

ARTICLE 1904  
BINATIONAL PANEL REVIEW  
UNDER THE  
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF  
CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA.  
FINAL AFFIRMATIVE COUNTERVAILING DUTY DETERMINATION  
FILE USA-CDA-2002-1904-03

**DECISION OF THE PANEL**

August 13, 2003

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Germain Denis  
Judge Milton Milkes  
Professor Daniel G. Partan<sup>1</sup>

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<sup>1</sup> The panelists wish to express their appreciation for the support received from Panelist Assistants Sheri Radke, Predrag Rogic and Paula Smith.

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## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION .....</b>	<b>5</b>
<b>II.</b>	<b>BACKGROUND.....</b>	<b>5</b>
<b>III.</b>	<b>PROCEDURAL HISTORY .....</b>	<b>8</b>
<b>IV.</b>	<b>PANEL JURISDICTION AND THE STANDARD OF REVIEW .....</b>	<b>11</b>
<b>V.</b>	<b>SUFFICIENCY OF PETITION.....</b>	<b>14</b>
<b>VI.</b>	<b>FINANCIAL CONTRIBUTION .....</b>	<b>17</b>
<b>VII.</b>	<b>BENEFIT/ADEQUACY OF REMUNERATION.....</b>	<b>20</b>
<b>A.</b>	<b>ACTUAL MARKET TRANSACTIONS .....</b>	<b>22</b>
<b>B.</b>	<b>WORLD MARKET PRICES .....</b>	<b>27</b>
<b>VIII.</b>	<b>SPECIFICITY .....</b>	<b>35</b>
<b>IX.</b>	<b>SCOPE DETERMINATIONS AND “CLASS OR KIND” ISSUES .....</b>	<b>39</b>
<b>A.</b>	<b>DUE PROCESS IN THE DEPARTMENT’S CONSIDERATION OF SCOPE ISSUES .....</b>	<b>40</b>
<b>B.</b>	<b>THE ROLE OF THE PETITION AND THE DEPARTMENT’S DISCRETION IN MAKING SCOPE DETERMINATIONS: DEFINING “CLASS OR KIND”.....</b>	<b>41</b>
<b>C.</b>	<b>THE STATUTORY REQUIREMENT OF INDUSTRY SUPPORT FOR EACH “CLASS OR KIND” OF MERCHANDISE INCLUDED IN THE PETITION .....</b>	<b>43</b>
<b>D.</b>	<b>THE PANEL’S STANDARD OF REVIEW OF THE DEPARTMENT’S SCOPE AND “CLASS OR KIND” DETERMINATIONS .....</b>	<b>44</b>
<b>E.</b>	<b>WHETHER EVIDENCE ON THE RECORD SUPPORTS THE DEPARTMENT’S REJECTION OF SEPARATE “CLASS OR KIND” STATUS FOR CONTESTED SPECIES AND CONTESTED PRODUCTS .....</b>	<b>48</b>
1.	<i>Western Red Cedar and Eastern White Pine.....</i>	<i>48</i>
2.	<i>Finger-Jointed Flangestock .....</i>	<i>49</i>
3.	<i>Square End Bed Frame Components and Box-Spring Bed Frame Kits.....</i>	<i>52</i>
<b>F.</b>	<b>PRODUCT EXCLUSIONS .....</b>	<b>54</b>
1.	<i>Reprocessed Maritimes-Origin Lumber.....</i>	<i>54</i>
2.	<i>Used Railroad Ties .....</i>	<i>56</i>
<b>X.</b>	<b>UPSTREAM SUBSIDIES .....</b>	<b>58</b>
<b>XI.</b>	<b>COMPANY EXCLUSIONS AND COMPANY-SPECIFIC DUTY RATES.....</b>	<b>65</b>
<b>A.</b>	<b>COMPANY EXCLUSIONS .....</b>	<b>65</b>
1.	<i>Goodfellow.....</i>	<i>70</i>
2.	<i>MLTC/NorSask.....</i>	<i>71</i>
<b>B.</b>	<b>COMPANY-SPECIFIC DUTY RATES .....</b>	<b>72</b>
<b>XII.</b>	<b>CALCULATIONS.....</b>	<b>74</b>
<b>XIII.</b>	<b>COALITION ISSUES .....</b>	<b>90</b>
<b>XIV.</b>	<b>COMMERCE’S REQUEST FOR A REMAND .....</b>	<b>91</b>
<b>XV.</b>	<b>CONCLUSION .....</b>	<b>91</b>

## I. INTRODUCTION

This Panel was constituted pursuant to the North American Free Trade Agreement (“NAFTA”) to review challenges to the final affirmative countervailing duty determination issued by the U.S. Department of Commerce (“Commerce” or “the Department”) relating to certain softwood lumber products from Canada. *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15545 (April 2, 2002) (“Final Determination”). In the Final Determination, Commerce concluded that provincial stumpage programs under which Canadian provinces confer rights to harvest standing timber on government owned forestlands are subsidies to producers of softwood lumber which are countervailable under United States law.

This Panel considers challenges made to the Final Determination by the Government of Canada, the Government of Alberta, the Government of British Columbia, the Government of Manitoba, the Government of the Northwest Territories, the Government of Ontario, the Gouvernement du Québec, the Government of Saskatchewan, the Government of the Yukon Territory, the British Columbia Lumber Trade Council, the Ontario Forest Industries Association, the Ontario Lumber Manufacturers Association and the Québec Lumber Manufacturers Association (collectively referred to as the “Canadian Joint Parties” or the “Canadian Parties”). Consideration is also given to challenges made by the Coalition for Fair Lumber Imports Executive Committee (the “Coalition”) and by various private parties. Following extensive briefing, oral argument in this matter was held in Washington, D.C. on April 15, 16 and 17, 2003.

Set out below are highlights of the background and procedural history to this review and thereafter the Panel’s analysis of the issues raised by the parties.

## II. BACKGROUND

Historically, most of the timberlands in Canada have been owned by the Crown, and management, including the harvesting of timber, has been administered by the provincial governments. This administration is done through provincial stumpage programs, pursuant to which private companies enter into tenure arrangements to harvest standing timber. Although there are various types of tenure arrangements, in general, the provinces grant long term harvesting rights to individuals and companies, which involve obligations as well as the right to cut timber. Access to the ability to cut standing timber is accomplished through the payment of stumpage fees and various in-kind payments. The provincial governments require license holders to assume responsibility for, *inter alia*, roadbuilding and maintenance, reforestation of harvested or damaged areas, and resource planning.

Agreements to operate sawmills or process certain volumes of harvested timber are sometimes incorporated into tenure agreements, as are minimum cut requirements and requirements to use specific sawmills. In many cases the tenure holders own and operate sawmills which process all of the logs they harvest, although there is evidence in the record to indicate that some tenure holders are independent harvesters that do not operate sawmills and sell their logs to unrelated mills.

Under the stumpage programs, the harvesting of timber creates the obligation to pay to the provincial government a fee (“stumpage”) calculated with reference to the volume of timber cut.

This is the fourth U.S. countervailing duty investigation of Canadian softwood lumber imports. In 1982, a petition was filed by the U.S. Coalition for Fair Canadian Lumber Imports alleging that certain provincial stumpage programs and other federal and provincial programs constituted countervailable subsidies. The Department’s investigation resulted in a negative finding. *Certain Softwood Products from Canada*, 48 Fed. Reg. 24159 (May 31, 1983) (“Lumber I”). Specifically, the investigation found that stumpage rights were not provided to a “specific enterprise or industry, or group of enterprises or industries” within the meaning of 19 U.S.C. § 1677(5)(B)(ii) and that stumpage did not constitute the “provision of goods or services at preferential rates.” 19 U.S.C. § 1677(5). Under the preferentiality standard, the law required Commerce to determine whether a good or service had been provided at a preferential rate using benchmarks that included the price the government charged other parties for identical or similar goods, the price charged by other sellers within the same political jurisdiction, the cost of providing the good or service, and the price paid for the good outside the country under investigation.

A new petition, filed in 1986 by the Coalition for Fair Lumber Imports, again alleged that certain provincial stumpage systems constituted countervailable subsidies. In this case, the Department reversed its previous position and issued a preliminary affirmative determination. *Certain Softwood Lumber Products from Canada*, 51 Fed. Reg. 37453 (1986) (“Lumber II”). The Investigating Authority found in this case, unlike in Lumber I, that the provincial stumpage programs were “specific” under the same statutory scheme. The change in position was stated to have resulted both from a new factual record and a revised interpretation of the law. In addition, the Preliminary Determination concluded that the “preferentiality” test was met, and consequently, a subsidy was found.

The Lumber II investigation was terminated when Canada and the United States entered into a Memorandum of Understanding (“MOU”) in December, 1986. Pursuant to the MOU, Canada agreed to collect a charge on exports of softwood lumber to the United States in an amount which was then about equal to that which had been calculated in the

Preliminary Determination. Under the terms of the MOU this tax could be reduced or eliminated for provinces that instituted “replacement measures”, e.g., increases in the amount of stumpage fees, or other charges. In exchange for this assessment, the petition was withdrawn and the investigation was terminated.

As a consequence of changes in their practices, pursuant to the terms of the MOU, the export charges for British Columbia and Québec were, in time, eliminated or substantially eliminated. Certain Atlantic provinces were also subsequently exempted. Canada then elected to terminate the MOU in September, 1991.

The Department promptly self-initiated a third investigation in October 1991. The result of this investigation, in May of 1992, was an affirmative subsidy determination in which it found that provincial stumpage programs and log export restraints in British Columbia conferred countervailable subsidies. *Certain Softwood Lumber Products from Canada*, 57 Fed. Reg. 22570 (May 28, 1992) (“Lumber III”). This determination was appealed to a binational panel under the Canada-United States Free Trade Agreement (“FTA”). The panel concluded that Commerce’s determination that the export restraints were “specific” was unsupported by substantial evidence. The panel remanded to Commerce on this and other issues. *Softwood Lumber from Canada*, USA-92-1904-01, Panel Decision (May 6, 1993).

Upon remand, the Department again found a countervailable subsidy, and once more upon review of the remand determination, the binational panel held that Commerce had inadequately addressed certain issues, including specificity. *Softwood Lumber from Canada*, USA-92-1904-01, Panel Decision on Remand (Dec. 17, 1993). The panel ordered Commerce to rescind the countervailing duty order, which it did on January 6, 1994. *See Certain Softwood Lumber Products from Canada*, 59 Fed. Reg. 12584 (March 17, 1994). The Department subsequently published an order revoking the countervailing duty order. *Certain Softwood Lumber Products from Canada*, 59 Fed. Reg. 42029 (Aug. 16, 1994).<sup>2</sup>

Negotiations conducted in 1995 resulted in the Softwood Lumber Agreement Between the Government of the United States of America and the Government of Canada (the “SLA”). Under the SLA, Canada agreed to impose fees on exports of softwood lumber from certain provinces to the United States. In return, the U.S. agreed not to initiate any action and to dismiss any petition filed. The SLA expired on April 1, 2001.

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<sup>2</sup> The United States requested the establishment of an Extraordinary Challenge Committee under the FTA on the basis of alleged conflict of interest by two Canadian panelists. The Extraordinary Challenge was rejected.

### III. PROCEDURAL HISTORY

On April 2, 2001, a new petition was filed with Commerce requesting initiation of a countervailing duty investigation to determine whether manufacturers, producers or exporters of certain softwood lumber products from Canada were receiving countervailable subsidies. The petitioners were listed as the Coalition for Fair Lumber Imports Executive Committee (hereinafter, “the Coalition”), the United Brotherhood of Carpenters and Joiners, and the Paper, Allied-Industrial, Chemical and Energy Workers International Union. The petition was amended on April 20, 2001 to add four lumber producers, Moose River Lumber Co., Shearer Lumber Products, Shuqualak Lumber Co. and Tolleson Lumber Co., Inc., as petitioners. The petition complained that the Government of Canada and provincial governments were providing countervailable subsidies with respect to the export, manufacture and production of softwood lumber.

On April 30, 2001, the Department commenced the investigation. *Notice of Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 21332 (April 30, 2001). The Notice of Initiation listed as potentially countervailable subsidies, federal and provincial timber management systems and other federal and provincial programs. The scope of the investigation was identified as softwood lumber, flooring and siding including all products classified under subheadings 4407.1000, 4409.1010, 4409.1090 and 4409.1020 of the Harmonized Tariff Schedules of the United States, and any softwood lumber, flooring and siding described below:

Coniferous wood, sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding six millimeters;

Coniferous wood siding . . . continuously shaped . . . along any of its edges or faces, whether or not planed, sanded or finger-jointed;

Other coniferous wood . . . continuously shaped along any of its edges or faces . . . whether or not planed, sanded or finger-jointed; and

Coniferous wood flooring . . . continuously shaped . . . along any of its edges or faces . . . whether or not planed, sanded or finger-jointed.

In the Notice of Initiation, Commerce stated that, due to the large number of Canadian producers, it intended to conduct the investigation on an aggregate basis. The Notice of Initiation also stated that Commerce would seek the cooperation of the Canadian and provincial governments in implementing a system to review applications for company exclusions from any order that might issue.

On May 1, 2001, the Department issued countervailing duty questionnaires to the Government of Canada and requested that it provide copies to the provincial governments. The Government of Canada and the provinces submitted responses to



these questionnaires on June 28, 2001. Additional information was filed by the Canadian Parties on numerous occasions after submitting the questionnaire responses. On July 25, 2001, Commerce issued supplemental questionnaires to the Government of Canada and the provinces. Responses were received on August 3, 2001. The Investigating Authority issued further supplemental questionnaires to certain provinces and the federal government in November and December 2001. Canada and the provincial governments submitted additional materials in response on December 17, 2001.

On May 8, 2001, the Government of Canada filed a proposal with Commerce setting forth a process by which to review requests for company exclusions.

On May 23, 2001, the International Trade Commission (“ITC”) published its preliminary determination, finding that there was a reasonable indication that an industry in the United States was being threatened with material injury by reason of imports from Canada of the subject merchandise.

In a letter dated July 31, 2001, the Government of Canada requested a province-specific rate for Québec producers of softwood lumber. In separate matters, two Canadian companies submitted requests for company-specific rates.

On August 2, 2001, Commerce amended the Notice of Initiation to exempt certain softwood lumber products harvested and produced in the provinces of New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland (the “Maritime Provinces”) from the investigation. *Amendment to the Notice of Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 40228 (Aug. 2, 2001). The Maritime Provinces were exempted because of unique circumstances associated with the Maritime Provinces and because the petitioners did not allege that any countervailable subsidies were received by producers in the Maritime Provinces. The exemption does not apply to softwood lumber products produced in the Maritime Provinces from Crown timber harvested in any other province.

On August 17, 2001, the Department published its Preliminary Determination. *Notice of Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 43186 (Aug. 17, 2001). Commerce preliminarily found that the provincial stumpage programs and certain non-stumpage programs were countervailable subsidies, and imposed provisional measures at 19.31% *ad valorem*. One company was preliminarily excluded. Following the issuance of the Preliminary Determination, the Canadian Parties filed additional factual information and analyses with Commerce.

In January and February 2002, Commerce verified the factual information submitted by the Government of Canada and the provinces, and issued verification reports on February 15, 2002.

On February 20, 2002, Commerce determined that it was impracticable to conduct examination and verification for each of the 351 applicants for company exclusions that were received. The Department determined that it was practicable for it to examine and consider a limited group of exclusion requests, from primary mills that produce lumber of U.S. or Maritime origin or from timber harvested on private Canadian land. Commerce did not act on the other applications on the grounds that the volume of applicants and documents submitted and the large number of groups and companies involved rendered the task impracticable.

On March 12, 2002, Commerce issued a preliminary determination on issues related to the scope of the order. Commerce required parties to submit briefs on this issue by March 15, 2002 and rebuttal briefs by noon on March 18, 2002. A hearing was held on scope issues on March 19, 2002.

The Final Determination was announced by the Department on March 21, 2002 and issued on March 25, 2002. The Final Determination incorporated an Issues and Decision Memorandum (hereinafter, the "Decision Memo"), which was also issued on March 25, 2002. In the Final Determination, Commerce reached the following conclusions:

It concluded that provincial stumpage programs are the "provision of a good," constituting the requisite finding under the statute of a "financial contribution."

In determining whether an alleged benefit had been conferred and whether the provincial governments received adequate remuneration for the purposes of the statute, Commerce rejected potential benchmarks in Canada and rejected assertions that the stumpage programs are operated on a market-consistent basis. Instead it employed benchmarks based on U.S. prices for short-term timber harvesting rights on state, federal and private lands in the United States.

Commerce found the stumpage programs to be *de facto* specific, stating that the users of such programs are limited in number.

It determined that an upstream subsidy analysis was not required on the ground that the alleged subsidy was a direct subsidy to lumber producers.

In calculating the benefit attributable to softwood lumber, Commerce determined that the numerator should be calculated based on the volume of timber harvested from Crown lands that entered sawmills, and included in the calculation of the denominator all products resulting from the lumber production process.

The Department stated that it had no authority to consider company specific rates in the context of a country-wide case.

Commerce determined that the products under investigation constituted a single class or kind of merchandise, although it excluded from the scope of the investigation softwood lumber products further processed from U.S.-origin lumber, when such processing is limited to planing, sanding or kiln-drying.<sup>3</sup>

Commerce denied the request to provide a province-specific rate for Québec.

Commerce excluded 20 companies from the investigation, having determined that those companies received either a zero or *de minimus* benefit during the period of investigation ("POI").

On May 16, 2002, the ITC issued its final determination that the industry in the U.S. producing softwood lumber products was threatened with material injury by reason of imports of the subject merchandise from Canada.

On May 22, 2002, Commerce published an amended countervailing duty order on softwood lumber products from Canada, which contained an amended net countervailable subsidy rate of 18.79 percent *ad valorem*. *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).

#### **IV. PANEL JURISDICTION AND THE STANDARD OF REVIEW**

This Panel's authority derives from Chapter 19 of the NAFTA. Article 1904(1) of the NAFTA provides that "each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review." Article 1904(2) directs the Panel to assess whether a final countervailing duty or antidumping duty

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<sup>3</sup> Commerce had previously excluded trusses, I-Joist beams, pallets, fence pickets, bed frames, garage doors, certain lumber panels, complete door frames, complete window frames, certain furniture, and other items if certain requirements were met. *See* Preliminary Determination, 66 Fed. Reg. at 43187-88.

determination is in accordance with the laws of the importing country, in this case, the United States. The laws consist of the “relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.” NAFTA, Chapter 19, Article 1904(2).

Pursuant to Article 1904(3) and Annex 1911 of the NAFTA, the Panel is required to apply the standard of review specified in Section 516A(b)(1)(B) of the Tariff Act of 1930, 19 U.S.C. § 1516a(b)(1)(B). That section states that “[t]he Court shall hold unlawful any determination, finding, or conclusion, found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” Under this standard, the Panel does not engage in *de novo* review and must restrict its review to the administrative record.

In reviewing Commerce’s interpretations of the governing statute, the Panel follows the two-stage approach adopted by the U.S. Supreme Court in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). When reviewing an agency’s construction of the statute which it administers, court is confronted with two questions:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”

*Id.* at 842-43.

An agency’s statutory interpretation is to be upheld if it is “sufficiently reasonable,” even if it is not “the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding.” *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986) (citing *Chevron*).

The U.S. Court of Appeals for the Federal Circuit has held that Commerce’s statutory interpretations enunciated in an administrative determination are “entitled to deference under *Chevron*.” *Pesquera Mares Australes Ltda v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001). Commerce’s regulations adopted after notice-and-comment rulemaking are also entitled to a high level of deference. *See Koyo Seiko Co. v. United*

*States*, 258 F.3d 1340, 1347 (*Fed. Cir.* 2001). Additionally, “[w]e must give substantial deference to an agency’s interpretation of its own regulations.” *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

Nonetheless, the Panel must “assure that the agency has given reasoned consideration to all the material facts and issues” and that Commerce has explained how its legal conclusions follow from the facts in the record. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Commerce must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made.” *Avesta AB v. United States*, 724 F. Supp. 974, 978 (CIT 1989) (*quoting Motor Vehicle Mfrs, Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983), *aff’d*, 914 F.2d 233 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 1308 (1991)). The reviewing court “must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Motor Vehicle Mfrs.*, 463 U.S. at 43 (*quoting Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974)).

Additionally, if Commerce “intends to depart from a prior position, ... it must give its reasons for doing so, thereby allowing the Court to understand the basis of the agency’s action and ... judge the consistency of that action with the agency’s mandate.” *Hoogovens Staal BV v. United States*, 4 F. Supp. 2d 1213, 1217 (CIT, 1998) (*quoting Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd of Trade*, 412 U.S. 800, 808 (1973)). Furthermore, the substantial evidence standard requires “more than mere assertion of evidence which in and of itself justified [the determination], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.” *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997) (*quoting Suramerica Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994)) (*quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

When an agency does need to fill gaps in a statute, it must act consistently with the underlying purpose of the law it is charged with administering. The Panel is to “reject administrative constructions, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy Congress sought to implement.” *Hoechst Aktiengesellschaft v. Quigg*, 917 F.2d 522, 526 (Fed. Cir. 1990) (*quoting Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1425 (Fed. Cir. 1988) and *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981)).

With this guidance, the Panel proceeds to evaluate the issues raised by the parties.

