can be made to the certified private forest producer or directly to the accredited forestry advisor, *i.e.*, the entity that performs silviculture on the private forest producer's land.¹²⁰

34. Hydro-Québec's Industrial Revitalization Rate (IRR)

Effective April 1, 2018, Hydro-Québec made a discounted, supplemental electricity rate available to Rate L customers who return to productive use all or part of an industrial plant's unused capacity, or who convert one or more industrial processes to use electricity. Hydro-Québec discloses the terms of the IRR and the electricity savings provided in its "Electricity Rates" annual publication. To be eligible for the IRR, an applicant must have a Rate L contract or become eligible for Rate L with the implementation of the project.¹²¹

35. Hydro-Québec's Reimbursement for Road Clearing

For forestry roads used by Hydro-Québec and private companies, Hydro-Québec shares the costs of snow removal, clearing, and sandblasting with those companies. Hydro-Québec has reimbursed Resolute for costs of such maintenance performed on certain roads within Resolute's harvesting area in Québec.¹²²

¹¹⁹ See *Lumber V Second Review Final Results* IDM at 18; see also *Lumber V Third Review Preliminary Results* PDM at 64-65.

¹²⁰ See *Lumber V Second Review Final Results* IDM at 18; see also *Lumber IV 2nd Review Final Results* IDM at Private Forest Development Program.

¹²¹ See *Lumber V Second Review Final Results* IDM at 20.

¹²² See *Lumber V Second Review Final Results* IDM at 20; see also *Lumber V Third Review Preliminary Results* PDM at 65.

36. Investment Program for Forest Management (PIAF)

The PIAF, the successor program to the PCIP, commenced on April 1, 2019. Similar to the PCIP, the PIAF has the objective of implementing strategies for the sustainable management of the public forest through partial cutting silvicultural treatments. Harvesters are required, when buying Crown stumpage, to harvest according to instructions from the government (*e.g.*, partial cutting) intended to assure forest sustainability to meet future volume demand. Consequently, the Québec government compensates harvesters up to a maximum of 90 percent of the assessed additional harvesting costs.¹²³

37. Additional CCA Relating to Manufacturing and Processing Equipment

Revenu Québec permits taxpayers to take an additional deduction for depreciation of qualifying equipment used in manufacturing, processing, or computer-related activities. The qualifying equipment, which must be new and used only in Québec, is property included in Class 50 (general purpose electronic data processing equipment and systems software for that equipment) or Class 53 (machine or equipment acquired primarily for use in manufacturing and processing goods intended for sale or lease) of Schedule B to the regulation respecting the Taxation Act.

The rate of the additional deduction is 35 percent for property acquired after March 28, 2017, but before March 28, 2018; 60 percent for property acquired after March 28, 2018, but before December 4, 2018; and 30 percent for property acquired after December 3, 2018. Taxpayers benefit from the additional CCA when calculating their net income for the taxation year in which the property is put into use and the following year.¹²⁴

Program Administered by the Government of Saskatchewan (GOS)

1. Manufacturing and Processing Tax Credit (M&P ITC)

Saskatchewan's M&P ITC provides corporations in Saskatchewan with a five percent tax credit on purchases of qualified capital assets, including manufacturing and processing equipment that can be applied against corporate income tax payable in the year earned. It also states that the credit is fully refundable when based on purchases of qualified property after April 2006. The M&P ITC is administered by the CRA on behalf of the GOS.¹²⁵

Subsidies Identified in *Supercalendered Paper*

Programs Administered by the GONB

1. Financial Assistance to Industry Program (FAIP): Loans

The FAIP provides funding from the GONB to eligible companies with the goal of helping companies establish or maintain their presence within the province. According to the Economic

¹²³ See *Lumber V Third Review Preliminary Results* PDM at 54-55.

¹²⁴ See *Lumber V Third Review Preliminary Results* PDM at 76-77.

¹²⁵ See *Lumber V Final Determination* IDM at 17.

