July 29 2003

BY E-MAIL & HAND

Mr. Grant C. Aldonas
Undersecretary for International Trade
Central Records Unit, Room 1870
U.S. Department of Commerce
14th Street and Pennsylvania Avenue., N.W.
Washington, D.C. 20230

Attention: Softwood Lumber Policy Bulletin

Re: Request for Addition of a Provision for Exemption of Independent Softwood Lumber Remanufacturers

Dear Mr. Aldonas:

On behalf of the Canadian Lumber Remanufacturers Alliance ("CLRA"), a respondent in the countervailing duty investigation and the administrative review (Inv. No. C-122-839), we submit these comments in response to the request of the Department of Commerce ("Department") for comments on its proposed policy bulletin on softwood lumber from Canada,[1] and with respect to the interim agreement negotiations between the Government of Canada and the United States. On May 30, 2003, we submitted to the Department the individual requests of the members of the CLRA for company-specific administrative reviews, along with certificates from each company, the Government of Canada, and the relevant provinces that each company received zero net subsidies.

Under the **"Purpose of the Policy Bulletin**" it is clearly stated:

> "The purpose of this policy bulletin is, consistent with the intent of U.S. law, to provide an incentive for Canadian provinces to move to market-based systems of timber sales that ensure that the provinces receive adequate remuneration for their sales of standing timber to Canadian producers of softwood lumber.
>
> More broadly, the Department intends the policy guidance to serve as the basis for a long-term, durable solution to the ongoing dispute between the United States and Canada over trade in softwood lumber and encourage the development of an integrated market for

[1] 68 Fed. Reg. 37456 (June 24, 2003).

> forest products consistent with the goals of the North American Free Trade Agreement and sustainable forestry. "[2]

For the policy bulletin to achieve its end, and serve as a long term basis, it must acknowledge a group of independent remanufacturers of lumber who operate across provinces and that participate in no provincial government programs and certifiably receive no subsidy.

The Department is aware of the plight of the CLRA members and, consistent with U.S. law, the policy bulletin must acknowledge their unique circumstances and offer this group an immediate exit ramp therein. By not offering such an exit for this identifiable group of producers across provinces, the Department would be knowingly undermining the competitive position of such operations.

Therefore, this letter shall serve as one comment on a vital issue that should be added to the policy bulletin and any interim agreement: independent lumber remanufacturers who have no factually determined benefits from any subsidy should be exempt from any interim measures that may be imposed while the requirements of the policy bulletin are being implemented by the respective Canadian provinces.

Furthermore, the CLRA proposes a monitoring program that would ensure no circumvention through CLRA members.

We understand that, subsequent to the Department's issuance of the policy bulletin, the United States and Canada have been negotiating an interim agreement. Should the United States reach a settlement of this dispute with the Government of Canada, the CLRA requests that its certified independent members be exempt from the imposition of any duties, taxes, quotas or any other measures under the Order and/or interim agreement, because they have received no benefit from any of the alleged subsidies from the Canadian Government or any of the provinces that interim measures would be intended to offset.

The independent lumber remanufacturers of the CLRA are a distinct sector with unique circumstances within Canada's lumber industry. They are not owned, controlled or affiliated with tenure holders. These companies are mainly privately held, small and medium sized enterprises that are family run. The independent CLRA members hold no tenure or stumpage rights, do not harvest standing timber, and do not purchase logs.

These independent lumber remanufacturers purchase lumber at arm's length from unrelated primary saw mills located in U.S. border states, Maritime Provinces, and the provinces of Alberta, British Columbia, Manitoba, Ontario, Québec, and Saskatchewan. They pay the market price for lumber and see no price difference due to origin of the lumber. The independent CLRA members have not and do not participate in any of the alleged federal or provincial subsidy programs at issue and have been certified accordingly by the Government of Canada and

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[2] Id. at 37457 (emphasis added).

the relevant provinces. The CLRA members are exporters of record during the period of investigation.

These independent lumber remanufacturers purchase sawn lumber in arm's-length transactions, and then further process such lumber prior to sale and export. Processing includes the following: a change in the width, thickness, length, profile, texture, grade or moisture; or the joining together of lumber through finger jointing or other processes. Further processing may include kiln-drying, planning (to include end-trimming, cutting-to-length, and/or profile ripping when performed concurrently with planning) to create smooth-to-size board, sanding and grading (when performed concurrently with any of the preceding processes at the same facility).