## V. SUFFICIENCY OF PETITION

The petitioners in this investigation are listed as the Coalition, four lumber producers, Moose River Lumber Co., Shearer Lumber Products, Shuqualak Lumber Co. and Tolleson Lumber Co., Inc., and two unions, the United Brotherhood of Carpenters and Joiners and the Paper, Allied-Industrial, Chemical and Energy Workers International Union.<sup>4</sup>

The Canadian Joint Parties assert that Commerce's determination that the petition was filed on behalf of an "interested party" is contrary to law and is not supported by substantial evidence. They argue that the Coalition did not qualify as an interested party because it merely acted as a representative of the Coalition for Fair Lumber Imports, which was the true party in interest. The Canadian Parties assert that there was insufficient information in the record to determine whether the Coalition for Fair Lumber Imports met the statutory requirements as an interested party because its members were not identified, nor was the volume and value of its members' production. They argue that the four individual companies were not interested parties within the meaning of the statute because the four companies did not file documents in the case or otherwise participate in the investigation, and because they failed to provide the required value information. The two unions did not qualify as interested parties because neither was representative of the softwood lumber industry. The Canadian Joint Parties also contend that Commerce failed to require the petitioner to provide the requisite information.

The statute requires that Commerce initiate a countervailing duty proceeding whenever "an interested party described in subparagraph (C), (D), (E), (F) or (G) of section 771(9)" files a petition that is accompanied by information reasonably available to the petitioner alleging the elements necessary for the imposition of duties under section 701(a) of the Act.<sup>5</sup> An "interested party" is defined as:

(C) a manufacturer, producer, or wholesaler in the United States of a domestic like product,

(D) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product,

(E) a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States,

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<sup>4</sup> On April 2, 2001, Commerce received a petition from the Coalition and the two unions. The petition was amended on April 10, 19 and 20, 2001. The amendment submitted on April 20, 2001 added the four lumber producers as petitioners.

<sup>5</sup> 19 U.S.C. § 1671a(b)(1).

(F) an association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), or (E) with respect to domestic like product, . . . .

19 U.S.C. § 1677(9).

Pursuant to the statute, Commerce also must determine whether the petition has been filed “by or on behalf of the industry.”<sup>6</sup> Commerce’s regulations provide that a petition must contain “[i]nformation relating to the degree of industry support for the petition, including: (i) [t]he total volume and value of U.S. production of the domestic like product; and (ii) [t]he volume and value of the domestic like product produced by the petitioner and each domestic producer identified.”<sup>7</sup> The regulations additionally require that the petition must contain, “to the extent reasonably available, the name, address, and telephone number of the petitioner and any person the petitioner represents.”<sup>8</sup>

The Department determined that the four individual companies were interested parties within the meaning of section 771(9)(C) of the Act as manufacturers, producers, or wholesalers in the United States of a domestic like product. The Department concluded that the Coalition was an interested party within the meaning of section 771(9)(E) as a trade or business association, and that the two labor unions were interested parties pursuant to section 771(9)(D). Commerce also determined that there was sufficient industry support for the petition.

The question before this Panel is whether the Department’s determination that the petition was sufficient was supported by substantial evidence or was otherwise in accordance with the law.

The four individual companies submitted along with the petition certain proprietary documents that contained the companies’ production volumes, indicating that each was a United States softwood lumber producer. We find no statutory requirement that a qualified interested party participate in further aspects of the investigation. Thus, Commerce’s decision that the companies were “interested parties” was supported by substantial evidence and was otherwise in accordance with the law.

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<sup>6</sup> 19 U.S.C. § 1671a(c)(1)(A)(ii).

<sup>7</sup> 19 C.F.R. § 351.202(b)(3).

<sup>8</sup> 19 C.F.R. § 351.202(b)(1).

Although the statute requires that a petition need only be filed by a single interested party, the Panel finds the Department's determination with respect to the Coalition and the two unions also to be proper.

Commerce's determination that the Coalition was an association, defined as a "gathering of people organized for a common purpose,"<sup>9</sup> was based on a reasonable interpretation of the statute. The petition identified the thirteen members of the Coalition as softwood lumber producers, and provided the production volume for each producer. The Department's conclusion that a majority of association members manufacture, produce or wholesale domestic like product was thus based on substantial evidence and was not contrary to law.

The two labor unions certified that they represented U.S. softwood lumber workers. The Panel does not read into the statute a requirement that the unions represent a certain percentage of the industry. Commerce's conclusion that they were interested parties because they represented workers in the softwood lumber industry is consistent with the statute.

The petitioners also provided the Department with their names, addresses, telephone numbers and submitted a list of U.S. softwood lumber producers that documented their support for the petition, in satisfaction of Commerce's regulations.

In determining whether the petition has been filed "by or behalf of the industry," the Department has interpreted its regulation to permit a determination of industry support on either a volume or value basis. Commerce argues that where industry support is determined on the basis of production volumes, value data is irrelevant to industry support. The petition and the amendments thereto contained information demonstrating that supporters of the petition accounted for 67 percent of total softwood lumber production. Based on information provided in the petition and the amendments, the Department determined that the industry support requirement was fulfilled. The Panel does not find Commerce's interpretation of its regulation to be in error.

In sum, the Panel concludes that Commerce's determination that the petition fulfilled the statutory and regulatory requirements was in the main supported by substantial evidence and was otherwise in accordance with the law.

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<sup>9</sup> *Black's Law Dictionary* at 119 (7<sup>th</sup> ed. 1999).



## VI. FINANCIAL CONTRIBUTION

There are two key elements to a finding of a countervailable subsidy, namely that a financial contribution is made by a government, and that a benefit is provided thereby. These two elements will be discussed in turn.

The statute describes several categories of financial contribution, including “providing goods or services, other than general infrastructure.” 19 U.S.C. § 1677(5)(D)(iii).

Prior to the Uruguay Round Agreements Act (“URAA”), the statute provided that the term “subsidy” included “(t)he provision of goods or services at preferential rates.” 19 U.S.C. § 1677(5)(A)(ii). Thus, although the URAA effected a change in the statutory definition of a countervailable subsidy, the phrase “goods or services” appears prior and subsequent to the URAA. The Agreement on Subsidies and Countervailing Measures (“SCM Agreement”) of the World Trade Organization (“WTO”) uses the identical language, i.e., where “ a government provides goods or services other than general infrastructure ....”

The Investigating Authority in this case determined that the provincial governments, through the tenure and stumpage programs, made a financial contribution to the harvesters of crown timber. The Department observed that stumpage might be regarded as the granting of a *right* to harvest timber, or as the timber itself. Looked at either way, it determined that the harvesters were “provided” with a good and that “... regardless of whether the provinces are supplying timber or making it available through a right of access, they are providing timber within the meaning of Section 771(5)(B)(iii).” Decision Memo at 5.

Commerce’s reasoning regarding the meaning of the term “goods” is based largely upon lexicographic sources.

In addition, in the Decision Memo, the Department notes the argument by the Coalition that the legislative history supports the Department’s decision.

The Canadian Parties contest the proposition that standing timber is a “good.” They argue that dictionary definitions of the term refer to movable property, and do not encompass all property rights. They equate the term to “movable tangible items that are capable of being traded”, as set forth in Black’s Law Dictionary. In addition, reference is made to the Uniform Commercial Code statement that “[a] contract for the sale... of timber to be cut is a contract for the sale of goods within this Article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty

at the time of contracting, and the parties can *by identification* effect a present sale before severance” (emphasis added). Art. 2-107(1) and (2).

Thus, their argument is based upon the distinction between actual identifiable property, and the rights granted to harvesters to a *profit à prendre*, an interest in real property. They cite cases that distinguish between this kind of property right and the “goods” which may be obtained through the exercise of such rights.

Second, Canada argues that the term “goods” must be interpreted in consonance with its use in provisions of other WTO agreements, reports and the SCM Agreement itself. They suggest that in a number of instances these authorities embrace “goods” only because they are traded internationally and equate “goods” with “property.”

Lastly, Canada contests the Department’s suggestion that if the stumpage programs do not contribute goods, they may amount to the contribution of a service. The Panel will not address this issue, as there is no indication that Commerce seriously advances this argument.

The Panel has examined the legislative history. The Statement of Administrative Action (“SAA”) refers to:

... four broad generic categories of government practices that constitute a “financial contribution.” The examples of particular types of practices falling under each of the categories are not intended to be exhaustive. The Administration believes that these generic categories are sufficiently broad to encompass the types of subsidy programs generally countervailed by Commerce in the past, although determinations with respect to particular programs will have to be made on case-by-case basis.

The SAA, which accompanied the URAA, explicitly states that the countervailing duty (“CVD”) statute is to be interpreted “sufficiently broad so as to encompass the types of subsidy programs generally countervailed by commerce in the past”. The Panel notes that the Act contains only one explicit exception, and that is one related to general infrastructure; there is no natural resource exception in the law or in the CVD regulations. The Panel, therefore, accepts that the statute is intended to have a comprehensive reach to include any goods or services, which are provided as a result of a government action in the country under investigation.

The SAA demonstrates Congress' support for the Department's determination that provincial stumpage programs constitute a financial contribution within the meaning of section 771(5)(D)(iii) of the Act.

It is also significant that all parties have acknowledged that timber is a 'market asset' and that through tenures the provincial governments relinquish ownership of those assets to the lumber companies. Regardless of the form of the transaction between the provincial governments and those who harvest the timber, in substance it is a sale of timber.

In this connection, it is noted that in each of the previous lumber cases, neither the Department nor a reviewing panel has specifically addressed the question at issue. Rather, it has been assumed that there is a financial contribution. Therefore, while the legislative history is far from conclusive, the Panel is of the view that it tends to support the position of the Investigating Authority and the Coalition.

While Commerce may never have previously considered the Canadian challenge to the finding of a financial contribution, the question was raised in a Canadian complaint before the WTO. The complaint, against the Preliminary Determination in this case was the subject of a WTO Panel report. WT/DS236/R, September 27, 2002. This report is not, of course, binding on this panel. See *Hyundai Electronics Co. Ltd. v. United States*, 53 F. Supp. 2d 1334 (CIT 1999). Nonetheless, the Panel finds the reasoning in the report persuasive as to the proper construction under the SCM Agreement.

In determining whether the provincial stumpage programs “provide goods or services” to tenure holders, the first question is whether the provinces “provide” something to the loggers. The WTO Panel concluded, after examining the tenure and stumpage programs, that “the only way to supply *standing* timber to harvesting companies is by allowing them to harvest the timber.” Hence, in that Panel’s view, “where a government allows the exercise of harvesting rights, it is providing standing timber to the harvesting companies.” WT/DS236/R at ¶¶7.17-18 (emphasis in original).

This Panel sees nothing in the statute or in the SCM Agreement which attaches any special meaning to the word “provides”, or which suggests that because the timber is harvested pursuant to licenses or tenures, it is not “provided” by the provinces. We therefore concur with the WTO Panel on this point.

The WTO Panel also addressed the issue of whether standing timber is a “good”, considering the dictionary definitions of the term, Canada’s argument that harvesting rights are different from “goods”, and that the term, under WTO agreements, is limited to “products”.

Rather than rely upon the various definitions of the term, the WTO Panel looked to the overall purpose of the SCM Agreement. The Panel found that in context the phrase “goods or services other than general infrastructure” has a more expansive meaning; it

refers to “a broad spectrum of things a government may provide”. WT/DS236/R at ¶7.23. Bearing in mind this purpose, the WTO Panel concluded that:

... a *financial* contribution also exists in case *goods* or *services* are provided which can be valued and which represent a value to the beneficiary in question. The word “goods” in this context of “goods and services” is intended to ensure that the term financial contribution is not interpreted to mean only a money-transferring action, but encompasses as well an in-kind transfer of resources, with the exception of general infrastructure. [WT/DS236/R at ¶7.24 (emphasis in original).]

Considering that in relevant respects the language of the countervailing duty statute mirrors exactly the WTO SCM Agreement, and that the broad purpose of these provisions is the same, the Panel considers that the meaning ascribed to the WTO SCM Agreement applies equally to the parallel provisions of the countervailing duty statute. Therefore, the Department’s finding of a financial contribution in this case is affirmed.

The Panel notes that, even if provincial stumpage constitutes a financial contribution for CVD purposes, none of the parties have questioned the fact that the act of granting timber harvesting rights to softwood lumber producers, and the establishment of any conditions attached to the exercise of those rights by provincial governments, constitutes a legitimate exercise of jurisdictional responsibilities by the granting authorities concerned.

## **VII. BENEFIT/ADEQUACY OF REMUNERATION**

The statute requires, given a financial contribution, that the contribution confer a benefit. A benefit is conferred when the good or service is provided for “less than adequate remuneration.” 19 U.S.C. § 1677(5)(E). That section further states that “the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being purchased in the country which is subject to the investigation or review.” The section requires the government to take into account the “[p]revailing market conditions includ[ing] price, quality, availability, marketability, transportation and other conditions of purchase or sale.”

This language parallels the language set forth in Article 14(d) of the SCM Agreement. Article 14(d) provides that “[t]he adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).”

Following the adoption of the URAA and the SAA that accompanied it, the Department issued interim regulations in 1995 regarding certain procedural matters, deferring the consideration of regulations interpreting the substance of the changes in the law. In November 1998, it issued its final regulation concerning the term “adequacy of remuneration.” 63 Fed. Reg. 65348, et seq. (Nov. 25, 1998). That section, 351.511(a)(2), defines “adequate remuneration” as follows:

(i) In general. The Secretary will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual market transactions in the country in question. Such a price could include prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions. In choosing such transactions or sales, the Secretary will consider product similarity; quantities sold, imported or auctioned; and other factors affecting comparability.

(ii) Actual market-determined price unavailable. If there is no useable market-determined price with which to make the comparison under paragraph (a)(2)(i) of this section, the Secretary will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question. Where there is more than one commercially available world market price, the Secretary will average such prices to the extent practicable, making due allowance for factors affecting comparability.

(iii) World market price unavailable. If there is no world market price available to purchasers in the country in question, the Secretary will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles. . . .

In connection with the publication of the new regulations, the Department noted that prior to the URAA amendments, the law provided that a subsidy was found if the goods or services were provided “at preferential rates.” (*See e.g.*, Lumber III). In view of the change in the standard, Commerce undertook to furnish guidance on how the new provision would be applied. This guidance has been referred to in the Commerce brief as the Preamble to the regulations, and the panel will adopt this term as well. Two items in the Preamble are particularly significant to this case. The first relates to the treatment of market distortion caused by the participation of a government in the market, and the other relates to the application of a “world market price” to measure the extent of a benefit. These comments will be discussed in turn.

## A. Actual Market Transactions

In its Decision Memo, the Investigating Authority declined to use the first benchmark set forth in the regulations, on the ground that there are no useable market-determined prices between Canadian buyers and sellers within the meaning of the regulations.

Commerce stated that “[w]here the market for a particular good or service is so dominated by the presence of the government, the remaining private prices in the country in question cannot be considered to be independent of the government price.” Decision Memo at 37. It reasoned that “[a] large government presence in the market will tend to make much smaller private suppliers price-takers,” and that “the government dominated market will distort the market as a whole if the government itself does not sell at market-determined prices.” *Id.* Commerce concluded that “[i]n such a situation, true market prices may not exist in the country, or it may be difficult to find a market price that is independent of the distortions caused by the government’s action.” *Id.*

The Department determined that provincial stumpage fees are not set to reflect market prices, but with a view toward traditional economic policy goals, such as job creation. Commerce also concluded that minimum cut requirements on public lands distort timber supplies and depress prices, and that the stumpage market is driven by the government’s control of the total softwood timber harvest. In Commerce’s view, substantial evidence exists to support the conclusion that stumpage fees on public lands are the price driver for the stumpage market in those provinces and that stumpage fees are largely derivative of the public land prices.

In arriving at its determination, Commerce relied heavily upon language found in the Preamble to the regulations, which in pertinent part states:

[w]e normally do not intend to adjust such prices to account for government distortion of the market. While we recognize that government involvement in a market may have some impact on the price of the good or service in the market, such distortion will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market. Where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government’s involvement in the market, we will resort to the new alternative in the hierarchy.

63 Fed. Reg. 65377.

With respect to individual provinces, Commerce stated in the Decision Memo that the information submitted on private prices was inadequate, based on, among other

things, differences in bidding or tendering process, the lack of market-based transactions or a failure to adequately break down the prices submitted. The Department also concluded that detailed import prices were unavailable and that prices from the Maritime Provinces could not be used due to insufficient information.

The Canadian Parties and the provinces argue that Commerce acted inconsistently with the statute and the regulations, which require it to use in-country market transactions, in rejecting record evidence indicating that market-determined prices exist in various provinces.

Specifically, the Canadian Parties argue that in Ontario, large numbers of private landowners export logs to the U.S. and that Commerce was provided with a survey of private timber sales transactions that indicate that private sellers sell private timber at prices above and below Crown rates. The Government of Québec maintains that it submitted substantial record evidence indicating that its private forest is a large and open market, free of government interference, and that the methodology employed by the province to set public stumpage rates has not changed significantly since Commerce validated Québec's system in Lumber III. Thus, Québec maintains, its prices are an appropriate benchmark for reviewing the adequacy of remuneration. Alberta claims that it provided market values, known as timber damage assessments ("TDAs"), for standing timber that were developed by the private sector for arm's length business purposes. TDAs represent compensation for damage by mineral rights extractors and, although they do not represent sales, Alberta claims they represent fair market value. British Columbia also states that it provided Commerce with information on competitive sales of stumpage in British Columbia through the Small Business Forest Enterprise Program.

The Canadian Parties argue that Commerce failed to give reasoned consideration to any of this evidence. They also argue that it ignored a study by Resource Information Systems, Inc. ("RISI"), which found the timber market in Ontario to be competitive and that timber prices sold in the private market were not distorted by government involvement in the market. There was also a study by Charles River Associates ("CRA") that concluded that the price for the supply of private timber in Ontario set the market price for softwood timber and that there was a competitive market for timber in Ontario. The Canadian Parties also point to a study by Dr. William Nordhaus that demonstrated that provincial stumpage charges do not lower the price of logs or lumber in comparison with an undistorted competitive market. Finally, the Canadian Parties take issue with Commerce's rejection of the Maritime Provinces as a source of benchmarks.

The Department argues that, based upon record evidence, it was reasonable to conclude that private prices in the provinces were related to the dominant Crown stumpage prices, and that there were no other competitive market prices available to use as a comparison. Thus, it claims, it properly turned to the second tier of its regulatory hierarchy to determine the adequacy of remuneration.

Specifically, Commerce asserts that Québec's stumpage program does not reflect "fair market values." Rather than acting like a commercial actor intent upon maximizing commercial revenue, Québec instead uses its stumpage program to implement policy objectives including creating and maintaining jobs. The Department asserts that Québec controls every aspect related to the Crown forests, including limiting the eligibility of parties entitled to harvest Crown timber, imposing appurtenancy requirements, maintaining annual allowable cut requirements, and imposing restrictions upon the transferability of harvesting rights. As a consequence of these restrictions, it claims that stumpage prices artificially established by Québec do not reflect competitive prices.

Commerce adds that, although Québec has a private timber harvest, evidence on the record indicated that it was reasonable for the Department to conclude that those private sales were not based upon an open market with free competition. In its Decision Memo, it points to largely anecdotal evidence, including statements made by a Ministère des Ressources Naturelles and an official from the Québec private wood lot owners' association. Commerce also states that it found unpersuasive a report presented by Québec that it argues demonstrated that private stumpage prices in Québec were slightly higher than prices in Maine. Commerce concluded that the study submitted by Québec relied upon a 75 percent quality premium for Maine trees, but that the quality premium adjustment was not reliable. In Commerce's view, given the dominance of Crown stumpage in Québec, *i.e.*, 83 percent, and compelling record evidence demonstrating that the province's private prices were influenced by the Crown stumpage prices, it reasonably concluded that those private prices were not useable as benchmarks under the first regulatory tier.

With respect to British Columbia, Commerce argues that the province controls the participants in the market, the volume available for harvesting, and imposes actual harvest requirements. Through these methods, the department asserts, British Columbia promotes job creation and retention while effectively eliminating the forces that would drive a competitive market.

Commerce states that British Columbia offered during the investigation two sources of potentially market driven private prices for use in measuring the adequacy of remuneration, but that neither source provided market prices that were appropriate because no underlying data concerning the transactions were provided and because it was not provided with information to determine whether the private prices were established consistent with market principles. As a result of the lack of useable, fair market private prices in British Columbia, and evidence demonstrating that the government dominated the market (*i.e.*, 90% of timber harvested during the period of investigation), Commerce claims that it properly resorted to the second tier of its regulatory hierarchy.



Similarly, it argues that Ontario's stumpage program does not reflect "fair market values." According to Commerce, Ontario charges fees that are administratively set and establishes appurtenancy requirements that require tenure holders to own mills or have commitment letters for processing an annual allowable cut. These measures, Commerce argues, allow Ontario to implement policy objectives such as the creation and retention of jobs. According to Commerce, the provincial price for timber on Crown lands is comprised of four component charges, the minimum charge, the forest renewal charge, the forestry futures charge, and the residual value charge. Commerce claims that the minimum charge is set administratively every year depending on the species and the destination of the harvested timber and that Ontario has stated that the primary reason for this charge is to generate a secure source of revenue regardless of market conditions. For the Department, Ontario's appurtenancy requirements and administered fee structure indicate that the province is not acting to maximize revenue from its timber resource, but to administer its stumpage program to pursue policy objectives.