Development Act, the legislation that enacted the FAIP, eligible companies may receive various forms of assistance, including in the form of loans. The Economic Development Act designates certain industrial, commercial, and business activities that are not eligible for financial assistance under the FAIP, including (a) logging; (b) primary agriculture; (c) primary mining; (d) quarrying; (e) broadcasting; (f) transportation; (g) communications; (h) publishing of news periodicals; (i) generation of electricity; (j) retail trade; (k) food catering; (l) warehousing; and (m) provision of personal services.¹²⁶

2. Northern New Brunswick Economic Development and Innovation Fund (NNBEDIF)

The NNBEDIF is one of the three programs administered by the New Brunswick Regional Development Corporation as reported by the GONB. The purpose of the NNBEDIF is to provide assistance to eligible companies with the goal of diversifying and growing the Northern New Brunswick economy. Under the NNBEDIF program, assistance may be provided in the form of loans, loan guarantees, or non-repayable contributions. Funding under the NNBEDIF is limited by geographic region; only companies with projects in the northern New Brunswick counties of Victoria Madawaska, Restigouche, Gloucester, Northumberland, and parts of Kent qualify.¹²⁷

Programs Administered by the GOBC

1. BC Hydro Power Smart Program: Thermo-Mechanical Pulp (TMP) Program

In 1989, BC Hydro started the Power Smart program. Power Smart funds are disbursed among programs for each of its three categories of customers: residential, commercial, and industrial. Within the industrial category are the subcategories Power Smart Partners-Transmission (PSP-Transmission), for customers that are connected to the BC Hydro system at above 60 kilovolts (kV), and Power Smart Partners-Distribution (PSP-Distribution), for customers that are connected to the BC Hydro system at 60kV and below.

PSP-Transmission provides funding for energy studies and projects encouraging energy efficiency. BC Hydro's industrial customers can apply for and undertake these PSP – Transmission projects either individually or as part of larger programs, such as the TMP program. BC Hydro created this subprogram in July 2014. It targets customers who own TMP facilities and is designed to facilitate energy efficiency and load displacement. The TMP program is open to British Columbia customers that own and operate TMP mills within BC Hydro's service area.¹²⁸

2. BC Hydro Power Smart Program: Industrial Energy Managers Program

Under the Industrial Energy Manager program, BC Hydro provides funding in the form of wage subsidies to PSP-Transmission customers to fund an employee dedicated to the position of

¹²⁶ See *Supercalendered Paper Expedited Review Final Results* IDM at 6.

¹²⁷ See *Supercalendered Paper Expedited Review Final Results* IDM at 6.

¹²⁸ See *Supercalendered Paper Expedited Review Final Results* IDM at 7.

Energy Manager who works to identify energy conservation opportunities. The funding under this program is available to BC Hydro’s industrial customers who use more than 10 GWh per year. According to BC Hydro officials, it provides funding for 43 energy managers out of 164 eligible sites.¹²⁹

3. Powell River City Tax Exemption Program

In 2014, the City of Powell River passed Bylaw 2394 establishing “a revitalization tax exemption program” for a term of three years (*i.e.*, for calendar years 2015 through 2017). This bylaw specified that this program applied exclusively to Class 4 major industrial property located within the revitalization area. The 2014 bylaw provided tax certainty for eligible companies by maintaining, through 2017, the property tax amount payable at roughly C\$2.75 million per year.¹³⁰

Subsidies Identified in *Uncoated Groundwood Paper*

Programs Administered by the GOBC

1. School Tax Credit for Class 4 Major Industrial Properties

The GOBC establishes school tax rates applicable to taxable property value in each of the eight non-residential property classes within the province. For calendar year 2016, the school tax rates were set by Order-in-Council No. 267; each non-residential property class has one applicable school tax rate. Also, for 2016, the GOBC subsequently adjusted the school tax rate of C\$5.40 per C\$1,000 of taxable value, as indicated in the Order-in-Council, to C\$2.16 per C\$1,000 of taxable value for all Class 4 Major Industry properties, pursuant to the Provincial Industrial Property Tax Credit.¹³¹

