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October 9, 2003

HAND DELIVERY

Honorable James J. Jochum
Assistant Secretary for Import Administration
Import Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, DC 20230

Re: Antidumping Proceedings: Treatment of Section 201 and
Countervailing Duties

Dear Assistant Secretary Jochum:

On behalf of the Provinces of New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador ("the Maritime Provinces"), the Maritime Lumber Bureau, and the producers located in the Maritime Provinces, we hereby provide comments in response to the Department of Commerce notice seeking public comments regarding the propriety of deducting section 201 and countervailing duties from gross unit price in order to determine the applicable export price and constructed export price used in antidumping duty calculations. 68 Fed. Reg. 53104 (September 9, 2003).

The Maritime Provinces were exempted from the Department of Commerce countervailing duty investigation in *Certain Softwood Lumber Products from Canada* due to the

unique circumstances of the Maritime Provinces.¹ In amending the notice of initiation in that case, the Department noted the historically unique circumstances of the Maritimes that have warranted the exemption of the Maritimes from the various actions taken by the U.S. government over the course of history of the lumber disputes including the 1986 Memorandum of Understanding, the 1991 self-initiated CVD investigation, the interim measures taken pursuant to Section 301, and the 1996 Softwood Lumber Agreement.² Further, the petition in the current countervailing duty case contained no allegation of subsidies by the Maritimes and, in fact, requested exclusion of Maritime softwood lumber from the investigation.³ The countervailing duty order issued in that case explicitly exempts from the countervailing duties imposed thereunder softwood lumber produced in the Maritimes that is accompanied by an original Maritime Lumber Bureau Certificate of Origin.⁴

Although the Maritimes were exempted from the countervailing duty investigation and resulting order, the Maritimes were not likewise exempted from the antidumping duty investigation and order. Entries of Maritime origin softwood lumber are currently subject to the “all others” dumping rate of 8.43 percent pursuant to the antidumping duty order issued in that case.

¹ *Amendment to the Notice of Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 40228 (Aug. 2, 2001) (discussing the well-established facts pertaining to the unique circumstances of the Maritime Provinces throughout the history of the softwood lumber disputes).

² *See id.*

³ *See id.* at 40229.

⁴ *Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 36070 (May 22, 2002).

The exemption of the Maritimes from the countervailing duty order must apply with equal force to the antidumping duty order in order to fully effectuate the exemption granted to the Maritimes should the Department determine to change its longstanding policy and practice with respect to the deduction of countervailing duties in the antidumping calculation. Should the Department ever calculate an antidumping duty rate that includes any countervailing duty deduction in its determination, such an antidumping duty rate cannot be applied to Maritime softwood lumber. The Department of Commerce must calculate a separate antidumping duty rate applicable only to the Maritimes, which excludes the impact of the countervailing duty deduction, in order to properly preserve the effect of the Maritime exemption.

Applying an antidumping duty rate that includes countervailing duties to Maritime softwood lumber would result in a discriminatory penalty being imposed on Maritime softwood lumber imports. The imposition of such a punitive duty on merchandise exempted from such countervailing duties is clearly contrary to U.S. and international law. Moreover, the imposition of a punitive duty on Maritime softwood lumber imports, which would effectively apply the countervailing duties to exempt merchandise, would contravene the Department's express acknowledgement of the unique circumstances of the Maritimes that have warranted the exemption of the Maritimes from the various trade actions taken by the U.S. government over the past two decades.

The U.S. antidumping statute does not authorize the deduction of countervailing duties or section 201 duties from the gross unit price in determining the export price or constructed export price in the antidumping duty calculation. Sections 772(c)(2)(A) and 772(d) provide no authority for such deductions as these special duties are not encompassed

within the meaning of “United States import duties,” “costs, charges, or expenses,” or selling expenses.⁵ The Department of Commerce’s longstanding policy and practice is not to treat special duties, such as antidumping and countervailing duties, as import duties, costs or selling expense deductions from the price used to establish export price and constructed export price.⁶ Commerce’s interpretation of these statutory provisions has been affirmed by the reviewing courts.⁷

The principal rationale for denying a deduction from gross unit price to determine export price and constructed export price with respect to special duties such as countervailing duties is that such a deduction would result in a double remedy or an impermissible double-counting. The effect of such an unauthorized deduction would be to create additional price discrimination or dumping margins where none exists. To construe the statute otherwise would also violate the United States obligations under the WTO Agreements⁸ and would contravene U.S. law.⁹

⁵ 19 U.S.C. §§ 1677a(c)(2)(A), (d).

⁶ See, e.g., *Certain Cold-Rolled Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 781 (January 7, 1998); *Certain Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 18547 (April 26, 1996).

⁷ See, e.g., *A.K. Steel Corp. v. United States*, 988 F. Supp. 594, 607-608 (Ct. Int’l Trade 1997), *aff’d*, 215 F.3d 1342 (Fed. Cir. 1999); *U.S. Steel Group v. United States*, 15 F. Supp. 2d 892, 899-900 (Ct. Int’l Trade 1998), *rev’d on other grounds*, 225 F.3d 1284 (Fed. Cir. 2000); *Hoogovens Staal BV v. United States*, 4 F. Supp. 2d 1213 (Ct. Int’l Trade 1998).

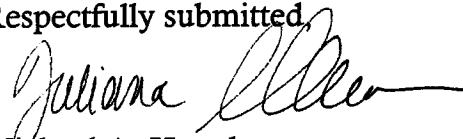
⁸ See, e.g., *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade*, arts. 2.4, 9.3; *Agreement on Subsidies and Countervailing Measures*, arts. 10, 19.4.

⁹ See 19 U.S.C. § 1671 (providing that “there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net countervailable subsidy”); 19 U.S.C. § 1673 (providing that “there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or constructed export price) for the merchandise”).

Should the Department of Commerce nonetheless determine to implement a change in its longstanding policy and practice to make a deduction for countervailing duties in the antidumping duty calculation, the Department must take steps affirmatively to ensure that no dumping margin derived from the countervailing duty deduction is applied to imports that have been exempted from the application of countervailing duties. This is an issue of deep concern to the producers and exporters of softwood lumber originating in the Maritime Provinces of Canada.

For all of the above stated reasons, we urge the Department to reject any proposed change in policy with respect to the deduction of countervailing duties from gross unit price to determine export price and constructed export price in the antidumping duty calculations. However, should the Department determine to implement a change in policy, the Department must ensure that no countervailing duties or additional duties are imposed on imports of softwood lumber from the Maritimes through any increase in the antidumping duty rate based on any countervailing duty deductions.

Respectfully submitted



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