Commerce claims that it reasonably determined that Ontario's private prices were not useable in its adequacy of remuneration analysis. The record established that the percentages of provincial, federal, and private timber harvested by Ontario during the POI were: 92 percent provincial, 1 percent federal and 7 percent private. Commerce relies on a study placed on the record by the petitioners conducted by Economists, Inc. ("Economists"), which concluded that administered stumpage prices have a distortive effect on private prices. Commerce states that it considered the two studies submitted by Ontario, the RISI study and the CRA study, but that it found the Economists study to be more persuasive. According to Commerce, record information, including survey responses, demonstrated that private timber sales and private land holders are not independent from the provincial stumpage system. It claims that it reasonably concluded that private prices in Ontario, which represented only 7 percent of the total harvest during the POI, could be distorted by Ontario's administered stumpage prices, which constituted 92 percent of the harvest.

With respect to the remaining provinces, Commerce contends the record contains no suitable private price transaction information, but that the record contains evidence demonstrating that the volume of Crown stumpage was overwhelmingly larger than the private harvest during the POI.

The Panel discusses the arguments raised by the parties in accordance with the standard of review set forth above.

Clearly, the law prefers market-based, actual transactions that occur in the country of export. Commerce itself has stated that "[t]he most direct means of determining whether the government required adequate remuneration is by comparison with private transactions for a comparable good or service in the country. The preferred benchmark in the hierarchy is an observed market price for the good, in the country under investigation,

from a private supplier (or, in some cases, from a competitive government auction) located either within the country, or outside the country . . .” Decision Memo at 36.

The Panel notes that the Canadian Parties do not appear to contest the validity of the regulation, which contemplates that there may be instances in which actual, market-based transactions are not available. Thus, it seems, all parties agree that there may be circumstances under which it is not possible to judge the adequacy of remuneration based on actual, market-based transactions in the exporting country and that there may be circumstances under which rejection of the first tier in the regulations is appropriate.

The Panel rejects the notion that significant involvement by the government in the market, by itself, serves as a basis for rejecting the first regulatory tier, without sufficient analysis of whether and how such involvement has distorted actual transaction prices. It is unreasonable to conclude, without further support, that where the government is a majority provider, private prices may not be used as a benchmark. However, the Panel finds that, with adequate support and analysis, it could be reasonable to conclude that significant involvement by the government may lead to market distortion.

Commerce states that it has based its conclusion on record evidence indicating that the government controls every aspect of Crown forests, as indicated in certain provinces by limited eligibility of parties entitled to harvest, appurtenancy requirements, cut requirements, restrictions on transferability and administered fee structures, and that such control is aimed at policy objectives rather than market principles. Commerce pointed to survey responses and a study by Economists, Inc., which indicated that private timber sales were not independent from the provincial stumpage system, to support its position. Commerce also maintains in some instances that information submitted on private prices was insufficient to determine whether such prices were determined in accordance with market principles. Based on such evidence, Commerce claims it was reasonable to conclude that private prices were related to stumpage prices and that there were therefore no market-based prices available to use as a comparison.

Although the Panel finds Commerce’s analysis to be minimal and its reliance in some instances on anecdotal evidence to be weak, the Panel is of the view that, even though it may not agree with the Department’s weighing of the evidence, it cannot say that substantial evidence in the record is lacking. In accordance with the standard of review which the Panel applies in this case, the Panel defers to the conclusions reached by Commerce and does not find its determination to be unlawful.

The Panel notes that Commerce concluded in Lumber III that prices in Québec are determined in accordance with market forces. As stated by Commerce, “. . . we determine that the private prices provide a reliable benchmark for comparison purposes.” Lumber III, 57 Fed. Reg. at 22597. Although the Lumber III investigation was conducted under the “preferentiality” standard, instead of the current “adequacy of remuneration”

standard, in both cases Commerce sought a reliable, market-based benchmark. Moreover, mills in Québec import significant quantities of logs from the U.S., and if prices in Québec were artificially low, it would not make economic sense to import. At the hearing, Commerce is also on the record as stating that in the situation where logs moved freely between Canada and the United States, the Canadian lumber industry concerned was operating under open and competitive market conditions.

The Panel finds Commerce's determination to be of a factual nature. Given the standard of review applicable to this case, and in light of the record evidence, the Panel agrees to defer to Commerce's decision to reject private prices in Québec and the other provinces as inadequate benchmarks for the purpose of the first regulatory tier. Although the Panel may have reached a different conclusion, and despite serious reservations, it does not find the Department's determination to be inconsistent with the law or to be unsupported by substantial evidence on the record.

## **B. World Market Prices**

After rejecting the first benchmark established in the regulations, namely actual market transactions in Canada, Commerce concluded that "world market prices" were available that could be used to determine whether the provincial stumpage programs provide a good or service to softwood lumber producers for less than adequate remuneration pursuant to the second regulatory benchmark.<sup>10</sup> The Department concluded that stumpage prices from the United States qualify as commercially available world market prices because it is reasonable to conclude that U.S. stumpage would be available to softwood lumber producers in Canada and because they are based on actual observed transactions within a competitive market.

Underpinning the Commerce determination is the supposed proximity of similar Canadian and U.S. forests, generally composed of the same species mix of trees. The Department determined that stumpage in the U.S. is comparable to stumpage in Canada with respect to "overall price, quality, availability, marketability, transportation and other conditions of sale." Decision Memo at 33-34. In the Preliminary Determination, the Department had indicated that prices from locations other than the United States could

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<sup>10</sup> As discussed below, the Panel notes that this is the second occasion on which Commerce has found a "world market price" under the second regulatory benchmark. The first was in *Final Negative Countervailing Duty Determination: Live Cattle from Canada* (October 22, 1999). In two other matters, Commerce arrived at a "world market price" in the context of an upstream subsidy analysis conducted under 19 U.S.C. § 1677-1. See *Final Affirmative Countervailing Duty Determination: Steel Wheels from Brazil* (April 18, 1989); *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order: Circular Welded Non-Alloy Steel Pipe from Venezuela* (September 17, 1992).

not be used because of the expense that would be incurred in transporting logs from other countries, and thus, only U.S. prices were considered. Nothing in the Final Determination indicates a change in this position.

For each province, Commerce compared the stumpage price with certain cross-border stumpage benchmark prices, making various adjustments in an attempt to create a comparable price. Adjustments were made for items such as road construction and maintenance costs, silviculture costs, fire protection and insect management costs, and forest planning expenses. Commerce's chosen benchmarks with respect to each province at issue are summarized as follows:

Québec: Commerce concluded that Maine price data obtained from the Maine Forestry Service serve as the most comparable benchmark.

British Columbia: Commerce relied on prices from the Washington Department of Natural Resources ("WDNR"), United States Forest Service ("USFS") prices from Washington, Idaho and Montana, prices from the Idaho Department of Lands, and prices from the Montana Department of Natural Resources and Conservation.

Ontario: For its cross-border benchmark, Commerce used prices from Michigan and Minnesota, using the Minnesota 2000 Corrected Public Stumpage Price Review, data from the Michigan Department of Natural Resources, and the USFS Timber Cut and Sold Report.

Alberta, Manitoba and Saskatchewan: Basing its benchmark on Minnesota, Commerce looked to the Minnesota 2000 Corrected Public Stumpage Price Review and the Price Index published by the Minnesota Department of Natural Resources.

The Canadian Parties challenge the agency's determination on the following grounds: (1) that Commerce's construction of the relevant statutory and regulatory sections to permit the use of an out-of-country benchmark is contrary to law; (2) that stumpage prices in the U.S. do not constitute a valid "world market price" and that consequently Commerce's use of such prices is contrary to law; (3) that Commerce is bound to its prior determinations that cross-border comparisons are arbitrary and capricious; and (4) that the Department's use of cross-border benchmarks is unsupported by substantial evidence. Similar arguments are raised individually by the provinces.

Although agreeing that the agency properly made its determination pursuant to the statutory mandate and the regulations, and thus supporting the determination, the

Coalition also raises several issues relating to the agency's attempts to adjust for market conditions in Canada.

Commerce contends that its use of a world market price is consistent with the regulations and is supported by substantial evidence because: (1) there are world market prices for timber; (2) U.S. timber prices would be commercially available to Canadian lumber producers; (3) the benchmarks were calculated using the most comparable timber in the U.S.; and (4) proper adjustments were made for differences in market conditions in Canada.

As an initial matter, and as discussed above, Commerce's regulations are entitled to a high level of deference. *See Koyo Seiko*, 258 F.3d at 1347. Under *Chevron*, assuming that Congress has not spoken directly to the question at issue, the question is whether the agency's construction of the statute is permissible. The Panel is to "reject administrative constructions,...that are inconsistent with the statutory mandate or that frustrate the policy Congress sought to implement." *Hoechst Aktiengesellschaft*, 917 F.2d at 526.

Both the Coalition and Commerce point out that the Canadian Parties do not contest the validity of the regulation. Nevertheless, it could be argued that, on its face, the regulation is inconsistent with the statute and thus should not be read to permit a benchmark based upon market conditions for the good or service other than within the country providing it. The WTO Panel report in *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada* (September 27, 2002), found that SCM Article 14(d) is "very clear: the adequacy of remuneration is to be determined in relation to *prevailing market conditions* for the good or service in question *in the country of provision or service*. ... [T]he ordinary meaning of [this provision] excludes an analysis based on market conditions other than those in the country of provision of the goods, i.e., Canada." WT/DS236/R at ¶7.44. However, the panel feels that it does not have to address this argument in order to dispose of the case.

The regulation provides in part, that a "world market price" may be used where "it is reasonable to conclude that such price would be available to purchasers in the country in question." 19 C.F.R. § 351.511(a)(2)(ii). The Canadian Parties argue that U.S. stumpage is not available in Canada because trees growing in the U.S. can only be harvested in the U.S. This argument is not without appeal. The Department has found a subsidy to exist with regard to the granting of tenures and the stumpage programs. If the subsidy was found to apply to lumber, or even to logs, of course, it would make more sense to say that the U.S. benchmark product might be available in Canada, as lumber and logs are movable. In fact, in its brief, Commerce does, at times, identify the subject goods as logs, and attempts to argue around the fact that in some cases the export of logs from the U.S. is restricted. (In this connection, the record establishes that during the

period of investigation, Washington State restricted the export of logs harvested on state-owned lands, as did Idaho and Montana.<sup>11</sup> )

In addition, the Department seems, in its brief, to attach significance to the fact that some Canadian companies own private lands in the United States, can and do bid at auction on U.S. stumpage, and can and do import U.S. logs. There is considerable evidence, for instance, that U.S. logs are routinely imported into Québec, and at the hearing Commerce stated that where logs move across the Canada-U.S. border the Canadian lumber industry then operates under open and competitive market conditions. However, the Panel fails to understand the significance of whether or not U.S. stumpage can be acquired by Canadian companies. The nationality of the purchaser of the rights to harvest timber cannot make the goods any more or less “available” in Canada.

Consequently, the Panel has difficulty with the notion that U.S. standing timber is “available” in Canada. Nevertheless, the Panel is not making a finding on this point, as there is a more fundamental reason for rejecting the use of a cross-border benchmark in this case.

As indicated previously, in the Preamble to the regulations, the Department addressed the use of “world market prices” as a measure of the adequacy of remuneration. The Preamble states that the Department will:

consider whether the market conditions in the country are such that it is reasonable to conclude that a purchaser in the country could obtain the good or service on the world market. For example, a European price for electricity normally would not be an acceptable comparison price for electricity provided by a Latin American government, because electricity from Europe in all likelihood would not be available to consumers in Latin America. However, as another example, the world market price for commodity products, such as certain metals and ores, or certain industrial and electronic goods commonly traded across borders, could be an acceptable comparison price for a government-provided good, provided that it is reasonable to conclude from record evidence that the purchaser would have access to such internationally traded goods.

63 Fed. Reg. 65377.

The Panel considers this policy statement to be a defensible construction of the regulation (notwithstanding that it is not to be accorded the same level of deference to

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<sup>11</sup> See Decision Memo at 44; Petitioner’s February 14 Memo at 35-36.

which the regulation itself is entitled) if the facts permit it. However, at the heart of this case is that the facts here do not permit application of the stated policy.

First, the reasoning of the Preamble, by its own terms, would seem to require that the goods or service at issue possess a set of unifying characteristics that would enable one to determine whether or not there is a “world market price.” Particular note is taken of the examples given in the preamble, and the reference to “internationally traded goods.”

The determination in *Final Negative Countervailing Duty Determination: Live Cattle from Canada*, 64 Fed. Reg. 57040 (Oct. 22, 1999), is the only instance in which the Department has ever applied the second tier benchmark and attempted to find a “world market price” in a countervailing duty investigation. In that case, the Department examined whether the Canadian Wheat Board provided a benefit to producers of live cattle by subsidizing the price of feed barley. Commerce compared the price of barley in the United States (the “world price”) with the alleged subsidized Canadian price, and concluded that the U.S. price was not higher than the Canadian price. Thus, it found no countervailable subsidy. Notably, the product involved, feed barley, is a commodity, and thus the determination fits nicely into the Preamble description of goods for which a “world market price” of “internationally traded goods” might be found.

However, the *Live Cattle* precedent is a far cry from the finding that standing timber is such a product. It is neither a commodity, nor is it a good which is commonly traded across borders. Indeed, it is hard to imagine any such product which meets the Department’s definition that is not subject to description in terms of objective standards and specifications. Thus, it is possible to imagine a standard price for other commodities such as crude oil, or even manufactured goods such as semiconductors, or even conceivably television receivers of standard specifications. However, the Panel is of the view that timber is not such a good or service, and that there is not a world market price for timber that meets the terms of the Preamble or of the statutory and regulatory requirements.

The Canadian Parties have submitted for the record a list of Factors That Affect Stumpage Prices compiled by the New York State, Division of Lands, Department of Environmental Conservation, which is illustrative of the inherent problems in attempting to contrive a single price for timber. They are: timber quality, volume to be cut by acre, logging terrain, market demand, distance to market, season of the year, distance to public roads, labor costs, size of the average tree, type of logging equipment, percentage of timber species in the area, end product of manufacturing, landowner requirements, landowner knowledge of market value, property taxes, performance bond requirements, and insurance costs. Further, the comment is made that “[c]omparisons among different jurisdictions and locations tend to increase the number and potential magnitude of the factors affecting stumpage value relative to a single jurisdiction, such as New York State.” When you try to make comparisons from country to country, you of course can

add to these factors such things as differing tax regimes, environmental regulations, and currency exchange.

The Department has recognized the difficulties which such factors present. In fact, in *Lumber I* Commerce noted that "...there is not a unified price for stumpage, because each individual stand of timber is unique due to a variety of factors, such as species combination, density, quality, size, age, accessibility, and terrain and climate." *Certain Softwood Lumber Products from Canada*, 48 Fed. Reg. 24159, 24168 (May 31, 1983). Commerce further stated that "[w]e believe that a comparison of Canadian stumpage prices with U.S. prices would be arbitrary and capricious...." *Id.*

Similarly, in *Lumber III*, the Department noted that "[w]e find that other factors which could adversely affect the comparability of adjacent U.S. and Canadian timber (e.g., exchange rate fluctuations) merely underscore the appropriateness of remaining within the relevant jurisdictions." *Certain Softwood Lumber Products from Canada*, 57 Fed. Reg. 22507 (May 8, 1992).

Commerce has not presented substantial evidence to support that market conditions in Canada and the United States are comparable, nor that its attempted adjustments adequately account for such conditions. Stumpage prices vary widely within and between locales, even within the United States. Commerce's use of different U.S. prices as benchmarks for different provinces demonstrates that there is not even a single U.S. price, let alone a world price.<sup>12</sup>

Commerce asserts that the above-quoted statements were made in the context of a different legal framework and that it is not bound by its prior determinations. Clearly Commerce is not necessarily "bound" by its prior determinations and must address factual issues on a case-by-case basis. *Yamaha Motor Corp. v. United States*, 910 F. Supp. 679, 684 (CIT 1995). Each determination is based on a separate administrative record, and this Panel must restrict its examination of the facts to the administrative record. However, if Commerce "intends to depart from a prior position, . . . it must give its reasons for doing so, thereby allowing the Court to understand the basis of the agency's action and . . . judge the consistency of that action with the agency's mandate." *Hoogovens Staal BV*, 4 F. Supp. 2d at 1217.

Most of the reasons listed by Commerce for rejecting cross-border comparisons in the prior lumber determinations are factual in nature. Most of the factual differences exist today and, as discussed in this opinion, are present in the administrative record in this case. Although not necessarily bound by its prior determinations, the opinions expressed by Commerce in those decisions indicate the difficulties inherent in comparing

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<sup>12</sup> See *Canada Cross-Border Report I* at 34, 45, 51-66, 136-48.



timber harvested in the U.S. with that harvested in Canada. In the Panel's view, Commerce has not offered an adequate explanation for its reversal of its earlier position and does not offer new factual circumstances that would now make cross-border comparisons any more reasonable. It is disingenuous for the Department to suggest that a new statutory regime could justify the use of what it already has described as an arbitrary and capricious exercise.

Without burdening this opinion with all the instances of Commerce's heroic effort to divine and then adjust U.S. stumpage prices, a few of the more problematic issues deserve mention. First, the auctions on which the Department bases many of its U.S. prices are for short-term harvesting rights and, in most cases, for mixed species forests, and the harvests were over several years. The Canadian harvests are from land subject to long-term tenure rights, the stumpage is calculated based upon actual harvests of known species, and were done during the period of investigation.

Indicative of the kind of problems encountered by the Department in making its comparisons is that of its use of Washington state benchmarks for British Columbia. In the Preliminary Determination, Commerce indicated that it could not use public (WDNR) auction prices for timber sales, because of log export restrictions imposed by the WDNR. However, in the Final Determination, having insufficient data on private timber prices, it decided to use the WDNR prices as a proxy for private sales. However, there is nothing in the record to support the speculation that the two are comparable.

With respect to the use of Minnesota as a benchmark for Alberta and Saskatchewan, the notion of comparable forests is not supported by substantial evidence. There is no common border between either province and Minnesota. Alberta's major forests are 370 to 750 miles north, and 600 miles east of Minnesota. In addition, there is a significantly different species mix between the two, different climatic conditions resulting in significantly different size trees, and transportation costs to mill are dramatically different.

Likewise, the predominant species in the Boreal forest region, where the vast majority of timber destined for Ontario sawmills is harvested, are softwood trees, especially black spruce and jack pine. Commerce verified that nearly 76% of the standing timber in the Boreal forest is softwood trees. Michigan and Minnesota (benchmarks for Ontario), however, are dominated by hardwoods, which constitute approximately 75% and 69% of the standing timber in the forests of Michigan and Minnesota, respectively. Significant differences in stumpage arrangements, including the rights and obligations of tenure holders, are also present.

In the Preliminary Determination, the Department declined to use USFS auction prices because there appeared to be a lack of credible evidence that the data available

yielded reliable open market values. Yet, in the Final Determination, on the same evidence, USFS prices were used to create benchmarks.

Great difficulties were encountered when trying to equate bid prices for tracts of forest in western Washington because of the species mix. Due to the high value of Western Red Cedar, a common tree in coastal Washington forests, compared with the low value of other species, the parties recognized that using WDNR auction prices for the whole area to be cut, resulted in substantially undervaluing the cedar compared to the other trees. Commerce's attempt to isolate the cedar prices through a regression analysis seems problematic, and in any event, necessarily only an approximation.

Canadian stumpage fees are determined with reference to the cubic metric volume of timber harvested. The U.S. timber harvests are measured in board feet. Commerce, in its Decision Memo, indicates that it tried to arrive at a figure which would convert board feet into cubic meters, and finally arrived at two conversion factors, one for western Washington, and another for the rest of the U.S. The difficulties in arriving at a factor to be used across a broad variety of tree sizes, different scaling techniques, different tree characteristics, taper and other factors made this exercise very problematic. In the end the Department did not develop its own conversion factor, but rather used a study by the ITC from 1983. Reading the Decision Memo suggests that Commerce based the adoption of this factor more as a matter of convenience than following a rigorous analysis of its accuracy. The Panel does not suggest that it would, or even could, substitute its judgment for that of the Department and find a different conversion factor. However, it is difficult for us to say that the adoption of the Department's final position is supported by substantial evidence.

The previous examples of inconsistencies, approximations, assumptions, and compromises demonstrate that it is not possible to conclude that there is a "world market price" for timber.

The Panel is of the opinion that the statute requires an analysis based on market conditions in Canada. By basing its price comparison on prices in the U.S., adjusted inadequately to account for differences in Canadian market conditions, Commerce has construed the statute in a manner that is contrary to law. Pursuant to the Supreme Court's *Chevron* ruling, the Panel owes no deference to Department interpretations of a statute where those interpretations do not reflect a permissible construction of the statute.

There is another point to be made. In Lumber I, the Department commented as follows:

It is not the DOC's policy to use cross-border comparisons in establishing commercial benchmarks *because such comparisons fail to account for differences*

*in comparative advantage between countries.* Furthermore, such comparisons would be particularly inappropriate in these investigations because of differences in such factors as species combination, density, quality, size, age, accessibility, terrain and climate..

48 Fed. Reg. at 24182 (emphasis added).

In other words, as noted in the Canadian Parties' brief, by attempting to value Canadian timber at U.S. prices whether or not adjusted for supposed market conditions, the Commerce methodology turns the law of comparative advantage into a law of comparative disadvantage. No country would negotiate a trade agreement with such an intended result.

In sum, the Panel finds that Commerce's determination with respect to the use of cross-border benchmarks under the authority of Part 351.511(a)(2)(ii) of the Regulations is unsupported by substantial evidence and is contrary to law. The Panel remands this determination to Commerce for further analysis under the statute and regulations in light of the Panel's decision.