Programs Administered by the Government of Newfoundland and Labrador (GONL)

1. SR&ED – GONL

The GONL provides a tax credit on companies’ eligible R&D expenditures. The tax credit was available at a standard rate of 15 percent of the cost of these expenditures. The tax credit is claimed on Form T661 of the taxpayer’s federal tax return.¹³²

2. Waiver of Managed Forest Land Tax

The Managed Land Tax is a requirement under the Forestry Act and the Forest Land Management and Taxation Regulations when a parcel of land, or part of a parcel, is declared “managed.” The rate is calculated on an annual basis and was C\$1.42 per hectare in 2016. The

¹²⁹ See *Supercalendered Paper Expedited Review Final Results* IDM at 7.

¹³⁰ See *Supercalendered Paper Expedited Review Final Results* IDM at 9.

¹³¹ See *Uncoated Groundwood Paper Final Determination* IDM at 9.

¹³² See *Uncoated Groundwood Paper Final Determination* IDM at 10.

GONL has entered into agreements dating back to 2009, to waive the payment of the annual managed land tax payable on tenure.¹³³

3. Labour Market Partnership (LMP)

The GONL provides a grant to eligible companies and organizations to develop and implement labor market strategies and activities to assist companies with labor adjustments such as downsizing, upsizing, new development, relocation, impact of new technologies, labor shortages, shortage of year-round job opportunities, and lack of community and organizational capacity for human resource planning. The GONL contributes 50 percent or less of the eligible training costs and over 50 percent if the employer is unable to avoid lay-offs but willing to invest in training for affected employees.¹³⁴

4. Forest Insect Control and Survey Assistance

Under the Forestry Act, the GONL Minister responsible for forestry has the authority to undertake all reasonable measures to provide for effective protection of the forests, whether on Crown land, public land, or privately-owned land. The Minister has entered into annual and multi-year forest insect and disease control agreements with forest companies with land tenure in the province. The GONL may waive cost share payments for all insect and disease control and monitoring costs on a land tenure.¹³⁵

5. Productive Forest Lands Inventory Program

The GONL instituted the Forest Inventory Program in 1974, to provide a continuous, management level forest inventory in the province. This program provided timber volumes and other statistics for management planning; maintained up-to-date maps of forests; enabled planning and development of provincial resources; initiated special studies on growth, cull, decay, etc.; and benchmarked existing forest characteristics to examine change over time. In 1996, the Newfoundland and Labrador Forest Service's forest inventory program was given savings and revenue targets under the GONL Program Review initiative. As part of this initiative, companies entered into agreements to share the cost of the Forest Inventory Program and were given access to GNL's forest industry inventory data. The GNL has waived payments under such agreements.¹³⁶

¹³³ See *Uncoated Groundwood Paper Final Determination* IDM at 10.

¹³⁴ See *Uncoated Groundwood Paper Final Determination* IDM at 12.

¹³⁵ See *Uncoated Groundwood Paper Final Determination* IDM at 12.

¹³⁶ See *Uncoated Groundwood Paper Final Determination* IDM at 12.

6. Canada—NL Job Grant

The Canada-NL Job Grant program is a cost-sharing program implemented as a part of the Canada-Newfoundland and Labrador Job Fund Agreement. The GONL provides up to C\$15,000 per person for training costs, which includes up to C\$10,000 in grant contributions. Funds provided under this program by the GOC are limited to the province of Newfoundland and Labrador, pursuant to the terms of the Canada-Newfoundland and Labrador Job Fund Agreement.¹³⁷