The record of the investigation contains no evidence that the CLRA members received any benefits under any of the alleged subsidy programs. The facts set forth above and the certificates submitted in our May 30, 2003 request for an administrative review establish unequivocally that the CLRA members receive zero or *de minimis* net countervailable subsidies.

In support of its request to be exempt from any interim measures that might be agreed to in a settlement between the Governments of Canada and the United States, the CLRA proposes a tracking system already recognized as "models" by the Department with respect to export from the Maritime Provinces. The CLRA would implement a "certificate of origin" tracking program with a clear chain of custody accompanying all CLRA product exported to the U.S., supported by a CLRA stamp, and proposes that the program would be administered in conjunction with a credible and recognized non-government organization, the Maritime Lumber Bureau ("MLB").

The existing MLB "certificate of origin" program can already track and certify remanufactured product produced from maritime-source lumber in provinces outside the Maritimes. This tracking system can be expanded to cover all remanufacturered products from certified CLRA members. This offers the Department and U.S. Customs a transparent and enforceable Canada-wide tracking system. This proposal would include requirements for regular audits and random facility-based inspections for CLRA members. This will ensure no circumvention, as sanctions for its vendors shall be equivalent to those standards and practices established by the MLB as already accepted by the Department. The CLRA pledges its full cooperation with the Department and U.S. Customs to implement a transparent and enforceable tracking system.

Keeping CLRA members under the Order and/or interim measures that may be agreed upon would be illegal and unjust. The only evidence in the record supports a finding of no benefit from any alleged subsidy for CLRA members. In the absence of evidence of a subsidy, no countervailing duties or interim measures can be imposed. Furthermore, by not recognizing the unique circumstances of CLRA members, and including their exports within the scope of the Order, the impact is to force independent producers or their importers to pay countervailing duties on softwood lumber to offset alleged subsidies that had not been received. This injustice must not be perpetuated in the interim measures.

Since the Department did not conduct an up-stream subsidies investigation required by the statute, there is no evidence that CLRA members received a competitive benefit.[3] Under its regulations, the Department must determine competitive benefit by determining whether "the price for the subsidized input product is lower than the benchmark input price."[4] There is no evidence in the record that the prices paid by CLRA members for lumber is lower than any benchmark input price. The certifications by the CLRA members and the governments make it clear that no competitive benefit was received. There is absolutely no evidentiary basis for the Department's presumption that alleged subsidies passed through to arm's-length purchasers. With evidence on the record that the CLRA members received zero net subsidies, the Department cannot now speculate about hypothetical pass-throughs.

Article 1.1(b) of the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement") also requires evidence that a benefit has been conferred. With respect to the Department's Preliminary Determination, the WTO Dispute Panel Report found that the Department imposed a countervailing duty on downstream producers without determining the existence of an amount of the benefit conferred on the allegedly subsidized product and, therefore, acted inconsistently with the SCM Agreement Article 1.1(b).[5] The Department conceded that there are remanufacturers that purchased lumber in arm's-length transactions. The Panel found that under such circumstance, the Department cannot simply assume that a benefit has passed through. The Panel concluded that by failing to examine whether the independent lumber producers paid arm's-length prices, the Department determined the benefit to the producers of the subject merchandise inconsistently with the SCM Agreement.[6] While we have not had access to the Dispute Settlement Panel's Final Ruling issued on July 2, 2003, we understand from press reports that it is virtually identical to its previous determinations.[7]

The SCM Agreement, the statute, and the Department's regulations are clear that a countervailing duty cannot be imposed on downstream producers, unless there is evidence that the up-stream subsidy confers a competitive benefit on down-stream producers. Based on the evidence, the Department may not impose duties on the CLRA members for benefits allegedly received by other companies, because there is no evidence that any of the benefits pass through to CLRA members. In act, any alleged subsidy on the input is extinguished in the arms-length sale to the CLRA members.

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[3] *See*, 19 U.S.C. § 1677-1(c).

[4] 19 C.F.R. § 351.523(c).

[5] *See*, *Panel Report -- United States -- Preliminary Determination With Respect to Softwood Lumber From Canada, WT/DS236/R* (Nov. 1, 2002) at Paragraph 7.79.