In their briefs and in oral argument before the Panel, both the Coalition and the Department suggested that an appropriate measure of adequacy of remuneration would be "fair market value," or what the sellers of timber would receive absent the involvement of the government. Suffice it to say that these standards are not the law as reflected in the statute, the regulations, or even in the Preamble which speaks to actual market transactions as the preferred standard. The Panel rejects this argument.

## **VIII. SPECIFICITY**

In order to find a countervailable subsidy there is another requirement to be met, namely that the subsidy be specific within the meaning of statute. The relevant statutory provision is as follows:

In determining whether a subsidy ...is a specific subsidy, in law or in fact, to an enterprise or industry within the jurisdiction of the authority providing the subsidy, the following guidelines shall apply: . . .

(iii) Where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exist:

(I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis are limited in number.

- (II) An enterprise or industry is a predominant user of the subsidy.
- (III) An enterprise or industry receives a disproportionately large amount of the subsidy.
- (IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.

In evaluating the factors set forth in subclauses (I),(II), (III), and (IV), the administering authority shall take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation.

19 U.S.C. § 1677(5A)(D).

The Department found the provincial stumpage programs to be specific under the statute, stating that stumpage programs are "... limited to those companies and individuals specifically authorized to cut timber on crown lands" and that [t]hese companies are pulp and paper mills and the saw mills and the remanufacturers which are producing the subject merchandise." Decision Memo at 52. Thus, according to Commerce, the users of provincial stumpage programs are "limited in number" within the meaning of 19 U.S.C. § 1677(5A)(D)(iii)(I).

Commerce argues that it is only required to undertake the specificity test "as an initial screening mechanism to winnow out only those foreign subsidies which truly are broadly available and widely used throughout an economy." SAA to the URAA at 4242. It cites, as examples of subsidies that are broadly available and widely used, roads, bridges, schools, police and fire protection. In contrast, the Department points out that the actual recipients of stumpage benefits are a group of wood products industries, including saw, pulp, and paper mills-both primary mills and remanufacturers.

The Department points out that in applying the statute it need not be concerned about *why* the recipients are limited in number, but rather it is only required to determine *whether* the actual recipients were limited in number.

Commerce asserts that it has broad discretion to interpret the Act and regulations. Because its *de facto* specificity findings are evidentiary in nature, the Department's specificity finding must be upheld unless the interpretation is precluded by the statute. Commerce also contends that there is no record evidence that provincial stumpage tenures were widely available to industries beyond the timber processing sector and, taking into account the diversity of the Canadian economy, stumpage programs are not broadly available or widely used.

The Canadian Joint Parties argue that: (1) Commerce is required to conduct a case-specific inquiry into whether the stumpage programs are provided to a specific class of users; (2) Commerce's conclusion that stumpage programs are not broadly available and widely used is contrary to law; (3) Commerce's determination that it need not consider which industries actually use stumpage is contrary to law; and (4) Commerce's conclusion ignores evidence that enterprises in more than 23 classes of industries use stumpage programs and is therefore unsupported by substantial evidence.

Of particular significance to the Canadian Joint Parties is that, as noted in their brief, in prior lumber cases, the Department "... found that the universe of stumpage users did *not* constitute a specific group." In Lumber I, Commerce concluded that "... in view of its use by wide-ranging and diverse industries, we determine that stumpage is not provided to a "specific group of industries." 48 Fed. Reg. at 24167.

Likewise, the reviewing panel in Lumber III rejected the proposition that the subsidy was specific because it was used by timber processing industries, concluding that defining the users of the subsidy as a "group of timber processing industries" was a "... circular (analysis) ... depending on the identification and labelling of the group of stumpage users, rather than upon a reasoned analysis of the businesses in which those users were engaged." FTA Panel Decision (December 17, 1993), at 35. The Canadian Parties argue that the facts have not changed materially since the earlier cases.

Canada has placed upon the record studies that establish that at least 23 separate classes of industries that produce over 200 goods use stumpage programs. As a result, the Canadian Parties take issue with the Department's failure to examine the nature of the stumpage programs, their use, the number of recipients who received the alleged benefits, the number of products affected and the diversification of economic activities in the provinces. In addition, they note that by standard industrial classification, 23 classes of industry utilize stumpage programs, and that the forest product sector was responsible for 2.3% of Canada's gross domestic product.

It follows, according to the Canadian Joint Parties, that Commerce must undertake an analysis to ascertain the actual recipients of the subsidy, and it should not have looked at those companies or industries which did not receive the alleged benefit. Further, in order to determine who receives the benefit, one must first determine what industries are represented. Since the term "industry" is not defined in the context of the specificity test, resort should be had to the definition of "industry" in 19 U.S.C. § 1677(4), which defines the term as "producers as a whole of a domestic like product."

The Department's rejoinder is that none of this supports the notion that the alleged subsidy is available beyond the timber industry, and that in common

understanding, the term “industry” should be taken to refer to the general class of products, rather than to any precise end product. It cites several decisions that indicate that subsidies may be *de facto* specific even to an industry that is broadly defined.

Lastly, the Canadian Parties argue that Commerce was mistaken in its conclusion that the users of stumpage programs are limited to a “group” of wood product industries, as such a “group” does not share common characteristics.

The argument posed by the Canadian Joint Parties with respect to Commerce’s findings in the prior Lumber cases is not persuasive. In Lumber I, Commerce found the Canadian stumpage program not to be specific, based on the “inherent characteristics” test and under a prior statutory regime that was subsequently amended by Congress in 1988. The “inherent characteristics” test was rejected by the CIT in *Cabot Corp. v. United States*, 620 F. Supp. 722 (CIT 1985) and was then abandoned by Commerce.

Commerce’s determination in Lumber III was based on the 1988 statute and relied on a factor contained in the 1989 Proposed Regulations. The Panel in Lumber III ruled that Commerce could not base its decision solely on evidence of the number of industries represented by program recipients, but that it must consider other factors. Following the Lumber III decision, the URAA amended the statute to provide the language set forth above. The CVD implementing regulations to the URAA clarify that in “determining whether a subsidy is *de facto* specific, the Secretary will examine the factors contained in section 771(5A)(D)(iii) of the Act sequentially in order of their appearance.” 19 C.F.R. §351.502(a). The regulations further provide that “[i]f a single factor warrants a finding of specificity, the Secretary will not undertake further analysis.” *Id.*

The SAA to the URAA states, in reference to the definition of specificity in Paragraph 5A of Section 1677, that Commerce is to seek and consider information relevant to all of the factors listed and that the weight to be accorded them will vary from case to case. The SAA adds that “. . . where the number of enterprises or industries using a subsidy is not large, the first factor alone [where access to the subsidy is ‘expressly’ limited ‘to an enterprise or industry’] would justify a finding of specificity . . . . On the other hand, where the number of users of a subsidy is very large, the predominant use and disproportionality factors would have to be assessed. . . . Commerce shall find *de facto* specificity if one or more of the factors exists.” The URAA clarified that Commerce may base its decision only on the first factor, *i.e.*, that the number of industries or groups of industries is limited.

The statute and regulations are clear that, in making its sequential analysis, the Department need only find one of the four factors listed in § 1677(5A)(D)(iii). The Panel can find no error in Commerce’s reasoning that the recipients of provincial stumpage were “limited in number.”

Even if the Panel accepts that there are 23 classes of industries, the number of recipients can still reasonably be considered “limited.” (*See Bethlehem Steel Corp. v. United States*, 223 F. Supp. 2d 1372 (CIT 2002), where Commerce concluded that because 68 of 105 requests for tariff reductions in one period and 51 of 107 requests in another were approved, the recipients of tariff reductions were limited in number.)

Finally, Part 351.502(b) of the Regulations states that “[i]n determining whether a subsidy is being provided to a “group” of ... industries ... the Secretary is not required to determine whether there are shared characteristics among the ... industries ...” This is consistent with the Department’s approach of examining the universe of users, as required by the statute, rather than the diversity of products made with the allegedly subsidized goods to determine if there is specificity. The Panel notes that the concept of a “steel industry” has been accepted by the courts (*see, e.g., Bethlehem Steel*), which produces hundreds of different items and may involve many types of sub-classes. Thus, consistent with the law and Regulations, the Panel finds that Commerce need not consider whether there are shared characteristics among those that receive the alleged benefit.

Under the standard of review which applies to this review, the Panel finds that the Department’s specificity determination is essentially of a factual nature, and must be afforded deference. The Panel also finds that the determination is not precluded by the statute and is supported by substantial evidence.

## **IX. SCOPE DETERMINATIONS AND “CLASS OR KIND” ISSUES**

The countervailing duty statute gives the Department the responsibility as “administering agency” to determine the scope of a CVD order in terms of the “class or kind” of imported merchandise to be included in the order. 19 U.S.C. § 1671(a)(1). The antidumping statute similarly refers to the “class or kind” of imported merchandise in giving the Department the responsibility to determine the scope of an antidumping order. 19 U.S.C. § 1673(1). Although neither statute defines the term “class or kind” and that term is not defined in the Department’s regulations, the general legal framework for the Department’s scope determinations seems straightforward. As was recently stated by the Federal Circuit in *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096 (Fed. Cir. 2002), which addressed both antidumping and CVD petitions, where an investigation is commenced by petition, the “purpose of the petition is to propose an investigation” whereas one “purpose of the investigation is to determine what merchandise should be included in the final order.” Hence, said the Court, “[i]t is the responsibility of the agency, not those who initiated the proceedings [the “petitioners”], to determine the scope of the final orders.” *Id.*, at 1097. Nevertheless the application of that general legal framework has given rise to numerous issues in the present proceeding as in other antidumping and countervailing duty proceedings.

We address the following issues raised by the Department's scope determinations: (A) the Complainants'<sup>13</sup> claim of violation of due process in the Department's consideration of scope issues; (B) the role of the petition and the Department's discretion in making scope determinations; (C) the statutory requirement of industry support for each "class or kind" of merchandise included in the petition; (D) the scope of Panel review of the Department's scope and "class or kind" determinations; (E) whether evidence in the record supports the Department's rejection of separate "class or kind" status for contested species and contested products, and (F) whether exclusion is warranted for two other products.

#### **A. Due Process in the Department's Consideration of Scope Issues**

In this proceeding the Department chose to take up issues relating to the scope of the investigation jointly with the same issues raised in the concurrent antidumping proceeding. The Department noted in its Preliminary Determination that it had received scope requests of three kinds relating to some 50 products: scope clarification requests, scope exclusion requests, and requests for determinations of separate classes or kinds. *See Notice of Preliminary Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. at 43186, 43187 (August 17, 2001). Substantially the same scope issues were raised in the antidumping proceeding. At that time, August 17, 2001, the Department excluded some products from the scope of the CVD investigation, but made no findings on requests for separate class or kind treatment. Thereafter, on March 12, 2002, the Department issued a preliminary determination on scope issues and called for briefs to be submitted by March 15, with rebuttal briefs due March 18, and held a hearing on scope issues on March 19, 2002.

Complainants charge that the Department's truncated process for final determination of CVD scope issues, which they term the "nine days in March" amounts to a denial of due process. The Department responds that it had requested comments on scope issues early in the investigation and specifically invited additional comments in the Preliminary Determination issued August 17, 2001. The Department's argument is as follows:

[By means of the submission of such comments,] all interested parties had notice of the alternatives the Department was considering for the final determination. That is, the record contained requests by some parties to consider certain products

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<sup>13</sup> The term "Complainants" refers to the British Columbia Lumber Trade Council ("BCLTC"), the Ontario Forest Industries Association ("OFIA"), the Ontario Lumber Manufacturers Association ("OLMA"), the Québec Lumber Manufacturers Association ("QLMA"), Tembec Inc., Weyerhaeuser Corp., West Fraser Mills, Ltd., and Canfor Corporation.



as being outside of the scope of the investigation. The record also contained requests by some parties to classify certain products as a different “class or kind” of merchandise. In respect to both types of requests, the record also contained the petitioners’ comments that a number of these requests be denied. Therefore, because these alternatives were on the record, the Department was not required to reach a full preliminary determination on all scope issues. Rather, because the parties had notice of the alternatives being considered, and could address these alternatives in their case briefs, the Department provided the parties with sufficient notice of these issues under the statutory and regulatory regime. [Department’s Response Brief, vol. V, at K-64-65.]

The Department describes the briefing and hearing scheduled for the “nine days in March” as discretionary and extraordinary, as it was not obligated by statute or regulation to request these written arguments or hold a specific hearing specifically addressing only scope arguments. The Department argues that the scope issues were adequately addressed by the opportunity for briefing and the hearing which was held.

The Panel is not persuaded that the Complainants have been denied due process on consideration of scope issues. Although it would certainly have been more reasonable, and perhaps more appropriate, to have allowed for a more leisurely schedule for written comments and for the scope issue hearing, there seem to the Panel to have been no surprises in the content or in the outcome of the scope proceeding. Complainants surely had ample opportunity to submit scope information and arguments in the period following the August 17, 2001 Preliminary Determination, and there is no reason to believe that Complainants, or their experts, were to any significant degree surprised or disadvantaged by the scope arguments put forward either in writing or at the scope issue hearing held March 19, 2002.

#### **B. The Role of the Petition and the Department’s Discretion in Making Scope Determinations: Defining “Class or Kind”**

The threshold substantive issue for the Panel is whether the Department properly determined that this investigation involves but a single class or kind of merchandise. The beginning point in this analysis is not in serious dispute: The Department has the statutory responsibility to determine the class or kind of merchandise subject to an investigation. *See Duferco Steel*, 296 F.3d at 1097 (“[i]t is the responsibility of [the Department], not those who initiated the proceedings [the “petitioners”], to determine the scope of the final orders.” *See also Mitsubishi Elec. Corp. v. United States*, 700 F. Supp. 538, 555 (CIT 1988), *aff’d* 898 F.2d 1577 (Fed. Cir. 1990), and *Torrington Co. v. United States*, 745 F. Supp. 718, 720-21 (CIT 1990), *aff’d* 938 F.2d 1276 (Fed. Cir. 1991). Indeed, the Complainants “do not challenge Commerce’s definition of scope.” Rather the Complainants frame the issue for Panel review as “whether there are multiple classes or kinds of merchandise within the investigation’s scope, as Commerce defined that scope”. *Ibid.*

In determining the scope of the investigation, the Department is guided by, but is not bound by the allegations set forth in the petition. *See Duferco Steel*, 296 F.3d at 1096. As in many other cases, the Court in *Mitsubishi Electric*, 700 F. Supp. at 555, linked the Department's authority to the terms of the petition: "The ITA has the authority to define and/or clarify what constitutes the subject merchandise to be investigated as set forth in the petition containing the intent of petitioner expressed in as specific and definite terms, descriptions, and language as reasonably expected of petitioner...." Thus, although the role of the petition is not specified in the statute, the Department's practice in determining the scope of the final CVD order is to "reflect[] the intent of the petition". *See Minebea Co. v. United States*, 782 F. Supp. 117, 120 (CIT 1992). Indeed, reviewing courts have said that the Department may give "ample deference" to the scope as described in the petition by the petitioners. *Torrington Co. v. U.S.*, 786 F.Supp. 1021, 1026 (CIT 1992), cited with approval in *Sundstrand Corp. v. U.S.*, 890 F.Supp. 1100, 1103 (CIT 1995).

Nevertheless the Department's definition of the scope of the CVD investigation and order presents both the "class or kind" issue and the issue of the extent to which the Department's determination of "class or kind" is subject to judicial review. As noted above, although the CVD statute refers to the scope of a CVD proceedings in terms of the "class or kind" of imported merchandise to be included in the CVD order, the statutory term "class or kind" is not defined either in the statute or in the Department's regulations. *See* 19 U.S.C. § 1671(a)(1). Hence, according to the Department, the matter of "class or kind" is left to the discretion of the Department, and which is guided by the scope as set forth in the petition, and the extent of the harm alleged by the petitioners.

Thus, says the Department:

[T]he scope of an order, as defined by the Department, may appear narrow or broad, depending upon the harm alleged by the Domestic Industry. This has led to separate orders [for separate classes or kinds of merchandise], for example, for roasted and unroasted pistachios from Iran, on one hand, and [to a single] order covering a large array of textiles from Argentina, on the other. *See, e.g., Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Roasted In-Shell Pistachios from Iran*, 51 Fed. Reg. 35679 (Oct. 7, 1986); *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; In-Shell Pistachios from Iran*; 51 Fed. Reg. 8344 (March 11, 1986); *Certain Textiles and Textile Products from Argentina; Final Countervailing Duty Determination*, 43 Fed Reg. 53421 (Nov. 16, 1978). [DOC Response Brief, vol. V, p. K-56.]

The Department explains that if, for example, the "domestic fruit-canning industry" were to claim harm by imports of various forms of fruit, the Department could

include in the CVD order both apples and oranges. But, where the “domestic fresh apple industry” claims injury resulting from imported apples, the CVD order would include only apples. .

In the present proceeding the Department relied upon the petition in determining the overall scope of the CVD investigation as addressing “various forms of softwood lumber from Canada” as a single “class or kind” of imported merchandise. While the scope of the harm alleged in the petition does not necessarily bind the Department to the concept of “class or kind” embodied in the petition, courts have affirmed that the Department’s discretion extends to determining the scope of the investigation and order based upon the allegations of harm in the petition. Accordingly the fact that the Department found but a single “class or kind” of merchandise across a large spectrum of softwood lumber products is not in itself a basis for overruling the Department’s determination.

### **C. The Statutory Requirement of Industry Support for Each “Class or Kind” of Merchandise Included in the Petition**

The examples of scope determinations cited in the previous section point to a link between “class or kind” issues and the degree of industry support needed for a CVD petition. The statute requires that a CVD petition be filed by an “interested party” which the statute defines in terms of producers of “a domestic like product”. *See* 19 U.S.C. § 1671a(b)(1), referring to 19 U.S.C. § 1677(9)(C), (D), (E), (F) & (G). Complainants argue that “domestic like product” must be defined separately for each class or kind of merchandise included in the petition. Hence, according to Complainants, to qualify a petition under 19 U.S.C. § 1677(9)(E), the petitioners (here the Coalition) must show industry support for each class or kind of merchandise. Thus the petitioners must show that “a majority of [its] members manufacture, produce or wholesale a domestic like product” in respect of each class or kind of merchandise included in the petition.

The Department observes that the issue of industry support will arise only if the Panel finds that separate classes or kinds of merchandise are in fact included in the investigation. Since the Department, which found only a single class or kind involved in this proceeding, did not consider the issue of industry support with respect to the asserted separate classes or kinds of merchandise, such a finding would require the Panel to remand to the Department “for further consideration of the legal and factual arguments” involved in the industry support determination.

The Panel agrees with the Department’s analysis. Accordingly the Panel need not address the relationship between “class or kind” and industry support. Should the Panel find that this proceeding involves more than the single class or kind of imported merchandise, the Panel would remand the issue of industry support for reconsideration by the Department.

#### **D. The Panel's Standard of Review of the Department's Scope and "Class or Kind" Determinations**

According to the Department, where there is no "clear consensus" in the evidence on the record "as to the particular merchandise which should or should not be covered by the scope [of the proceeding], a court must affirm the Department's ultimate definition of the scope, as long as its determination is reasonably supported by the record." DOC Response Brief at K-4. In the present investigation, the Department found that "no product subject to the order warranted separate class or kind treatment."

The Department states that it uses the following procedure in determining whether to include a particular product within the scope of a CVD investigation and order:

[T]he Department often considers whether or not individual merchandise subject to the order *differs from other subject merchandise to such a degree, that separate class or kind treatment is warranted*. In determining *if products are so distinct and unique* as to grant such treatment for countervailing duty purposes, the *Department compares the merchandise with all other merchandise covered by the scope*. [DOC Response Brief at K-5 (emphasis supplied).]

In their challenge to the Department's denial of separate "class or kind" treatment for particular products, Complainants assert that if a petition identifies a single class of goods that "in reality" includes more than one class or kind, Commerce is required to subdivide the merchandise into multiple classes or kinds. Only in this way can the investigation properly account for each class or kind, including those which are found not to be properly identified within the Petition. The issue here is not what to do when a petition classifies as a single class or kind merchandise that "*in reality*" constitutes more than one class or kind, it is by what standard the Department is to decide whether a petition includes one or more than one "class or kind" of imported merchandise.

Where the Department must address claims that multiple classes or kinds of merchandise are at issue, Complainants cite *Diversified Products Corp. v. U.S.*, 572 F. Supp. 883 (CIT 1983), and argue that the Department is required to apply the *Diversified Products* criteria to determine if a contested item is a separate class or kind of merchandise.

*Diversified Products* involved an administrative review of an antidumping order which the Department construed as applicable to a product that had not yet been developed at the time of the antidumping investigation. In determining that the newly developed product belonged to the same class or kind of merchandise that was included in the final antidumping order, the Department used the following five broad criteria:

“the general physical characteristics of the merchandise, the expectation of the ultimate purchasers, the channels of trade in which the merchandise moves, the ultimate use of the merchandise, and cost.” 572 F.Supp. at 889. Reviewing the Department’s application of these criteria, the Court upheld the Department’s “class or kind” determination, finding that it was supported by substantial evidence on the record.

The Department points out that *Diversified Products* and its progeny address a “scope ruling” made by the Department in an administrative review of a final CVD or antidumping order – and not an initial scope determination made by the Department in the course of an investigation. Unlike the initial scope determination, the Department’s “scope ruling” is governed by § 351.225 of the Department’s regulations, which provides a procedure by which parties may request what the Department calls a “scope ruling” to determine whether a product is covered by an existing CVD or antidumping order. Subparagraph (k)(1) of § 351.225 directs the Department to base such “scope rulings” on “[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations” of the Department. Where those criteria “are not dispositive,” subparagraph (k)(2) of §351.225 directs the Department to consider the following five criteria:

- (i) The physical characteristics of the product;
- (ii) The expectations of the ultimate purchasers;
- (iii) The ultimate use of the product;
- (iv) The channels of trade in which the product is sold; and
- (v) The manner in which the product is advertised and displayed.