7. Capacity Assistance Agreement with NL Hydro

NL Hydro is a Crown-owned electrical utility company operating in the Newfoundland and Labrador province. NL Hydro's strategic plan involves addressing the energy sector strategic directions of the Ministry of Natural Resources. NL Hydro's mission is to carry out the energy policy of the GONL. The GONL maintains capacity assistance agreements with industrial customers, whereby capacity assistance is provided to NL Hydro. Industrial customers agree to provide electrical capacity to NL Hydro through generation facilities or by curtailing their demand and reducing the load on the electrical system.¹³⁸

8. Silviculture Assistance Program

The GONL reimburses companies for certain silviculture activities performed and provides seedlings for planting at no cost. Companies are legally obligated to ensure all that harvested sites are adequately regenerated as set forth in the Certificate of Managed Land issued annually by the GONL, in accordance with section 43 of the Forestry Act. The GONL reimburses companies for performing eligible treatments pursuant to a multi-year agreement (Silviculture Agreement). The eligible treatments include tree planting, mechanical site preparation for planting, precommercial thinning, plantation maintenance, and vegetation management.¹³⁹

Programs Administered by the GOQ

1. Tax Credit for Private Partnership Pre-Competitive Research

The GOQ provides a tax credit based on a company's eligible expenditures in forming partnerships to carry out pre-competitive research in Québec. The tax credit rate is 30 percent for small and medium-sized enterprises (SMEs) and 14 percent for large corporations. SMEs can claim qualified expenditures over a C\$50,000 exclusion threshold, while large corporations, can claim those over a C\$225,000 exclusion threshold.¹⁴⁰

¹³⁷ See *Uncoated Groundwood Paper Final Determination* IDM at 13.

¹³⁸ See *Uncoated Groundwood Paper Final Determination* IDM at 13.

¹³⁹ See *Uncoated Groundwood Paper Final Determination* IDM at 13.

¹⁴⁰ See *Uncoated Groundwood Paper Final Determination* IDM at 11.

2. Tax Credit for Training in the Manufacturing, Forestry, and Mining Sectors

Under the Taxation Act, the GOQ provides a tax credit for eligible training expenditures equal to the total cost of training, which can also include the salary or wages paid during the training period. For the training expenditures to qualify, the training must consist of a course related to an activity in the manufacturing, forestry, or mining sector and must be given to an enrolled eligible employee by either an accredited instructor or one at a recognized educational institution. Employees qualify as being eligible if their activities consist primarily of carrying out or supervising duties attributable to an activity in the manufacturing, forestry, or mining sectors. The tax credit is available at a rate of 24 percent of the cost of these expenditures. Companies in the manufacturing, forestry, and mining sectors can claim the credit when filing their corporation income tax return.¹⁴¹

3. PAREGES Program

PAREGES is administered by the GOQ's Ministry of Transport, Sustainable Mobility, and Transport Electrification and the Ministry of Sustainable Development, Environment, and the Fight against Climate Change. The PAREGES program provides grants to support infrastructure projects and enterprises that use rail or maritime transport solutions to foster better intermodal options and allow for reduction of GHG emissions.¹⁴²

B. Additional Subsidies Information from Canada's WTO Notifications

Since the prior lumber subsidies report, there was no new WTO Subsidy Notification by Canada, or TPR.¹⁴³ Relevant lumber industry subsidy programs reported in Canada's current and prior reports are listed below.

1. Transformative Technology Program (TTP)

The TTP provides funding under the *Department of Natural Resources Act* and the *Forestry Act* in the form of contributions for pre-competitive, non-proprietary R&D for development and adaptation of emerging technologies such as forest biomass, forest biotechnology, and nanotechnology. The program was created in April 2007 and expired on March 31, 2014.¹⁴⁴

2. Forest Innovation Program (FIP)

The FIP provides non-repayable contributions to support pre-competitive research, development and technology transfer in the forest sector, to help position the sector for growth and participation in areas such as bioenergy, biochemicals, nanotechnology, and advanced construction materials. Funding is provided under the authority of the *Department of Natural Resources Act* and the *Forestry Act*. The program budget was C\$23 million for FY 2016-17 and

¹⁴¹ See *Uncoated Groundwood Paper Final Determination IDM* at 11.