[6] *See*, *Id.* at Paragraph 7.73-17.

[7] *WTO Issues Final Ruling*, 20 BNA Int'l Trade Rep. (July 10, 2003) at 1182. "The Panel also said Commerce erred in presuming -- rather than establishing -- that downstream producers of log and lumber inputs were subsidized through an arm's length transaction with an upstream enterprise benefiting from the stumpage program, in violation of Article 10 of the SCM Agreement and Article VI:3 of the General Agreement on Tariffs and Trade."

In the third investigation of Certain Softwood Lumber from Canada, the Department acknowledged that remanufacturers that purchase lumber through arm's-length transactions should be excluded:

> Since it is clear that several of the products… produced by independent remand producers are the same products that are produced by stumpage holders that benefit from the subsidies found to exist, the issue then becomes determining which individual companies produce remands as part of a continuous process starting with the felling of subsidized timber, and which produce remans from lumber purchased at arm's length. The Department's procedures for accomplishing this are either through company exclusion requests or through the investigation and promulgation of company-specific rates.[8]

Similarly, in the current (4th) countervailing duty investigation, the Department acknowledged the plight of independent remanufacturers who purchase lumber at arm's length prices and offered administrative reviews for specific companies to establish that they do not receive countervailable benefits:

> Respondents argue that there are remanufacturers which do not hold Provincial stumpage rights and which purchase lumber from stumpage holders at arm's-length prices. Thus, respondents argue that these remanufacturers are not benefiting from the Provincial stumpage programs. However, the Department, consistent with section 777A(e)(2)(B) of the Act, is conducting this investigation on an aggregate basis; no company-specific rates are being determined, except to the extent we have found it practicable to consider certain company-specific exclusion requests. For other producers, a review is the appropriate avenue to determine if there are specific companies that do not receive countervailable benefits.[9]

On May 30, 2003, and in accordance with the Department's Regulations,[10] CLRA members submitted their requests for administrative reviews and a zero rate determination, along with the required certificates. This is consistent with the statute that provides that the Department "shall

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[8] 57 Fed. Reg. 22,570 (May 28, 1992).

[9] Certain Softwood Lumber Products from Canada: Final Results of Countervailing Duty Investigation Issues and Decision Memorandum at 17, 67 Fed. Reg. 15545 (April 2, 2002).

[10] *See*, Section 351.213(k).

establish an individual countervailable subsidy rate or individual weighted dumping margin for any exporter or producer not initially selected for individual examination…."[11]

The evidence in the record establishes that the independent remanufacturers of the CLRA purchase their lumber in arm's-length transactions and receive zero net subsidies. There is no evidence in the record to the contrary. Consistent with the WTO ruling, the statute and the Department's regulations, these CLRA members must be exempt from any interim measures.

Having improperly included the CRLA members within the Order, it is incumbent upon the Department to rectify this injustice by fulfilling its promise to conduct reviews of remanufacturers who have purchased lumber at arm's-length prices. With only 24 CLRA applicants for zero rates, it would not be impractical for the Department to develop a stream-line process for determining company-specific rates for the CLRA members.[12]

The policy bulletin and the interim agreement must include a process wherein the CLRA members can prove that they receive no benefit from any of the alleged subsidies and, therefore, are not subject to any interim measures. This could be accomplished by the Department completing the current administrative review of CLRA members or by establishing a similar process under the policy bulletin and interim agreement. The 24 members of the CLRA must be provided with an exit route through which they can get out from under the current unjust burden they are forced to bear for alleged subsidies that they do not and cannot receive. This proposal by the CLRA is consistent with and supports the goals of the policy bulletin for market-based pricing and transparency.

For the reasons set forth above, the Canadian Lumber Remanufacturers' Alliance respectfully requests that its members be exempt from the Order and any interim measures agreed to by the Governments of Canada and the United States.

Respectfully submitted,

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Karen A. McGee
Counsel to the
Canadian Lumber Remanufacturers' Alliance

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[11] Section 782(a) of the Tariff Act, 19 U.S.C. § 1677m(a).

[12] *See,* letter from Counsel to the Government of Canada to the Hon. Donald L. Evans (June 18, 2003) at 14.