The regulation’s “scope rulings” criteria are identical to the *Diversified Products* criteria, except that the “manner in which the product is advertised and displayed” is substituted for the cost of the product.

Since the present proceeding reviews the Department’s initial scope determination and its refusal to exclude certain products from the scope of the investigation and CVD order, neither the *Diversified Products* caselaw nor the Department’s regulation essentially incorporating that caselaw applies of its own force.

Nevertheless Complainants assert that the Department “*must apply*” the *Diversified Products* criteria to determine whether an item is a separate class or kind of merchandise. Without explicitly abandoning the “*must apply*” proposition of their Case Brief, Complainants’ Reply Brief cites *Torrington*, 745 F.Supp. at 720-29, for the proposition that “the *Diversified Products* factors *are applicable* in original investigations”. Complainants’ Reply Brief at 4 (emphasis supplied). While *Torrington* certainly endorses the Department’s use of the *Diversified Products* factors to address

class or kind issues raised in an investigation, *see Mitsubishi Electric*, cited in *Torrington*, 718 F.Supp. at 723, *Torrington* does not support the proposition that the Department “*must apply the Diversified Products criteria*” in making “class or kind” determinations in an original investigation. Indeed, the Panel has found no authority for that proposition. Hence, although in the exercise of its discretion the Department may choose to apply the *Diversified Products* criteria to “class or kind” determinations in a CVD investigation, the Panel holds that the Department is not bound by law to do so.

In the present case, although the Department’s scope determinations were not “scope rulings” subject to § 351.225 of the Department’s regulations, the Department “recognize[ed] the reasonableness of the *Diversified Products* factors” and chose to use those factors “to guide its determination of whether a particular product should be separated, for purposes of the final order, as a separate ‘class or kind.’” In making such determinations, the Department states that it compared the contested softwood lumber products “with other merchandise subject to the order, and although it found each product to contain certain unique qualities, *none of these products differed to such a degree* from other merchandise subject to the order *to warrant treatment as a separate class or kind* under the order.” [DOC Response Brief at K-8 & 10-11 (emphasis supplied).]

Complainants object to the Department’s analysis on grounds of “law and logic”. Complainants assert, first, that the way in which the Department applied the *Diversified Products* criteria is inconsistent with *Diversified Products* jurisprudence, and, second, that “logic” dictates that the Department must either “compare every product to every other product under the [*Diversified Products*] criteria (which is impractical)”, or must “*compare every challenged product to a benchmark* that represents the same set of core products covered by the scope” of the investigation. Complainants’ Reply Brief at 5 (emphasis supplied).

On the first of these two arguments, Complainants cite a “scope ruling” case, *Bohler-Uddeholm Corp. v. U.S.*, 978 F. Supp. 1176, 1183 (CIT 1997), for the proposition that “a proper *Diversified Products* analysis would compare the products in question to the *entire class or kind of merchandise*” covered by the final order (emphasis supplied by Complainants). Complainants’ Reply Brief at 5. The passage quoted from *Bohler-Uddeholm* may accurately state the *Diversified Products* “scope ruling” methodology. However, the issue here is whether Complainants have established that the Department is required by law to apply the *Diversified Products* methodology to the initial scope determination at issue in the present proceeding. Inasmuch as the Panel has held that that the law does not require the Department to apply the *Diversified Products* criteria to initial “class or kind” determinations in a CVD investigation, the fact that in this proceeding the Department may have departed from the *Diversified Products* methodology in making the initial class or kind determination does not invalidate that determination.

The Complainants' second argument is that the "logic" of class or kind determinations requires the Department to "*compare every challenged product to a benchmark*". Whether or not the Complainants' "benchmark" argument is as logical or persuasive as Complainants contend, their argument is one that the Panel cannot accept. As the Panel observed at the outset of this section of the opinion, although the CVD statute refers to the scope of a CVD order in terms of the "class or kind" of imported merchandise, neither the statute nor the Department's regulations defines the term "class or kind". Since the Department has no statutory or other legal responsibility to apply a "benchmark" analysis to the determination of "class or kind" issues, the Panel considers that the Department has discretion to determine how to apply the "class or kind" concept to carry out the intent of the statute in the context of the facts of each case.

To summarize the dispute as to the methodology for making initial "class or kind" determinations, Complainants argue that the fit of any product within the scope of the final investigation and order must be tested by the *Diversified Products* criteria and will be subject to judicial review under the *Diversified Products* jurisprudence. In contrast, the Department's focus is on the "*degree*" to which a contested product "*differs from other subject merchandise*" and whether the contested product is "*so distinct and unique*" as to warrant separate "class or kind" treatment. See DOC Response Brief at K-5 (emphasis supplied). And, in determining whether contested products are "*distinct and unique*", the Department examines all other merchandise covered by the investigation.

In this investigation, the Department, guided by the petition, gave broad scope to the CVD investigation and order as embracing but a single "class or kind" of imported merchandise, namely "various forms of softwood lumber from Canada". The Department's methodology for initial "class or kind" determinations indicates that the Department treated this determination as a matter of degree. As explained by the Department, the Department's task is to compare the contested product with all other merchandise covered by the CVD investigation to determine whether the contested product is "so distinct and unique" as to differ from other subject merchandise – in which case the contested product would be given separate "class or kind" treatment.

The Panel recognizes that, owing to the limited scope of judicial review of expert agency decisions, the Panel is not authorized to second-guess the Department's expert judgment on such matters of degree. The Panel must therefore affirm the Department's reasonable interpretations of the governing statute, and, in this instance, the methodology chosen by the Department to give effect to the "class or kind" provision of the statute. The Panel must also affirm factual determinations made by the Department pursuant to that methodology unless such determinations are "unsupported by substantial evidence on the record." 19 U.S.C. § 1516a(b)(1)(B). The Panel may not reweigh the evidence or substitute its own evaluation of the evidence for that made by the Department. [See the section on Standard of Review in this opinion.] Thus, although we briefly review the record evidence as to the two contested species and three contested products in the next section, our review is limited to assessing whether in those instances the Department's

denial of separate “class or kind” status is reasonably supported by evidence on the record.

#### **E. Whether Evidence on the Record Supports the Department’s Rejection of Separate “Class or Kind” Status for Contested Species and Contested Products**

As indicated above, review has been sought in respect of two species, namely Western Red Cedar and Eastern White Pine, and three products that the Department held were covered by the CVD investigation and order: Finger-Jointed Flangestock, Square End Bed Frame Components, and Box-Spring “Kits” that are not exported to the United States in individual packages. With respect to the two contested species and the first two of the four contested products, that is, Western Red Cedar, Eastern White Pine, Finger-Jointed Flangestock, and Square End Bed Frame Components, Complainants argue that each species or product is a separate class or kind of merchandise and hence falls outside the scope of the “softwood lumber products” investigation.

In view of the Panel’s findings, the Panel’s review of record support for the contested scope determinations is based on the Department’s approach to scope issues. Accordingly our inquiry in each case is whether substantial evidence on the record supports the Department’s determination that, based on comparisons “*with all other merchandise covered by the scope*” of the CVD investigation, the contested product is not “*so distinct and unique*” as to warrant separate “class or kind” treatment.

With respect to the contested species and the products at issue here, the Department either provided a detailed analysis under each *Diversified Products* factor or addressed only the “factors which arguably distinguished that product from other merchandise covered by the scope of the investigation.” And, in each case, the Department found that although each species or product had properties unique to its species or product type, each was still softwood lumber, and was similar enough under the *Diversified Products* factors with the other scope merchandise to be included in one class or kind of merchandise.

#### **1. Western Red Cedar and Eastern White Pine**

With respect to Western Red Cedar and Eastern White Pine, the Department analyzed all five *Diversified Products* factors. Although extensive counter arguments have been made by Complainants, those arguments cannot overcome the deference owed to the Department on findings of fact and the application of its methodology for determining whether a contested product is “so distinct and unique” as to differ from other subject merchandise. For example, the Department found that many physical characteristics and end-uses invoked to distinguish these two species from other species of softwood lumber were in fact shared in varying degrees with other softwood lumber species. Such characteristics include attractive appearance, light weight, and natural



durability for Western Red Cedar, and structural strength and ability to take stains, paints, etc, for Eastern White Pine; and end uses include high-end use for shingles, paneling, and siding for Western Red Cedar, and millwork, paneling, and siding for Eastern White Pine. The Department made similar analyses of characteristics shared between the two contested species and other species of softwood lumber across the remaining *Diversified Products* factors, that is, expectations of the purchaser, channels of trade, and manner of advertising.

Ultimately the question for the Panel is whether substantial evidence on the record supports the Department's determination to decline to accord separate class or kind status to Western Red Cedar and Eastern White Pine. The Department's determination need be supported only by "substantial evidence", which does not refer either to the weight of the evidence or to the preponderance of the evidence; and the Panel is not entitled to reweigh the evidence in reaching its conclusion. By this standard and in light of the Department's methodology for making class or kind determinations, the Panel considers that substantial evidence on the record supports the Department's determination that neither Western Red Cedar nor Eastern White Pine is "so distinct and unique" as to warrant separate "class or kind" treatment. Hence the Panel affirms the Department's determination with respect to Western Red Cedar and Eastern White Pine.

## **2. Finger-Jointed Flangestock**

Turning to Finger-Jointed Flangestock (hereinafter "FJF"), it is common ground between the parties that FJF "is a softwood lumber product" from Canada. DOC Response Brief, at K-30 (emphasis in the original). Although FJF is an "engineered wood product" with "physical characteristics which make the product unique", the Department determined that FJF "was not so unique as to treat it as a different class or kind of merchandise". DOC Response Brief, at K-30. The Department states that although it had reached this judgment after analysis under all five *Diversified Products* factors, it had explained the judgment in terms of some, but not all, of the *Diversified Products* factors. The Department states that it "determined that the merchandise shared common features with other softwood lumber products and therefore only addressed those *Diversified Products* factors which arguably differentiated this product as unique for purposes of class or kind treatment." Id. at K-33 (emphasis supplied).

Complainants chiefly rely on two arguments in urging that the Department's decision to deny separate "class or kind" status to FJF is contrary to law.

First, Complainants argue that the law requires the Department to apply the complete *Diversified Products* analysis in making class or kind determinations in an original investigation. As shown above, the Panel has rejected this argument on the ground that neither the statute nor the Department's regulations establish a legal responsibility for the Department to use the *Diversified Products* analysis in an original

investigation. Hence the Department has discretion to invoke *Diversified Products* analysis as a guide to its determination, as it did in the present case.

Second, pointing to the rather brief explanation of the Department's FJF "class or kind" determination, i.e., the two paragraphs in the Decision Memo at 165-66. Complainants argue that the determination is not supported by substantial evidence on the record and that the Department failed to provide a clear "path of reasoning which led to the final outcome." See *Wheatland Tube Co. v. U.S.*, 161 F.3d 1365, 1369-70 (Fed Cir. 1998).

The Panel notes, however, that there is record evidence of the uniqueness of FJF, and that the Department's "path of reasoning" shows very little more than that FJF is a "softwood lumber product from Canada" having some *Diversified Product* features in common with other softwood lumber products. Neither element is contested here. What is at issue is whether FJF is "so unique" as to warrant separate "class or kind" treatment in this proceeding.

While the Department acknowledges that the "physical characteristics" of FJF "make the product unique", it asserts that these physical characteristics are not "in of themselves (sic) sufficient to warrant separate class or kind treatment". DOC Response Brief at K-30-31. In the Decision Memo at 165, PR Doc. 863, the Department characterized FJF as "another lumber product in the *broad field of lumber products with distinct characteristics and end uses*" (emphasis supplied). The Department also said: "The particular construction, strength rating, dimension and end-use of flanges cannot be the sole basis for their treatment as a separate class or kind." *Id.* These statements seem to mean that while the Department accepts that FJF has "unique" physical characteristics and end-uses, a showing of a product's unique physical characteristics and/or end-uses may not make the product sufficiently "unique" for separate "class or kind" treatment.

The Department further explained that "FJF's unique length, channel of trade and manner of advertising potentially differentiated this softwood lumber product from other products under the scope." DOC Response Brief at K-33. As to the latter two factors, the Department "recognized" that it had found that the FJF producer Tembec was able to identify "a distinct channel of trade (sales to I-beam producers)" and "a [distinct] manner of advertising (none since it sells all of its flange stock to I-beam producers)", but it "found that this channel and manner of advertising were not so distinct from 'other lumber specialty products'." *Id.* at K-31, quoting from Comment 52, PR Doc. 936. This refers to the Decision Memo where the Department said: "[T]his channel of trade and this manner of advertising, distinct as they are from most dimension lumber, are not so distinct from those of other lumber specialty products." Decision Memo at 165. This seems to mean that a showing of a product's merely "distinct" channel of trade and/or advertising will not make the product sufficiently "unique" for separate "class or kind"

treatment where other subject merchandise shares similar channels of trade and/or advertising.

Putting these statements together as indicating the Department's "path of reasoning", it seems that a showing of any combination of a product's "distinct" and/or "unique" physical characteristics, end-uses, channels of trade, and/or advertising may not make the product sufficiently "unique" for separate "class or kind" treatment where any other subject merchandise shares one or more similar characteristics. Nothing is said about the expectations of purchasers, which is the remaining *Diversified Products* factor, but, as the Department has said, while it looks to *Diversified Products* for guidance, it is not obligated to address every *Diversified Products* factor in an original scope determination.

On the present record the Panel is able to discern the following "path of reasoning": First, FJF is undeniably "softwood lumber from Canada". Second, whereas the physical characteristics and end-uses of FJF are "unique", FJF channels of trade and advertising are merely "distinct" in that these channels also exist for other forms of softwood lumber. We are not clear as to when an "unique" characteristic of a softwood lumber product will be considered by the Department to be sufficiently unique to warrant separate "class or kind" treatment. However, on the final step of evaluating the uniqueness of FJF, the Department appears to consider that evidence showing that channels of trade and advertising similar to those used for FJF are used for other forms of softwood lumber is sufficient to establish that FJF is not "so unique" as to warrant separate "class or kind" treatment.

In a broad scope investigation (such as softwood lumber), the Department's reasoning seems to make it virtually impossible for any specialty product (like FJF) to receive separate "class or kind" treatment. Although (like FJF) the specialty product may be considered "unique" by the Department in respect of physical characteristics and end-uses, and (like FJF) the product is supplied directly to the end-user and therefore not advertised, the product will not qualify for separate "class or kind" treatment. This will be true whenever, as here, the investigation includes a broad array of specialty products some of which (like FJF) will naturally be supplied directly to the end-user and not advertised. This was essentially acknowledged by the Department in the Decision Memo, at 165, in that the Department characterized FJF as "another lumber product in the broad field of lumber products with distinct characteristics and end uses", but rejected separate "class or kind" treatment since other softwood lumber products use the same channels of trade and advertising.

Nevertheless the Panel considers that the Department has discretion to adopt such a methodology in its interpretation of the "class or kind" provision of the CVD statute. The Department is entitled to include in "the broad field of [softwood] lumber products" such specialty products as Finger-Jointed Flangestock, and to choose to be guided by *Diversified Products* factors in "class or kind" determinations. Hence the only question

for Panel review is whether substantial evidence on the record supports the Department's determination that Finger-Jointed Flangestock is not "so distinct and unique" as to warrant separate "class or kind" treatment. Since sufficient record evidence supports the Department's finding that Finger-Jointed Flangestock shares common features (channels of trade and manner of advertising) with other softwood lumber products, the Panel affirms the Department's determination that Finger-Jointed Flangestock does not warrant treatment as a separate class or kind of merchandise.

### **3. Square End Bed Frame Components and Box-Spring Bed Frame Kits**

Separate class or kind treatment for Square End Bed Frame Components (hereinafter "SEBF Components") presents much the same issue as Finger-Jointed Flangestock. SEBF Components are undeniably "softwood lumber products from Canada", and, whereas the physical characteristics and end-uses of SEBF Components may be "unique", SEBF Component channels of trade and advertising are merely "distinct" in that these channels also exist for other forms of softwood lumber. For the reasons stated by the Panel in the preceding paragraph with respect to the "class or kind" treatment of Finger-Jointed Flangestock, the Panel considers that substantial evidence on the record supports the Department's determination that SEBF Components are not entitled to separate "class or kind" treatment.

There is, however, one complicating factor: SEBF Components are "extremely similar" to Radius End Bed Frame Components (hereinafter "REBF Components"), a softwood lumber product that was excluded from the scope of the investigation with the support of the petitioners.

Petitioners specifically identified SEBF Components as within the scope of the petition, but agreed to the exclusion of REBF Components because, whereas SEBF Components "cannot easily be distinguished from other softwood lumber products", REBF Components "can visibly be identified by the unique 'radius cuts' on both ends". DOC Response Brief at K-42, citing Comment 52, PR Doc. 936. Complainants' object to the disparate treatment of SEBF Components (included in the investigation) and REBF Components (excluded from the investigation):

Square End Bed Frame Components necessarily must belong to the same "class or kind" of merchandise as excluded Radius End Bed Frame Components. Examination of the *Diversified Products* criteria reveals that Square End and Radius End Bed Frame Components are *exactly* the same under each of the *Diversified Products* factors, except for the obvious fact that the ends of the Radius End components are rounded. The radius cut corners on the ends of some bed frame components but not others hardly suffice to distinguish the two sets of components. ... Square End and Radius End Bed Frame Components are not sold or marketed as different articles of commerce, or for different uses, or to

different users, or through different channels of trade. [Complainants' Case Brief at 71.]

The Department agreed that "SEBF Components and REBF Components are the same class or kind of merchandise", but argues that this "does not mean that SEBF Components should be included in the exclusion from the order" since:

It is within the discretion of the Department to exclude products which would otherwise be covered by the scope of an investigation. ... There is no statutory, regulatory or other legal authority which has ever required the Department to broaden an exclusion, because it determined that other products were within the same "class or kind" as that exclusion. [DOC Response Brief at K-43.]

The Panel does not consider that the Department's exclusion of REBF Components would necessarily require a similar exclusion for SEBF Components.

Complainants also objected to the Department's treatment of box-spring bed frame kits. As proposed by the petitioners, the Department determined that box-spring frame kits should be excluded from the order, but only if the kits were "individually packaged". Complainants objected, arguing that "the exclusion should be expanded to include 'kits imported in bulk form' because 'individual bundling' is neither common in the industry, nor economical." DOC Response Brief at K-38 (citing record documents). The Customs Service confirmed that the industry-wide practice is "to ship identical bed-frame components bundled together, not in kits." *Id.* at K-39. But Customs also said "that it would be 'problematic to administer and enforce' any exclusion involving kits, whether or not individually bundled, because no HTS classification number recognizes these collections of box-spring frame components." *Ibid.* With this evidence on the record, the Department considered that "from an administrative/enforcement perspective any exclusion of box-spring frame components would be difficult, if not impossible, to enforce." *Id.* at K-40.

Nevertheless, since "petitioners offered on the record their belief that the scope of the order should narrowly exclude box-spring frame components shipped in individual packages", the Department excluded individually packaged box-spring bed frame kits from the countervailing duty order. *Ibid.* In supporting the exclusion of box-spring frame kits, petitioners argued that individual packaging was needed "to prevent manipulation or evasion [of the CVD order] as a result of this exception". Hence petitioners would only support exclusion of "kits which were bundled in such a way that an 'individual package or bundle' would make one bed frame." *Id.* at K-38 (citing record documents).

The Department supports the exclusion order by reference to the broad discretion enjoyed by the Department in determining the scope of an investigation. Since the petitioners supported an exclusion limited to kits shipped in individual packages, and gave reasons on the record in support of that limitation, the Panel considers that the Department's determination to exclude only individually packaged box-spring bed frame kits is supported by substantial evidence on the record.

## **F. Product Exclusions**

In addition to claims for separate "class or kind" status, two types of claims for exclusion of particular products have been submitted to the Panel for review in these proceedings. One is a request by the Canadian Parties to exclude products using lumber that originates in the Maritime Provinces but is reprocessed in other Canadian provinces. The second is a claim by Anderson Wholesale, Inc., to exclude used railroad ties from the scope of the investigation. The Department rejected both claims.

### **1. Reprocessed Maritimes-Origin Lumber**

The Department gave the following reason for rejecting the request to exclude reprocessed Maritimes-origin lumber:

Once the lumber is processed in a non-Maritimes province, it becomes indistinguishable from lumber of other origin and may benefit from subsidies bestowed on the mill. To the extent that a company processing the Maritimes-origin lumber can demonstrate that it does not receive any other subsidies, the company can be excluded from the CVD investigation, and the Maritimes-origin lumber processed in an unsubsidized mill outside the Maritimes provinces is not subject to CVD duties.<sup>14</sup> [Comment 57 at Exclusion 1, PR Doc. 936; DOC Response Brief at K-69.]

Since Petitioners did not allege that softwood lumber originating in the Maritime Provinces is subsidized and should be included in the investigation, softwood lumber produced in the Maritime Provinces and exported directly to the United States is not included in the CVD order. In addition, Petitioners agreed to a Government of Québec request to exclude U.S.-origin lumber that underwent "minor processing" in Québec and was then reexported to the United States. The U.S.-origin lumber exclusion provides:

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<sup>14</sup> The Canadian Parties charge that this latter statement is "disingenuous and belied by the Department's actions, as the Department refused to consider company exclusion applications from all but 30 applicants, all of which were primary mills and not remanufacturers. See Commerce Feb. 20 Exclusions Memo at 3-4, P.R. 750." Canadian Parties Joint Brief at II, 2-3, note 2. The Panel's discussion of company exclusions is in part XI *infra*.