¹⁴² See *Uncoated Groundwood Paper Final Determination IDM* at 16.

¹⁴³ Canada's most recent Subsidy Notification is *Canada N372*, and most recent TPR is WT/TPR/S/389/Rev.1 (August 23, 2019).

¹⁴⁴ This program is no longer reported in Canada's subsidy notification.

C\$26 million for FY 2017-18. The program started on April 1, 2012, and was set to expire on March 31, 2018. However, the program was further extended for C\$63 million over three years starting in 2017 through 2020.¹⁴⁵

3. Export Restrictions to Promote Further Processing in Canada

Previously, in *Canada TPR314/R1*, Canada indicated that under the *Export and Import Permits Act*, it imposes export controls on logs, pulpwood and red cedar products to promote further processing in Canada. This program is not reported in *Canada N372*.¹⁴⁶

4. Forestry Funding Program¹⁴⁷

Ongoing since 2004, the program, administered by La Financière Agricole du Québec, supports certified forestry producers in acquiring wooded lots, with assistance provided in the form of loan guarantees for loans of up to C\$750,000 and for a maximum term of 30 years.¹⁴⁸

5. Ontario Jobs and Prosperity Fund

Launched in January 2015, the program is administered by the Ministry of Economic Development and Growth and provides grants and loans under four distinct streams, each with its own application process. Among the four is the Forestry Growth Fund, which helps value-added and bio-product forestry projects improve productivity and innovation, enhance competitiveness, support new market access, strengthen supply chains and provide socio-economic benefits.¹⁴⁹

6. Wood Innovation Program

This program, administered by Québec's Ministère des Forêts, de la Faune et des Parcs, aims to stimulate investment in the undertaking of projects in the forest products industry or any other industry using forest products. Investment projects can receive funding of up to 50 percent of eligible expenses, for a total maximum amount of C\$2.5 million. Studies can receive funding of up to 75 percent of eligible expenses, for a maximum amount of C\$75,000, for a maximum of two studies per FY. Applied research can receive funding of up to 50 percent of eligible expenses for a maximum amount of C\$200,000 per project or C\$400,000 for a maximum of two projects per FY. The program will remain in effect until March 31, 2023.¹⁵⁰

¹⁴⁵ See *Canada N372* at 54-55.

¹⁴⁶ For prior notification, see *Trade Policy Review of Canada, Report by the Secretariat*, WT/TPR/S/314/Rev.1 (September 30, 2015), Section 3.2.3, pages 72-73, paras. 3.99 and 3.100, Table 3.11. (*Canada TPR314/R1*).

¹⁴⁷ Previously known as "Québec Forestry Financing Program."

¹⁴⁸ See *Canada N372* at 121-122.

¹⁴⁹ See *Canada N372* at 91-92.

¹⁵⁰ See *Canada N372* at 129-130.

C. Subsidies Identified in Connection with the SLA which have been Reviewed by an Arbitration Panel

1. Ontario Forest Sector Loan Guarantee Program

This program was announced in 2005 to make available C\$350 million in loan guarantees over five years to stimulate and leverage investment in the forest industry. These loan guarantees could be for a term of two to five years and generally range from C\$500,000 to a maximum of C\$25 million.

2. Ontario Forest Sector Prosperity Fund

This program was announced in 2005 to provide grants to the forest sector that would support and leverage new capital investment programs.¹⁵¹

3. Forest Industry Support Program

This program was announced in 2006 to make available C\$425 million in financing to foster investment and modernization projects to improve the productivity and competitiveness of Québec's forest products industry.

4. 15 Percent Capital Tax Credit

This program was announced in 2006 to provide a 15 percent tax credit to Québec's forest products industry on investments in manufacturing and processing equipment through 2009.