U.S. Lumber shipped to Canada for minor processing and imported into the United States is excluded from the scope of the CVD investigation if the following conditions are met: 1) the processing occurring in Canada is limited to kiln-drying, planing to create smooth-to-size board, and sanding, and 2) if the importer establishes to Custom's satisfaction that the lumber is of U.S. origin. [Quoted from DOC Response Brief at K-68 note 15.]

Nevertheless, Petitioners opposed any exclusion for lumber originating in the Maritime Provinces and reprocessed in Québec, stating that it is "virtually impossible to determine whether a shipment of softwood lumber from a particular company consists *only* of lumber produced from Maritimes-origin wood, unless that company processes Maritimes-origin wood *exclusively*." See DOC Response Brief at K-68. The Panel observes, however, that the exclusion of US-origin lumber reprocessed in Canada does not require that the exporting company process U.S.-origin wood "*exclusively*."

With apparent reference to the inconsistent treatment of reprocessed Maritimes-origin lumber as compared to reprocessed U.S.-origin lumber, the Department asserts that the law does not require it to "treat merchandise within the scope [of the investigation] in a uniform manner with merchandise outside of the scope." The Department relies upon its "broad discretion" both to define the scope of the investigation and to "exclude any merchandise from the scope of an order, as long as the exclusion does not interfere with the relief requested in the petition." DOC Response Brief at K-68-69.

The Panel does not agree that the Department's rejection of an exclusion for reprocessed Maritimes-origin lumber lies within the Department's discretion. In a CVD proceeding, as in any statutory proceeding, it is the responsibility of the Department to give effect to the will of Congress. While the intent of Congress is often difficult to discern, the CVD statute is designed to impose countervailing duties only on imported merchandise that benefits from subsidies conferred by the government of the exporting country. See 19 U.S.C. § 1671(a). In determining the scope of the proceeding, the Department may choose to be guided by the intent of the petition, but neither the petition nor the concerns of the Petitioners can give the Department a legal basis to impose countervailing duties where they are not warranted under the statute.

The parties agree that neither U.S.-origin nor Maritimes-origin lumber receives the subsidy at issue in this proceeding. When such lumber is reprocessed by companies that also process subsidized lumber, there may be legitimate concern that the resulting product may be "indistinguishable" from lumber that the reprocessing company produces from subsidized logs. In such circumstances, the burden will fall upon the producer/exporter to show that, in fact, a particular shipment is derived from unsubsidized U.S.-origin or Maritimes-origin lumber. The U.S.-origin lumber exclusion does exactly that. The Canadian Parties stress that Maritime-origin lumber must be

accompanied by a certificate from the Maritime Lumber Bureau confirming its origin, which may provide a basis for distinguishing reprocessed Maritimes-origin lumber from subsidized lumber. Nothing in the record shows that U.S. imports of reprocessed Maritimes-origin lumber cannot be handled in a fashion similar to U.S. reimports of reprocessed U.S.-origin lumber. Such a procedure would focus the countervailing duties on the subsidized merchandise and ensure that countervailing duties are not imposed on Maritimes-origin lumber when it does not in fact benefit from the subsidies at issue here. The Panel considers that the Department's blanket refusal to exclude reprocessed Maritimes-origin lumber from the scope of the order is inconsistent with the intent of the statute and therefore not authorized by law.

Accordingly the Panel remands the matter of excluding reprocessed Maritimes-origin lumber to the Department for reconsideration in light of this opinion.

## **2. Used Railroad Ties**

New softwood lumber railroad ties are excluded, but used railroad ties are included within the scope of the CVD order. The exclusion of new railroad ties results from the Customs classification of this product under a Harmonized Tariff System heading (HTSUS 4406) that was not included in the petition, whereas the subheading that covers used railroad ties (HTSUS 4407.1000) is included in the petition. Furthermore, although the petition did not specifically identify used railroad ties, Petitioners affirmed that their intention was to include all products covered by HTSUS 4407.1000, including used railroad ties. Complainant Anderson Wholesale, Inc. (hereinafter "Anderson"), an importer of used railroad ties, requests that the product be excluded from the scope of the order.

Anderson asserts that the used railroad ties currently imported from Canada were manufactured either in the 1950's and 1960's, or even earlier, in the 1930's and 1940's, and that it is not known whether such ties consist of softwood or of hardwood lumber, and whether they were manufactured in the provinces subject to the CVD order in this proceeding, or elsewhere, such as in the Maritime Provinces or in the United States. What is known, however, is that imported used railroad ties are no longer fit to be used as railroad ties; they are used as landscape timbers.

Anderson argues that used railroad ties must be excluded because new railroad ties are excluded. However, since Anderson accepts that new and used railroad ties have totally different uses, and are classified by the Customs Service under separate HTSUS



headings, the Department is well within its discretion in treating the two as distinct products, excluding one and including the other within the scope of the investigation.<sup>15</sup>

In rejecting Anderson's exclusion request, the Department relied on the Customs classification and the fact that the petition covers used railroad ties, and asserted that "even damaged, used and old softwood lumber products continue to fall under the scope of our investigations." Comment 52, PR Doc. 936, quoted from DOC Response Brief at K-51. While the Department's comments may be accurate, they do not address two threshold issues presented by the exclusion request: First, are the used railroad ties at issue *softwood lumber* products? And, second, do currently imported used railroad ties benefit from the subsidies at issue in this proceeding?

Since Complainant Anderson accepts that its imports of used railroad ties may be either hardwood or softwood lumber, or both, the Department has discretion to treat the imports as softwood lumber unless Complainant can establish otherwise. And, since Complainant offered no record evidence that its used railroad ties are hardwood lumber, Complainant cannot obtain an exclusion on that basis. However, as Petitioners state in their brief, should a specific shipment of used railroad ties be shown to be of hardwood, that shipment would fall outside the scope of the CVD order since the order extends only to imports of softwood lumber products.

On the second question, Anderson presents two distinct claims that current imports of used railroad ties do not benefit from "stumpage" subsidies. Anderson's first claim is that currently imported railroad ties may have been produced in any one of three jurisdictions: in the United States, in the Maritime Provinces, or in the provinces whose lumber exports are subject to countervailing duties. Since Anderson accepts that its railway tie imports may have been produced in the affected provinces, the Department has discretion to include such imports in the CVD order unless Anderson can establish that a particular shipment had been produced elsewhere. As the Panel held with respect to reprocessed Maritime-origin lumber, where an importer is able to show that its products have not benefited from the subsidies at issue in this proceeding, the Department must exclude those imports from the scope of the CVD order.

Anderson's second claim relevant to receipt of subsidies is that currently imported railroad ties were produced in the 1950's or 1960's, or earlier, and hence should not be subject to the current CVD order even where they were produced in the affected provinces. In response Petitioners argue that Canadian softwood lumber subsidies "date from the beginning of the century." Since nothing further was said on this issue in the Final Determination, the Department apparently relied on the Petitioners' response in

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<sup>15</sup> Indeed the Petitioners call "used railroad ties" a "misnomer", referring to the product imported by Anderson as "creosote-impregnated landscape timbers. See Petitioners' Brief at 675-76.

rejecting Anderson's request for exclusion. *See* Final Determination at 166-67 note 484, PR Doc. 936.

Even assuming that Petitioners' "beginning of the century" reference is historically accurate, there is no basis in the record to attribute to imports of used railroad ties the Department's findings that currently produced softwood lumber products benefit from the current subsidies at issue here. The railroad ties at issue here were produced forty and fifty years ago under different subsidies practices that have not been identified and have not been investigated by the Department in this proceeding. Accordingly the Panel vacates the Department's rejection of an exclusion for used railroad ties and remands the matter to the Department for reconsideration in light of this opinion.<sup>16</sup>

## **X. UPSTREAM SUBSIDIES**

An upstream subsidy is a subsidy on an input the benefit of which is passed through to a downstream product. The provision regarding upstream subsidies permits the assessment of countervailing duties on the downstream product notwithstanding that there is no subsidy provided directly to that product. Conversely, no countervailing duty is to be assessed on the downstream product if the input is not subsidized.

In its Decision Memo, Commerce states that the statutory provision on upstream subsidies does not apply because "no reasonable grounds" exist to believe or suspect that provincial stumpage confers a competitive benefit on the subject merchandise in the form of an upstream subsidy as defined in the law. The Department's rationale for this conclusion is, briefly stated, that both timber (the input) and the downstream products (lumber and remanufactured lumber products) are subsidized because the recipient of the subsidy is the producer of the subject goods. Restated, the manufacturers of the subject lumber and the remanufactured products and the recipients of the stumpage subsidies, are in each case one and the same entity. Further, to the extent that there may be producers of subject goods to whom the subsidy is not passed through, because the investigation is being conducted on an aggregate basis, no upstream analysis is required. Rather, any such company is entitled to a subsequent review to determine a company specific rate. In the case of a party to whom no benefit is passed through, the company specific rate would presumably be zero.

According to section 1671(e) of Title 19:

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<sup>16</sup> The Panel finds no merit in Anderson's additional arguments concerning the relevance of classifications made by the Customs Service or of provisions of the expired Softwood Lumber Agreement, which the Panel agrees has no effect on the Department's determination of the scope of the present investigation.

[w]henver the administering authority has reasonable grounds to believe or suspect that an upstream subsidy, as defined in section 1677-1(a)(1) of this title, is being paid or bestowed, the administering authority shall investigate whether an upstream subsidy has in fact been paid or bestowed, and if so, shall include the amount of the upstream subsidy as provided in section 1677-1(a)(3) of this title.

Section 258 of the URAA defines an upstream subsidy as:

... any countervailable subsidy, other than an export subsidy, that (1) is paid or bestowed by an authority . . . with respect to a product (hereafter in this section referred to as an `input product`) that is used in the same country as the authority in the manufacture or production of merchandise which is the subject of a countervailing duty proceeding; (2) in the judgment of the administering authority bestows a competitive benefit on the merchandise; and (3) has a significant effect on the cost of manufacturing or producing the merchandise.

19 U.S.C. § 1677-1(a)(1).

In determining whether a competitive benefit has been bestowed:

the administering authority shall decide that a competitive benefit has been bestowed when the price for the input product referred to in subsection (a)(1) of this section for such use is lower than the price that the manufacturer or producer of merchandise which is the subject of a countervailing duty proceeding would otherwise pay for the product in obtaining it from another seller in an arms-length transaction.

19 U.S.C. § 1677-1(b)(1).

Part 351.523 of the Regulations provides the specific requirements for the initiation of an upstream subsidy investigation. Before investigating the existence of an upstream subsidy, the Department must have a reasonable basis to believe or suspect that the following elements exist: (1) a countervailable subsidy, other than an export subsidy, is provided with respect to an input product; (2) *inter alia*, the government sets the price of the input product so as to guarantee that the benefit provided with respect to the input product is passed through to producers of the subject merchandise; and, (3) the *ad valorem* countervailable subsidy rate on the input product is equal to, or greater than, one percent. 19 C.F.R. § 351.523(a)(1). An “input product” is defined in the Regulations as “any product used in the production of the subject merchandise.” 19 C.F.R. § 351.523(b).

The Canadian Parties argue that the provincial stumpage programs involve the harvesting of timber, and result in the production of logs. They assert that logs themselves are not within the scope of the investigation, but instead are inputs to the production of the subject merchandise, i.e., softwood lumber.

The Canadian Parties assert that Section 701 (e) of the Tariff Act is unambiguous. Congress' intent in passing the upstream subsidy provision was to address issues such as those found in prior softwood lumber cases and to require the Department to make specific factual findings showing that purchasers of inputs receive a countervailable benefit. Canada asserts that where a subsidy is alleged with respect to an input product, the allegation must be analyzed under the separate upstream subsidy provisions of the statute. Where the purported subsidy is granted to upstream input products -- products that are used in the manufacture or production of the merchandise being investigated -- the link between the purported subsidy and the subject merchandise is, at most, indirect. Therefore, the statutory rules require a determination that the benefit to the original recipient of the subsidy has been "passed through" to the downstream producer of the subject merchandise.

Where the producer of the allegedly subsidized input product (the timber harvester) and the producer of the downstream product (the lumber producer or the remanufacturer) are one and the same entity, the Canadian Joint Parties agree that Commerce need not do an upstream analysis as the alleged subsidy is provided directly to a producer of the subject merchandise. However, it is claimed that Commerce, in this case, has unlawfully presumed that the two are the same, contrary to the evidence.

Canada argues that this presumption is in violation of the statute and that the Department has ignored substantial record evidence establishing that many lumber producers purchase their log inputs in arm's-length transactions and thus receive no benefits directly from provincial stumpage programs. They state that the evidence on the record establishes that independent harvesters harvest timber, and that unrelated sawmills often purchase at arms-length from those independent harvesters. The Canadian Parties point out that nearly one-third of the Crown harvest in several provinces was harvested by harvesters that did not own sawmills. The Canadian Parties claim that Commerce had conceded that some of the harvest goes to loggers not owning sawmills, and that the provinces in their questionnaire responses indicated that these were arms-length transactions. The Canadian Parties state that there was also a request on the record for an upstream subsidies investigation, and that it was Commerce's responsibility to honor that request.

Specifically with respect to remanufacturers, Canada challenges Commerce's decision not to conduct an upstream analysis to determine whether all remanufacturers received countervailable benefits, because some remanufacturers may be stumpage holders and the Department was conducting its investigation on an aggregate basis. Canada is not satisfied with Commerce's decision to leave the interests of

remanufacturers, who may not have received countervailable benefits, to be examined only as part of a subsequent “review” when the proper relief would be considered.

Finally, the Canadian Parties point out that in Lumber III, which was also an aggregate case, the Department acknowledged that it was appropriate to account for arms-length purchases. The Department’s refusal to do so in Lumber III was based upon the claimed lack of evidence regarding the extent of such purchases, but the principle is undisputed. Because the Department did not do so in this case, the Canadian Parties claim that Commerce’s subsidy calculation is invalid and overstates the amount of benefit received by producers of the subject merchandise.

Canada specifically requests that the Panel remand the case to the Department with instructions to exclude arms-length purchasers from application of the order and to exclude from the numerator of the subsidy calculation the benefit attributed to the volume of logs purchased by sawmills in arms-length transactions (and the volume of lumber purchased by remanufacturers in arms-length transactions). In Canada’s view, a remand to Commerce to conduct an upstream subsidy investigation at this time would not be appropriate nor an effective remedy.

Commerce responds by pointing out that when it investigates a product that is upstream to another, but both products are subject merchandise, both products are investigated without the necessity of a separate upstream subsidy analysis because neither is upstream to subject merchandise. Since the scope of this investigation covers both dimension lumber and remanufactured products, and since both are produced by stumpage holders who are directly receiving and benefiting from the countervailable subsidies, an upstream subsidy investigation is not required.

The Department further states that in an aggregate investigation, an upstream subsidy investigation is not required for the small minority of softwood lumber not directly subsidized. Where it is not “practicable” to determine individual exporter or producer subsidy rates, because of the large number of exporters or producers involved in the investigation, Commerce has the option of limiting the examination to a statistically valid sample of exporters or producers accounting for the largest volume of subject merchandise that can reasonably be examined, or determining a “single country-wide rate.” According to Commerce, no upstream subsidy analysis is necessary or appropriate with respect to lumber under investigation, because the “vast majority” of lumber producers receive the stumpage subsidies directly (i.e. through input logs), not indirectly through independent suppliers.

According to the Department, the record demonstrates that the great majority of producers of subject merchandise are tenure holders and thus direct recipients of the benefit provided by the stumpage programs. In British Columbia, for example, 90 percent of the timber harvest originates from Crown lands. More than 83 percent of this

timber is harvested by tenure holders that are, by the terms of the tenure agreements, required to own sawmills. Only about nine percent of the Crown timber has been shown to be harvested by entities that do not own sawmills. As to the remaining eight percent, the evidence is inconclusive regarding the requirement of sawmill ownership in the tenure agreements. Thus, somewhere between nine percent and seventeen percent of Crown timber in British Columbia is harvested by entities that do not own sawmills.

In Quebec, the Forest Act explicitly requires that tenures be granted only to persons authorized to operate a wood processing plant. Similar requirements are found in Ontario, Alberta, Saskatchewan, and Manitoba. For these provinces, the Department estimates that about 95% of timber is harvested by entities that own sawmills.

The Department claims that in spite of the Canadian Parties' reliance on the independent logger they fail to identify any such entities or provide information about the portion of stumpage purchases that may be attributed to them. According to the Department, there are very few transactions by independent harvesters. And those transactions that do occur are restricted by requirements that they sell to mills within the province. These restrictions hamper the harvesters' ability to negotiate freely and force them to sell to specified customers. As the British Columbia government noted, independent loggers operate as employees or contractors for holders of private lands or Crown tenures.

Finally, Commerce asserts that when it conducts an investigation on an aggregate basis, no company-specific rates are determined, except to the extent it has found it practicable to consider certain company-specific exclusion requests. For other producers, Commerce states that a review is the appropriate avenue to determine if there are specific companies that do not receive countervailable benefits.

The Coalition supports Commerce's views, citing *Delverde v. United States*, 989 F. Supp. 218, 224 (CIT 1997), to argue that, when Commerce investigates a product that is upstream to another but both products are subject merchandise, both products are investigated without the necessity of a separate upstream subsidy allegation, because "neither is upstream to subject merchandise." Accordingly, since both first-mill lumber and remanufactured lumber are subject merchandise, the Department may properly investigate both without an upstream analysis. Furthermore, for the Coalition, even if the Department had determined that some independent loggers provided some logs to lumber producers that required an upstream analysis, the Canadian Parties had not provided the Department with the data necessary to conduct such an examination.

The questions which the panel must answer, then, are as follows. First, there is the factual issue as to whether all buyers of logs are the same parties who directly benefit from the stumpage programs so that, as a matter of law, the alleged subsidy can be attributed to the logs which are made available to such mills or producers

(remanufacturers) who are not direct beneficiaries of the stumpage programs. The second question is whether it is permissible to avoid the analysis on the basis that the investigation is conducted on an aggregate basis.<sup>17</sup>

As a preliminary matter, the Panel observes that there is no need for a pass-through analysis when both parties in an arm's length transaction are producers of subject merchandise. The only situation where a pass-through analysis may be required is where the tenure holder is an entity that does not produce subject merchandise, or, in other words, does not own a sawmill.

There is a factual dispute as to the prevalence of independent loggers in this investigation. While the Canadian Parties assert that independent loggers represent a significant portion of the market, the Department has found that overwhelmingly, tenure holders own lumber processing operations. In spite of these assertions, the Department concedes in its brief that loggers that do not own sawmills harvest at least 9 percent of Crown timber in British Columbia. That number is said by the Department to be 5 percent for Saskatchewan and Manitoba. These numbers represent a significant portion of the Crown timber harvest as to which there is uncertainty as to whether the benefit attributable to stumpage pricing may fairly be included in the benefit calculation.

While the Department thus concedes that some independent loggers exist, it asserts that sales by such loggers are *de facto* not arms length sales as the independent loggers are required to sell logs to sawmills pursuant to certain regulatory and contractual provisions. The effect of these restrictions is to force independent loggers to pass the benefit they received by way of their tenures to the purchasing sawmills. The Department describes several mechanisms that achieve this result. In British Columbia, for example, the Department acknowledges that between 9 and 17 percent of Crown timber is harvested by entities that do not own sawmills. Yet the Department found that the British Columbia Forest Act requires that all timber from B.C. lands be processed in British Columbia. In addition, the independent loggers in question are small business operators. These circumstances, taken as a whole, indicate that sales of logs from

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<sup>17</sup> The Panel notes a panel constituted under the WTO recently concluded that, where there is evidence of sales by independent harvesters to unrelated sawmills, and that downstream producers of subject merchandise purchase inputs from unrelated sawmills, Commerce must conduct a pass-through analysis to determine whether the alleged subsidy provided to the tenure holder is passed through to the producer of the subject merchandise. The WTO Panel based its conclusion on the general language of Article 1.1 of the WTO SCM Agreement and reasoned that, if the producers of the subject merchandise are not recipients of the alleged subsidy, a pass-through analysis must be conducted to confirm whether the benefit has been passed along to the finished product. See WTO Panel Report, *United States – Preliminary Determinations with respect to Certain Softwood Lumber from Canada*, at ¶¶ 7.68-7.79 (WD/DS236/R, Sept. 27, 2002).

independent loggers to sawmills that produce subject merchandise are not arms length transactions between independent parties. The Department provided a similar analysis for Quebec, Ontario, and Alberta. On the other hand, the Department conceded that in Saskatchewan and Manitoba there are no similar legal requirements to force harvesters to sell to mills within the province. The Department's decision not to conduct a pass-through analysis for these two provinces was based solely on the fact that about 95% of Crown timber in both provinces was harvested by entities that also hold provincial licenses to operate sawmills.

Factual determinations by the Department must be affirmed if they are supported by substantial evidence on the record. The Panel does not find that, with respect to British Columbia, Quebec, Ontario, and Alberta, there is no substantial evidence to support the Department's determination that sales to sawmills by independent loggers in these four provinces are *de facto* not arms length transactions. The record evidence sustains the Department's finding that the legal requirements imposed upon the sale of logs by entities that do not own sawmills operate to limit their ability to set the price. The Canadian Parties have not challenged this finding. For these reasons, the Department's conclusion that producers of subject merchandise in the four provinces who buy logs from independent loggers have in fact received the stumpage benefit appears not to be inconsistent with the law or to be unreasonable. The Panel affirms the Department's decision not to conduct a pass-through analysis with respect to such transactions in these four provinces.

With respect to Saskatchewan and Manitoba, the evidence in the record is quite different with respect to the Department's decision not to conduct a pass-through analysis. The Department has not addressed the fact, which it accepts, that in both Saskatchewan and Manitoba about 5% of Crown timber is harvested by independent loggers. The Department also notes in its brief that independent loggers in these two provinces are not hampered by requirements regarding domestic processing.

With regard to Saskatchewan, the Department found that about 86% of the harvest was attributable to four major Forest Management Areas tenure holders, all of which own sawmills. *See* Decision Memo at 137. The remaining 14% of the Saskatchewan harvest was conducted pursuant to Forest Products Permits (FFP). *Id.* However, the Department has not determined whether FFP holders are required to or in fact own sawmill operations. *Ibid.*

As to Manitoba, the Department analyzed the various types of license agreements required to harvest Manitoba timber. *Id.* at 128. As discussed in the Department's brief, the license agreements do not require domestic processing. *See ibid.*

In short, the evidence on the record does not warrant an assumption that independent harvesters are limited in their ability to set the sale price of their logs and



thus are not capable of retaining the stumpage benefit in sales to sawmills. Thus the record lacks a reasoned basis for the Department's decision not to conduct a pass-through analysis for independent logger transactions in Saskatchewan and Manitoba. Nevertheless we are mindful that the parties bear the burden of developing the record in a countervailing duty proceeding. *See Mannesmannrohren-Werke AG*, 120 F. Supp. 2d 1075, 1087 (CIT 2000). As set out in the Department's regulations, "The Department obtains most of its factual information in antidumping and countervailing duty proceedings from submissions made by interested parties during the course of the proceeding." 19 C.F.R. § 351.301(a). Since the record lacks evidence of the extent of arms length transactions in sales by independent loggers to sawmills in Saskatchewan and Manitoba, the Panel affirms the determination of the Department not to undertake a pass-through analysis of such transactions.

## **XI. COMPANY EXCLUSIONS AND COMPANY-SPECIFIC DUTY RATES**

### **A. Company Exclusions**

The Department's regulations allow it to exclude from an aggregate case an exporter or producer for which it determines an "individual net countervailable subsidy rate of zero or *de minimis*." 19 C.F.R. § 351.204(e)(1). The Department uses this mechanism to exclude from a countervailing duty order parties that receive no subsidy or receive a subsidy that is *de minimis*.

In the Notice of Initiation, Commerce stated that "it anticipates creating a system that will allow us to expeditiously process and rule on these exclusion requests without compromising the integrity of the CVD law, while, at the same time, ensuring fairness and transparency in the treatment of the exclusion requests." 66 Fed. Reg. at 21335. Commerce explicitly sought "the cooperation of the Government of Canada and the provincial governments in implementing any such system." *Id.*

In response, the Government of Canada filed a proposal in May 2001 setting forth a process by which Commerce could review company exclusions. The Government of Canada agreed to collect and file exclusion requests and certifications, to categorize the applicants and to provide company-specific data. The Department took no action on the proposal, but in August 2001, it issued a decision memorandum that established a system to process exclusion requests. In the memo, the Department accepted the Canadians' proposal, with certain clarifications. The Department also stated that it would consider applications for exclusion prior to the issuance of the preliminary determination if filed within eight days. Despite the short deadlines, the Canadian Parties filed 95 applications for exclusion.

In the Preliminary Determination, Commerce stated that, with one exception, it was not granting any of the exclusion requests because certain information had not been

provided. The Department also stated that it “intend[s] to continue working closely with both individual requesters and the [Government of Canada] on this issue as the investigation proceeds.” 66 Fed. Reg. 43188.

The Canadian Parties claim they then expended significant resources to revise the company exclusions process to satisfy Commerce. For example, a specific office was established by the Government of Canada to oversee the exclusion request process and an independent consulting firm was retained to ensure quality control. Significant time was spent gathering the required information and categorizing the applicants into groups. Ultimately, more than 350 requests for exclusion were filed.

Despite receiving cooperation from the Canadian and provincial governments, and despite their spending considerable time developing and implementing a system to submit requests for company exclusions, Commerce declined to consider the requests submitted on the grounds of impracticability.

In the Final Determination, the Department stated that it found it practicable to consider only 30 of the more than 350 company requests for exclusion it had received. In its Decision Memo, Commerce explained that its methodology for examining exclusion requests was based on an “input source” criterion, because this was simple, factual and easily verifiable. Using an “input source” criterion, Commerce considered whether the subject logs were sourced from the Maritime provinces, from private lands or sources other than Crown land. Company exclusion applications that relied on other bases for exclusion, such as arm’s length transactions, were not considered or granted. This, Commerce explained, was because such transactional bases for exclusion required extensive investigation and analysis, which would have been too difficult to do for each company within the time limits of the Final Determination. It would also be beyond the scope of the limited exercise envisioned under the regulations for consideration of company exclusions in an aggregate case.

Section 777A(e)(2)(b) of the Act gives the Department discretion to “determine a single country-wide subsidy rate” when “it is not practicable to determine individual countervailable subsidy rates . . . because of the large number of exporters or producers involved.” 19 U.S.C. § 1677f-1(e)(2).

Commerce’s regulations state that it “will exclude from an affirmative final determination under section 705(a) . . . any exporter or producer for which the Secretary determines an . . . individual net countervailable subsidy rate of zero or *de minimis*.” 19 C.F.R. § 351.204(e)(4). The Department’s regulation vests the agency with the discretion to “consider and investigate” exclusion requests “to the extent practicable.” 19 C.F.R. § 351.204(e).

The authority to grant exclusions from an aggregate subsidy rate is conditioned by specific requirements aimed at ensuring that the basis upon which the request is granted is reliable or verified. Pursuant to 19 C.F.R. § 351.204(e)(4), an exporter or producer that desires exclusion from an order must submit the following information:

- (i) A certification by the exporter or producer that it received zero or *de minimis* net countervailable subsidies during the period of investigation;
- (ii) If the exporter or producer received a countervailable subsidy, calculations demonstrating that the amount of net countervailable subsidies received was *de minimis* during the period of investigation;
- (iii) If the exporter is not the producer of the subject merchandise, certifications from the suppliers and producers of the subject merchandise that those persons received zero or *de minimis* net countervailable subsidies during the period of investigation; and,
- (iv) A certification from the government of the affected country that the government did not provide the exporter (or the exporter's supplier) or producer with more than *de minimis* net countervailable subsidies during the period of investigation.

The Canadian Parties argue that Commerce's decision to consider only 30 applicants is an abuse of discretion. Although the Canadian Parties agree that the regulations give the Department some discretion on exclusions, they assert the discretion is limited. Canada claims that it is an abuse of discretion to commit to consider applications for exclusion and then claim impracticability.

According to the Canadian Parties, the statute required Commerce to conduct an upstream subsidy investigation to determine whether any alleged subsidy was passed through to downstream purchasers. (*See* the previous section on upstream subsidies for a discussion of the issue.) They claim that if the Department had not refused to do so, two-thirds of the exclusion applicants who applied as arm's length purchasers of logs or lumber would have been found unsubsidized in the upstream subsidies investigation and would have had no reason to apply for exclusions. Canada asserts that Commerce cannot lawfully claim that the number of applicants made its task impracticable, when the number of exclusion applicants was a direct result of its own failure to abide by the statute on upstream subsidies.

According to Canada, Commerce's claim that it was too complex to determine affiliation, or to determine whether transactions were at arm's length, show that its line drawing was not reasonable. There were groups of applicants that had no affiliation with the tenure holder, and the Department's own "Exclusions Memo" stated that transactions between unaffiliated parties are deemed to be at arm's length. Each of the company applicants -- at least those whose applications were submitted by the Government of

Canada and many others -- was advised on the definition of affiliation and certified to its affiliates or their absence. The Canadian Parties assert that Commerce did not adhere to its own bright line rule of excluding only companies basing their applications on source, and had abused its discretion in the exclusion process.

Canada points out that in Lumber III, Commerce had recognized that remanufacturers, who hold no crown stumpage rights, are not affiliated with crown stumpage holders, and purchase their inputs at arm's length, should be excluded from a countervailing duty order, going well beyond the regulatory requirements for exclusion. The Department's procedures for accomplishing this are either through company exclusion requests or through the investigation and promulgation of company-specific rates.

For its part, Commerce argues that it has ample discretion to decide whether to consider requests for company exclusion. The Department states that the statute and regulation make clear that it may consider requests only to the extent practicable, and that it is not required to grant all requests for exclusion. Commerce argues that it was within its discretion to decide the basis for what is practicable, and that it was reasonable to conclude that considering over 350 company exclusion requests would not be practicable. The Department considers that, in administering the law, it has discretion in the choice of methodology as long as the chosen methodology is reasonable and its conclusions are supported by substantial evidence on the record.

Commerce also states that it had not received all of the information required under 19 C.F.R. § 351.204(e)(4)(i)-(iv) at the time of its decision.

According to Commerce, conclusions reached by the Panel in Lumber III remain valid, specifically where the Panel:

upheld the Department's decision not to exclude 334 companies because the investigation would be "impracticable";  
accepted that when country-wide aggregate rates are assessed, a CVD is imposed on the merchandise equal to the amount of the country's net subsidy, not the amount of the subsidy in fact received by the company; and  
recognized that Commerce was not legally required to grant company exclusion requests in an aggregate case.

In sum, Commerce asserts that, in investigations conducted on an aggregate basis, the exclusion of companies is totally within its discretion. Its decision was consistent with Lumber III, was supported by substantial evidence on the record and was in accordance with the law.

The Coalition agrees with Commerce, arguing that neither the statute nor the regulations require the Department to consider all exclusions in an aggregate case. At most, the law gives the agency discretion to determine whether it is practicable to consider and investigate, based on, *inter alia*, the number of exclusion requests, the complexity of the issues that must be considered and the overall complexity of the case. Company exclusion investigations, it is argued, are of secondary importance to the statutorily mandated issues, such as completing the aggregate investigation itself. The Department properly balanced the mandatory tests against the discretionary tests, and made an appropriate decision in light of its available resources.

The Panel considers the arguments raised by the parties in accordance with the standard of review set forth above, namely whether Commerce's decision is reasonable, supported by substantial evidence and is otherwise in accordance with the law.

The Panel first notes that the language of Section 777A(e)(2) of the Act and the applicable regulations clearly provides the administering authority with considerable discretion to decide whether to consider requests for company exclusion.

The Panel is mindful that the panel in Lumber III concluded that the "bright line" criterion the Department had chosen in that case to limit its investigation was reasonable, and that a Panel may not substitute its own bright line nor remand the decision, unless the decision is an "abuse of discretion" or a decision that "no reasonable agency could have made in the circumstances." The Lumber III Panel had also concluded that it was proper for Commerce to determine a country-wide aggregate rate and apply it to all companies, even those claiming exclusion based on zero or *de minimus* subsidies.

Nonetheless, the Panel finds that Commerce failed to properly apply its own "input source" criterion by failing to grant applications submitted by all companies that relied on the source of their lumber as the basis for exclusion. These companies included those that salvage used railroad ties, barnboard or other "old wood" from demolished buildings, riverbeds, etc. These applicants submitted letters indicating that they did not hold Crown stumps and did not benefit from any subsidy. The timber harvesting happened decades ago and was clearly not done during the POI. These applicants could not have benefited from the alleged subsidy and presented the source of their inputs as the basis of the application. As Commerce failed to provide a rational basis for not considering these exclusion applications, especially in the face of its own policy of considering applications based on "input source," the Department's determination in this regard is unsupported by substantial evidence and is contrary to law. The Panel remands this issue to Commerce for consideration of those additional companies whose applications were based on input source.

The Panel is troubled that Commerce gave assurances to the Canadian Parties that their exclusion requests would be seriously considered and sought their cooperation in establishing a system of review, when it should have fully anticipated the number of requests it would receive given the number submitted in past lumber cases. Given that in Lumber III Commerce received 334 requests for exclusion, the agency should have allocated the proper amount of resources to adequately consider a comparable number in this case after it announced its intention to establish a system to process the requests received. Moreover, it was the Department's own delay that, at least in part, created the impracticability.

The Panel believes that by conducting the case on an aggregate basis, as an exception to the general rule in favor of establishing individual company CVD rates, the bar has been raised for Commerce to consider applications for exclusion fairly and to allocate the resources necessary to do so. This is particularly relevant in instances such as this where the Department has declined to conduct an upstream subsidy analysis. The Panel is disappointed that Commerce failed to do so.

Nonetheless, with the exception of the one category of applicants noted above whose applications were based on input source, the Panel is of the opinion that the statute and the regulatory grant of discretion is sufficiently broad so as to permit Commerce to reasonably conclude that consideration of the more than 350 applications for company exclusion would be impracticable. Thus, the Panel concludes that Commerce's decision is supported by substantial evidence and is otherwise in accordance with the law.

## **1. Goodfellow**

Goodfellow Inc. ("Goodfellow"), a Canadian softwood manufacturer, submitted a brief contesting Commerce's failure to consider its request for a company exclusion on the grounds that it had not received countervailable subsidies. The company explains that it purchased lumber for the production of remanufactured products from unaffiliated suppliers in 'arm's length transactions.' Goodfellow also claims that lumber purchased for same-condition re-sales was purchased in 'arm's length transactions' and thus any benefit received from such sales was *de minimis*. Goodfellow maintains that Commerce's failure to consider exclusion requests is particularly egregious in light of the agency's failure to conduct an upstream subsidy analysis.

For the reasons set forth above in relation to arguments raised by the Canadian Parties, the Panel determines that Commerce was not obligated to consider or grant Goodfellow's request for a company exclusion and that the agency's decision in this regard was supported by substantial evidence and was otherwise in accordance with the law. Nevertheless, the Panel's disappointment as expressed above is particularly relevant in this case.

## 2. MLTC/NorSask

The Meadow Lake Tribal Council (“MLTC”) and NorSask Forest Products Inc. (“NorSask”) submitted a brief in support of Canada's claim that provincial stumpage did not constitute countervailable subsidies. MLTC/NorSask specifically argue that the First Nations of Northern Saskatchewan (“First Nations”) cannot be said to benefit from a countervailable subsidy, because aboriginal rights over their traditional lands and their treaty rights are "*sui generis*" and constitute a "unique market characteristic," relying on certain Canadian caselaw which they claim supports such principles.

Because the unique characteristics of the First Nations had not been considered by Commerce, MLTC and NorSask ask the Panel to remand to Commerce with instructions to: a) provide a reasoned analysis as to the unique characteristics of the aboriginal rights over their traditional lands; b) determine that exports of softwood lumber into the United States from MLTC/NorSask are exempt from CVDs; and c) determine that exports of softwood lumber from First Nations' forestry operations constitute a special category of exclusion from the imposition of CVDs.

Commerce argues that MLTC and NorSask fail to show how, under U.S. trade law, the existence of aboriginal rights in their lands constitutes a special characteristic that would negate the existence of a benefit. MLTC/NorSask argued in their exclusion request that, because of their aboriginal proprietary rights in the land, benefits received do not amount to a countervailable subsidy. Commerce maintains that this is not a proper use of company exclusion requests, which are a vehicle for exporters or producers to demonstrate that they fulfil the minimum certification requirements for potential exclusion from a CVD order.

The Department further argues that it does not have the authority to consider the status of aboriginal rights on Canadian lands or matters of self-government arrangements of the First Nations, which are matters of Canadian law. These issues are not relevant to its determination or to its consideration of MLTC/NorSask's exclusion request. If MLTC/NorSask's request for exclusion had been rejected, it was because it had neither provided supporting calculations nor the government certification required under regulations at 19 C.F.R. § 351.204(e)(4).

Finally, the Department claims it had not received the information it requires for providing an exemption when it conducts a CVD investigation on an aggregate country-wide basis. In particular, there must be a certification that an exporter or producer received zero or *de minimis* countervailable subsidies. If *de minimis* subsidies are alleged, supporting calculations must be provided and there must be a government certification accompanying the exclusion request.

For the reasons set forth above, the Panel finds that Commerce had the discretion not to consider MLTC/NorSask's exclusion request and that the agency's decision was supported by substantial evidence and was otherwise in accordance with the law.

## **B. Company-Specific Duty Rates**

Two companies, Canfor Corporation ("Canfor") and Tembec Inc. ("Tembec") requested a company-specific countervailing duty rate.

Canfor claims to be the largest producer in Canada and exporter to the United States of softwood lumber covered by this investigation. On May 30, 2001, Canfor filed a letter with Commerce requesting that a company questionnaire be prepared and submitted to Canfor. Commerce did not respond to the request. In the Final Determination, Commerce stated that the statute and regulations generally do not provide for voluntary respondents in aggregate cases.

Tembec filed a request for a company-specific duty rate with Commerce on December 21, 2001 and re-submitted its request on February 21, 2002. The December 21 submission contained what Tembec claimed to be the information required for the calculation of an individual countervailable subsidy rate. The Department stated in its Decision Memo that the company had not filed its request for a company-specific determination within the deadline set in section 782 (a)(1)(B) of the Tariff Act. Commerce also stated that Tembec had not provided the necessary certifications required under section 351.204 (e)(4) of the Act.

Section 777A(e)(2) of the Tariff Act (19 U.S.C. § 1677f-1(e)(2)) provides that, where it is not practicable to determine individual countervailable subsidy rates under section 777A(e)(1) of the Act because of the large number of exporters or producers involved in the investigation or review, the administering authority may:

(A) determine individual countervailable subsidy rates for a reasonable number of exporters or producers by limiting its examination to (i) a sample of exporters or producers . . . , or (ii) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country . . . ; or,

(B) determine a single country-wide subsidy rate to be applied to all exporters and producers.

This is an exception to the general rule established in section 777A(e)(1) of the Tariff Act (19 U.S.C. § 1677f-1(e)(1)), which provides that "the administering authority



shall determine an individual countervailable subsidy rate for each known exporter or producer of the subject merchandise.”

These provisions were introduced by the URAA of 1994. The SAA of the URAA explains that:

[s]ection 265 of the implementing bill repeals section 706 (a)(2). It eliminates the presumption in favor of a single country-wide CVD rate and amends section 777A of the Act to establish a general rule in favor of individual CVD rates for each exporter individually investigated. In addition, instead of examining a limited number of individual exporters and producers, section 777 A (e)(2)(B) would permit Commerce to calculate, on the basis of aggregate data, a single country-wide subsidy rate to be applied to all exporters and producers of the subject merchandise.

Pursuant to 19 U.S.C. § 1677m(a), in any investigation or a review in which the administering authority has limited the number of exporters or producers examined, or determined a single-country-wide rate, the administering authority is to establish an individual countervailable subsidy rate for the exporters or producers selected for examination, if:

such information is so submitted by the date specified: (A) for exporters and producers that were initially selected for examination; or, (B) for the foreign government, in a CVD case where the administering authority has determined a single country-wide rate; and,

the number of exporters or producers who have submitted such information is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation.

Canfor argues that the only reasonable interpretation of the countervailing duty statute is that it compels the agency to accept voluntary responses in aggregate cases unless the number of exporters or producers who submit such information is so large that individual examination of them would be unduly burdensome and inhibit the timely completion of the investigation. Canfor claims that the number of respondents is not excessive and that Commerce acted unreasonably in not responding to its request for a questionnaire.

Tembec claims that it provided Commerce with the information necessary to calculate a company-specific rate three months before the final determination was due, and two months before Commerce undertook examination of some 30 companies requesting exclusion. Tembec asserts that it was the only company to voluntarily submit

information to calculate a company-specific CVD rate and that the number of exporters seeking individual rates was not so large so as to be unduly burdensome. Tembec requests that the case be remanded to Commerce with instructions to calculate a company-specific rate for Tembec based on the evidence of record.

The Canadian Parties add that, in relation to Tembec and other producers or exporters who may request a company-specific rate, Commerce had an obligation under 19 U.S.C. § 1677m(a)(2) to provide company-specific rates when the number of exporters or producers concerned is not too large. The Canadian Parties agree with Tembec that its request was timely and that the Panel should provide relief.

Commerce asserts that in a country-wide aggregate investigation, calculation of individual rates is not an option. Commerce reasons that, in an aggregate country-wide countervailing duty investigation, all exporters or producers are assigned the same countervailing duty rate, even if some, had they been investigated individually, would have received higher or lower rates. The very nature of the concept of aggregate rate investigations inheres in not determining individual rates because of the extraordinary burden of doing so for a large number of respondents. The regulation discussing voluntary respondents (19 C.F.R. § 351.204(d)) references other situations where voluntary responses are applicable, but does not mention its application to investigations conducted on an aggregate basis.

The Panel is mindful of the standard of review applicable to this case and states again that an agency's statutory interpretation is to be upheld if it is "sufficiently reasonable," even if it is not "the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding." *American Lamb, supra*, 785 F.2d at 1001 (citing *Chevron*). The Panel is of the view that Commerce's interpretation of the statute and its own regulation is not unreasonable and that it did not have a statutory or regulatory obligation to consider Canfor and Tembec's request for company-specific duty rates. Thus, the Panel finds that Commerce's decision to decline to consider Canfor and Tembec's request for a company-specific rate to be supported by substantial evidence and to otherwise be in accordance with the law.