5. Québec's Road Tax Credit

This program was announced in 2006 and allowed the GOQ to incur costs previously borne by the forest products industry. The program includes C\$100 million for a refundable tax credit of 40 percent for the construction of and major repairs to access roads and bridges.

6. British Columbia Sales of Grade 4 Timber

Since 2007, British Columbia has sold increasing amounts of publicly owned timber in its interior for salvage rates, providing a benefit to softwood lumber producers. While the mountain pine beetle infestation has caused extensive damage to forests in British Columbia, the majority of the damaged timber is usable for softwood lumber products.

¹⁵¹ See also *Supercalendered Paper Final Determination* IDM at 28.

D. Additional Subsidies Identified in Connection with the SLA

1. Wood Promotion Program

The GOO provides C\$1 million per year in funding to the forest products industry to enhance value-added manufacturing.

2. North Ontario Grow Bonds Program

The GOO provided approximately C\$13 million in bonds to new and growing businesses in the North. For example, in September 2006, a C\$250,000 loan to the Manitou Forest Products Limited for expansion of its sawmill was among the projects funded.

3. Forest Industry Long-Term Competitiveness Initiative

This program provides government funding for research and development that benefits the forest products industry.

4. Ontario Forest Access Road Construction and Maintenance Program

This program was announced in 2006 to make available C\$75 million to reimburse forest companies for costs incurred for constructing and maintaining primary and secondary forest access roads.

5. Reductions in Operational and Silvicultural Costs

This program was announced in 2006 and allowed the GOQ to incur costs previously borne by the forest products industry. The program includes C\$210 million in measures to reduce the cost of operations and silvicultural investments.

GERMANY

Since the previous lumber subsidies report, there was a new WTO Subsidy Notification by Germany, but the EU has not undergone a TPR. The most recent Subsidy Notification contains no relevant lumber industry subsidy programs for Germany.¹⁵²

ROMANIA

Since the previous lumber subsidies report, there was no new WTO Subsidy Notification by Romania, and the EU has not undergone a TPR.¹⁵³ The most recent Subsidy Notification contains no relevant lumber industry subsidy programs for Romania.

SWEDEN

Since the previous lumber subsidies report, there was no new WTO Subsidy Notification by Sweden, and the EU has not undergone a TPR.¹⁵⁴ The most recent Subsidy Notification contains no relevant lumber industry subsidy programs for Sweden.

BRAZIL

Since the previous lumber subsidies report, there was no new WTO Subsidy Notification by Brazil, and Brazil has not undergone a TPR.¹⁵⁵ The most recent Subsidy Notification contains no relevant lumber industry subsidy programs for Brazil.

IV. Conclusion

We note that this report is limited to all subsidies identified following the reporting methodology described above and does not constitute a finding regarding the countervailability of the listed subsidies under U.S. law or the WTO SCM Agreement. We also note that this report only includes subsidies identified pursuant to the described reporting methodology. A subsidy's presence in or absence from this report is not an indication of whether the subsidy is countervailable under U.S. law, is in accordance with the relevant WTO agreements, or is actionable under any other international agreement.

¹⁵² See WT/TPR/S/395/Rev.1 (July 7, 2020); and G/SCM/N/372/EU/Add. 11 (January 21, 2022).

¹⁵³ See WT/TPR/S/395/Rev.1 (July 7, 2020); and G/SCM/N/372/EU/Add. 23 (September 28, 2021).

¹⁵⁴ See WT/TPR/S/395/Rev.1 (July 7, 2020); and G/SCM/N/372/EU/Add. 27 (July 27, 2021).

¹⁵⁵ See WT/TPR/S/358/Rev.1 (October 18, 2017); and G/SCM/N/372/BRA (July 1, 2021).

V. **Appendix: Public Comments**

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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-conserve-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". The signature is fluid and cursive, with a large initial "E" and a long, sweeping tail.

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 the first letter of the first name being a large, stylized 'E'.

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