## **XII. CALCULATIONS**

Claim I: The Department failed to determine the exact amount of the benefit that is attributable to softwood lumber products

The Canadian Parties argue that the Department did not determine the exact portion of the benefit that can properly be attributed to softwood lumber. Apart from softwood lumber, processing of logs obtained through stumpage programs yields co-products such as chips and sawdust that have commercial value. In their brief, the

Canadian Parties cite numbers in the range from 31-56 as the percentage of the wood volume used to produce softwood lumber. They contend that by failing to apportion the appropriate amount of the benefit to co-products and subtract that amount from the amount apportioned to softwood lumber products, the Department inflated the benefit received and assessed a duty higher than the subsidy received. At the hearing, counsel for the Canadian Parties cited *Kajaria Iron Castings Ltd v. United States*, 156 F.3d 1163 (Fed. Cir. 1998), as authority that requires the Department to net out the benefit of the subsidy provided that the necessary data was available. According to Canadian counsel, the necessary data was available.

The Canadian Parties argue that the Department's calculation methodology was in violation of §701(a) of the Tariff Act and Article 19.4 of the SCM Agreement, both of which require that countervailing duties shall not exceed the value of the subsidy. They claim that as a consequence of this method of calculation, the CVD rate was increased by 8 percentage points.

Commerce points out that the statute does not provide specific guidance on the method of calculating subsidy rates. Consequently, Commerce claims it has broad discretion to devise a methodology consistent with the statute. The Department relies on its regulations, specifically 19 C.F.R. § 351.525(a), which provides that in calculating the *ad valorem* subsidy rate, the total benefit shall be divided by the total sales to which the benefit applies.

In this case, the Department argues that the subsidy provided is used to produce both subject and non-subject merchandise. The regulations address this issue by allocating the benefit to all products to which the subsidy applies. The Canadian Parties claim that the Department should have determined what portion of the logs are used to produce subject merchandise and calculated the benefit based on that volume is contrary to the Department's regulations. Commerce points out that sawmills must process the entire log in order to produce lumber. Any unfairness that might result by calculating the benefit based on the total volume of logs that entered sawmills is eradicated by allocating the total benefit not solely to sales of subject merchandise but to sales of all products that originate from processing of logs.

In examining this question, the Panel must assess whether the Department's method of determining the numerator of the subsidy rate fraction is consistent with the governing statute. More precisely, the issue is whether the Department should have calculated the amount of the benefit by multiplying the price differential by the total volume of logs that entered sawmills or just the volume of wood fiber that eventually ended up as subject merchandise.

The calculation of the subsidy rate is governed by the statute and the regulations promulgated by Commerce. The Panel agrees with Commerce that the statute does not

provide detailed guidance in this matter but supplies a general principle that the CVD rate should not exceed the benefit provided. *See* 19 U.S.C. § 1671 (providing that "there shall be imposed . . . a countervailing duty, in addition to any other duty imposed, *equal to the amount of the net countervailable subsidy*) (emphasis added). The Panel thus turns to the regulations and must determine whether the Department properly applied its regulations in this matter. The Panel notes that the Department is entitled to deference in interpreting its own regulations unless such an interpretation is clearly erroneous. *Thomas Jefferson, supra*, 512 U.S. at 512. The Panel concludes that Commerce properly adhered to the regulations and affirms.

The Department relies on 19 C.F.R. § 351.525(b) for the principle that a subsidy will be attributed to the products that it would most likely benefit from it. The nature of the subsidy will in most cases determine to which products it will be attributed. An export subsidy by its nature benefits the producer only when it exports its products and thus will not be attributed to the producer's domestic sales. *See* 19 C.F.R. § 351.525(b)(2). Similarly, subsidies that are conditional on the sale of products on a certain market will be attributed only to products sold on that market and not to products sold on other markets. *See* 19 C.F.R. § 351.525(b)(4). Commerce points out that the provision of timber by the Government of Canada and the provincial governments through stumpage programs is not tied to any specific product. Thus, any subsidy that might arise from the operation of these programs must be attributed to all products that result from the processing of logs that enter sawmills.

The Canadian Parties do not contest this principle but argue that it is possible to determine the benefit that is attributable solely to the subject merchandise. In their view, once this apportioning of the benefit is carried out, there would be no need to attribute the entire benefit to all products that result from the processing of logs, but instead to attribute to the subject merchandise only that portion of the benefit that is properly attributable to the subject merchandise. According to the Canadian Parties, this would result in a more accurate subsidy rate.

As Commerce points out, sawmills purchase logs for the sole reason of processing them into lumber. The fact that discarded material in the form of chips and sawdust has some commercial value does not negate the fact that the value of the log is determined by its conduciveness to be processed into lumber. Thus, the price of a log is driven by the ultimate volume of lumber that will be derived from it. If genetic engineering could produce a log of such shape that nearly 100% of its volume could be processed into lumber, that log would surely be much more valuable than a conventional log of the same total volume that can yield only 40-50% of its volume in lumber.

To illustrate by way of an example with hypothetical values, when a sawmill pays \$10 for a log that is 10 cubic meters in volume and ends up with 4 cubic meters in lumber by processing the log, the \$10 initial sales price is determined to a large extent by the value of 4 cubic meters of lumber and only to a very small extent by the value of 6 cubic

meters of chips or sawdust. The Canadian Parties' approach would have us believe that the sawmill paid \$4 for the portion of the log that it used to make the lumber. This would be true only if the 6 cubic meters of chips or sawdust were equal in value to 6 cubic meters of lumber. Even the Canadian Parties concede that this is not the case.

Assume that lumber is valued at \$5 per cubic meter and that by-products sell at 0.50 cents per cubic meter. The sawmill would thus earn \$20 from the sale of lumber and \$3 from the sale of by-products. To tailor this analogy to the factual scenario in this investigation, assume that the same log is sold in the United States for \$15 and that the sawmill thus receives a \$5 benefit. Under the Department's method, the subsidy rate would equal  $5/23$  or 21.7%. The Canadian Parties' proposed calculation would require that the benefit be discounted at 60% as that represents the volume of wood fiber that became by-products. The subsidy rate fraction thus becomes  $2/20$  or 10% -- a marked difference. The Canadian Parties' methodology would result in a government subsidy to by-products of 100% (\$3 benefit divided by \$3 in sales) -- a commercially improbable result.

The Canadian Parties' argument rests on the premise that every cubic centimeter of wood in a log processed in a sawmill is of equal value. As counsel for the Department pointed out at oral argument, the subsidy rate is determined by value and not volume. Even if it were possible to separate the volumes that went into the production of lumber and by-products, the correct amount of benefit that was received for the production of subject merchandise can never be determined by reliance on volume alone. The relative values of such volumes would have to be factored into the calculation in order to achieve a proper result. Keeping with the above hypothetical figures, the total volume of wood fiber that is used to produce lumber is worth 10 times more than the volume used to derive by-products. In other words, the 60% of the volume that ended up as by-products accounted for only 13% (\$3 is 13% of \$23) of the sales value. If any discounting were to be done, it would have to reflect the ratio between the sales values of lumber and by-products. Under this method, the subsidy rate for the lumber would equal  $4.35/20$  (\$5 benefit discounted at 13% equals 4.35) or 21.7% -- the same rate achieved by the Department's calculations.

The Panel notes that the determination of the value of the benefit cannot be subjected to one principle but will depend on the facts of each individual case, the nature of the benefit being provided, and the manner in which the benefit is being provided to the recipient. In the case relied upon by the Canadian Parties, *Kajaria Iron Castings*, a complex tax subsidy case, two classes of merchandise were involved: (1) certain castings (the "subject merchandise") which received tax rebates termed "CCS rebates", and (2) certain non-subject castings which also received tax rebates termed "IPRS rebates". Two types of "subsidies" were claimed: (a) an over-rebate of both types of tax rebates, and (b) the government's failure to tax the subsidy thus received. Commerce countervailed both the value of the over-rebates and the value of the tax that should have been levied on the over-rebate amounts, and did so both with respect to the "CCS rebates" on the subject

merchandise and to the “IPRS rebates” on the non-subject merchandise. Commerce included the “IPRS rebates” as countervailable benefits on the theory that these rebates were an “untied” subsidy that “was not particular to only specific merchandise (either subject or non-subject merchandise).” 156 F.3d at 1176 (quoting Commerce *Remand Results*). The Federal Circuit held the latter ruling improper: “The entire benefit received [in respect of the IPRS rebates], i.e., the subsidy and the nontaxation of the subsidy, was related solely to non-subject castings.” Material to our inquiry here, the Federal Circuit ruled:

. . . [W]hen the party under investigation provides documentation that allows Commerce to separate the portion of [the subsidy] related to non-subject merchandise from the remainder of a countervailable [subsidy], Commerce should not countervail the portion of [the subsidy] tied to non-subject merchandise. [156 F.3d at 1176.]

The Court also held it improper for Commerce to countervail both the subsidy and the nontaxation of the subsidy as benefits because, in so doing, Commerce in effect double-counted the over-rebates: “Commerce imposed a countervailing duty that was not ‘equal to the amount of the net subsidy’ in contravention of 19 U.S.C. §1671(a).” 156 F.3d at 1175.

Thus, in *Kajaria Iron Castings*, the apportioning of the benefit to subject merchandise did not present legal or administrative difficulties, and the Federal Circuit correctly required the Department to parcel out the exact amount attributable to the subject merchandise.

The Panel concludes that Commerce’s methodology of accounting for the sales of by-products in the denominator of the subsidy rate calculation adequately implements the governing statute and the regulations. Accordingly, the Panel does not find to be unreasonable the manner in which Commerce determined the numerator of the subsidy rate calculations.

Claim II: The Department failed to conduct a pass-through analysis

The Canadian Parties argue that the Department was required to conduct a pass-through analysis as the record evidence indicated that numerous sawmills purchase logs from independent loggers through arm’s length transactions. Since the stumpage benefit was calculated based on the volume of all Crown logs entering sawmills, it must be determined that all of the logs were provided to the sawmills at the subsidized price. The Canadian parties request that the Panel determine whether the statute and the regulations require the Department to conduct a pass-through analysis so as to determine the total benefit used as the numerator in the subsidy rate calculation.

As discussed above in the Upstream Subsidies section, the Panel affirms the Department's determination not to conduct an upstream subsidy analysis. Thus, the Commerce's calculation in this respect will not be disturbed.

Claim III: The Department failed to include sales of residual products in the denominator of the subsidy rate calculation

The Canadian Parties claim that the Department should have included the sales of residual products from logs, such as poles, posts, and railway ties, in the denominator of the subsidy rate calculation. "Residual products" are defined as products resulting from production processes other than the lumber production process. Instead, the Department included only sales of softwood lumber products and co-products, i.e., products that result from the lumber production process.

The Canadian Parties rely on the Department's regulation, 19 C.F.R. § 351.525(b)(3), which requires the Department to allocate the benefit of a subsidy to *all* the products of a firm that produced subject merchandise. The Canadian Parties assert that sawmills that receive the benefit of stumpage programs commonly produce residual products as well as softwood lumber products. Since the Department failed to confine the numerator of the subsidy calculation to the exact amount of benefit properly attributable to softwood lumber products and co-products, it should have included in the denominator all sales of all products that are made from logs that are included in the numerator.

According to the Canadian Parties, sales of residual products represent about 12% of all softwood shipments, amounting to a total value of C\$1,529,051,100. They regard the Department's exclusion of sales of residual products as an application of the adverse facts available doctrine, which is properly triggered only when a party fails to cooperate. The Canadian Parties assert that there was no allegation that Canada failed to cooperate to the best of its ability, and no corroborating evidence to show that sales of residual products were actually \$0.00.

Commerce argues that merchandise that is to be included in the denominator of the subsidy rate calculation must have resulted from the processing of subsidized logs. According to Commerce, the Canadian Parties failed to show that residual products were products of timber entering sawmills.

The Department relied on information from Statistics Canada ("StatCan") which divides lumber shipments into four categories: (1) softwood lumber; (2) hardwood lumber; (3) co-products; and (4) residual products. According to StatCan, residual products are those that do not fit in the other three categories. The Department examined

the products in this latter category and concluded that it included products, such as logs, pulpwood that was harvested by sawmills and sold to other manufacturers, and particle and waferboard, that were not a result of lumber processing and were never processed by sawmills. Even if the Statistics Canada residual products category contained some products that resulted from lumber processing, the Department claims it had no way of segregating such products due to the failure of the Canadian Parties to provide the necessary information to enable the Department to do so. Commerce claims that the burden of production is on the party with knowledge and control of the information. According to the Department, the exclusion of residual products from the denominator was therefore appropriate under the law.

At the outset, the Panel notes inconsistencies in the briefs and oral argument presented by the Department of Commerce regarding the standard upon which to base inclusion or exclusion of products in the denominator of the subsidy calculation. In their brief, the Department argues that Canadian Parties failed to show that residual products were products of timber entering sawmills. At a different point in the brief, however, the Department states that the denominator should include merchandise that “resulted from the *processing* of subsidized logs”. And, at oral argument, counsel for the Department admitted that products such as shakes and shingles legitimately belong in the denominator. These statements imply that as long as a product is derived from logs that entered sawmills, regardless of what production process is used, the sales value attributable to the product should be included in the denominator. This is the position advocated by the Canadian Parties. On the other hand, the Department’s brief faults the Canadian Parties for submitting a list of residual products during the investigation that included products “*that did not result from the production of lumber*” (italics supplied). At oral argument, counsel for the Department claimed that the Canadian list “included products that were not part of the lumber-manufacturing process”. These statements indicate that the Department considers only products that result from the lumber-manufacturing process to be properly part of the denominator.

To add to the confusion, the petitioner claims that the numerator includes only the logs that were used in the lumber production process and that, consequently, none of the logs from the numerator were used to produce residual products. The petitioner asserts that during the period of investigation, both the Department and the Canadian Parties operated under the assumption that only logs used to produce lumber would be considered under the category “all logs entering sawmills” and that the data that the Canadian Parties provided conformed to this assumption. The petitioners cite to record evidence that demonstrates that the data submitted for each province reflected only that portion of the harvest that was used for the production of lumber. Thus, according to petitioners, since no logs included in the numerator were used to produce residuals, there is no need to include any sales of residual products in the denominator.

In an effort to sort out the various claims, the Panel observes that all parties at least implicitly recognize that had the numerator included logs used in the production of



residual products, the sales of residual products should be included in the denominator. This principle was recognized as valid by the Department in the case of accounting for sales of co-products. In the Panel's view, the fact that residual products employ a different production process should not alter the application of this basic principle. However, both the Department and the petitioner state in their briefs that the subsidy in this case is attributable to "all products produced during the softwood lumber production process". This is in effect a statement that the subsidy is tied to the softwood lumber production process; as such it directly contradicts the Department's assertion that this case involves subsidies that are not tied to lumber production.

The Panel recognizes the deference owed to the Department in the implementation of its own regulations. However the Department must support its decision with a reasoned explanation. As the Department has recognized in its brief:

While [a reasoned explanation] is not formally part of the standard of review that this Panel must apply, the statute does require the Department to publish a notice supporting its final determination in the Federal Register. This notice must provide "an explanation of the basis for its determination that addresses relevant arguments . . . concerning the establishment of . . . a countervailable subsidy . . ." [Citing 19 U.S.C. § 1677f(i)(1)&(3)(A).] With respect to the interested parties' legal arguments, the statute merely "requires that issues material to the agency's determination be discussed so that the 'path of the agency may reasonably be discerned' by a reviewing court." [Citing the URAA Statement of Administrative Action, H.R. Doc. No. 103-316, at 892 (1994).] [DOC Response Brief, vol. II, A-10.]

In the present case, inconsistent claims advanced by the Department render it not possible for this Panel to "reasonably . . . discern[]" the "path" followed by the Department. In the view of the Panel, the Department may not claim that the stumpage subsidy is not tied to lumber production in the context of explaining its decision to include in the numerator the timber volume attributable to co-products, while at the same time it argues the opposite in an effort to exclude from the denominator all products that did not result from the lumber production process.

The Canadian Parties' position has its own inconsistencies. At oral argument, counsel for the Canadian Parties claimed that all of the products on the list submitted to the Department during the investigation were derived from logs entering sawmills. In their brief, however, although not conceding error, the Canadian Parties allow for the possibility that some of the products on the list to which the Department objected, such as particle and wafer board, may not in fact have been processed by sawmills. The Canadian Parties further claim that a "trifling error" is no reason to exclude the entire category. The Department, on the other hand, counters that "*many* of the products contained in the residual products category were never processed by the sawmills (emphasis supplied)." DOC Br. I-11.

Thus, the Panel is faced with three claims. The petitioner claims that the logs included in the numerator were not used to produce residual products. The Department concedes that some residual products on Canada's list could have been included in the denominator, but refuses to do so claiming that it received insufficient data from the Canadian Parties to enable it separate out residual products that qualify for inclusion in the denominator. The Canadian Parties assert that all products on the list they provided to the Department are produced by sawmills and should therefore be included in the denominator.

The Panel finds that the Department did not provide a reasoned explanation for its decision to categorically exclude all residual products from the denominator. The Panel is aware that the problem essentially involves the expertise of the agency; the Panel may not substitute its judgment for that of the agency provided the agency is supported by substantial evidence on the record. In this instance, however, the Department's explanation is inconsistent with its prior practice in this very investigation. The Department justified its exclusion of residual products by stating that "they were not the result of the lumber production process". As discussed above, the Department's justification implies the premise that the benefit is tied to the lumber production process – a premise that the Department itself vigorously opposed in the context of the numerator calculation. As shown in the discussion regarding the calculation of the numerator, the Department's regulations clearly require it to attribute the benefit of a subsidy to all the products of a firm that receives the subsidy. *See* 19 C.F.R. § 351.525(3) (requiring the Secretary to "attribute a domestic subsidy to all products sold by a firm"). The benefit in this case was calculated on the basis of all logs entering sawmills. The Panel notes that although the Department's explanation indicates an implicit reliance on this argument, the Department never explicitly adopted the petitioner's assertion that no logs in the numerator were used to produce residual products.

Owing to these inconsistencies, the Panel remands the issue of the inclusion of residual products in the denominator of the subsidy calculation to the Department for further consideration. Specifically, the Department should address whether all logs included in the numerator were used solely to produce softwood lumber products and co-products. If so, the Department may not include sales of residual products in the denominator. The Department should clarify the basis for its rejection of residual products on the list supplied by the Canadian Parties. Did the Department reject residual products because "many" of such products did not result from the lumber production process, or because the logs used were never processed by sawmills? In both its Final Determination and its brief, the Department relies on both justifications. Since the Panel considers the two grounds inconsistent, the Department has not provided the Panel with a clear path of the Department's reasoning. To the extent that sawmills produce residual products using material from logs that are included in the numerator, sales of such products should be included in the denominator, regardless of the process employed in their production.

The Panel recognizes that agency expertise is involved in this exercise and affirms that the Department has broad discretion in the application of its expertise. The Panel also recognizes that inclusion of residual products in the denominator could pose analytical difficulties. For example, the Canadian Parties claimed at oral argument that residual products such as particleboard and fiberboard are made by sawmills from sawdust. Sales of sawdust, as a co-product, are already included in the denominator. Using co-products as inputs for residual products may result in double counting thereby inflating the denominator. In addition, processes used in the production of residual products may add considerable value to the product, giving rise to the question of how to account for that added value and still derive a subsidy rate that adequately reflects the benefit received.

Claim IV: The Department failed to include sales of excluded companies and sales from the Maritime Provinces in the denominator

The Canadian Parties argue that it is a “well-established principle” that the Department must include sales of all producers of subject merchandise of the country under investigation in the course of establishing a country-wide rate. They claim that the Department violated this rule by excluding from the denominator both sales of excluded companies and exports from the Maritime Provinces.

The Canadian Parties rely on *IPSCO v. United States*, 899 F.2d 1192, 1197 (Fed. Cir. 1990) and *Kajaria Iron Castings, supra*, 156 F.3d. 1163, for the proposition that the proper procedure in determining a country-wide rate is for the “ITA to calculate a weighted-average net subsidy rate by dividing the sum of all benefits provided in subsidy of the subject goods by the total value of export sales of the goods in the United States.”

As far as the sales from the Maritime Provinces are concerned, the Canadian Parties point out that Maritime timber is not subsidized and hence companies from the Maritime Provinces should be excluded from the CVD order. However, they say, exports from all provinces must be included in the calculation of a country-wide rate. The Department's prior practice affirms this principle: In *Fresh Atlantic Salmon from Chile*, the Department investigated subsidies from only two regions but used sales of all salmon from Chile in the subsidy rate denominator.

The Department's response is that the statute allows the Department to calculate the subsidy rate on a country-wide basis if it determines that calculation of company-specific rates would be impracticable. Commerce claims that it properly excluded companies that did not benefit from the subsidies from the calculation of the country-wide rate as well as sales of companies from the Maritime Provinces as these provinces provided no subsidy.

As to the Canadian Parties' claim that sales of these producers should nevertheless have been included in the denominator, the Department argues that the Canadian Parties are relying on legal standards that are no longer in effect. Prior to the URAA, the statute contained a preference for country-wide rates. In this period, a country-wide rate was calculated through a weighted average of company-specific rates. The current law, however, expresses a preference for company-specific rates, and, when a country-wide rate becomes necessary, the rate is calculated based on the aggregate use of the subsidies. The Department points to the statute that now provides that the "estimated country-wide rate . . . shall be based on industry-wide data regarding the use of subsidies determined to be countervailable." 19 U.S.C. § 1671d(c)(5)(B). Therefore, sales of companies that did not receive or use a subsidy, the Department argues, should not be included in the denominator of the country-wide subsidy rate calculation.

The Panel must determine whether the statute authorizes the Department to exclude from the denominator of the subsidy calculation sales of companies found to be subsidized at a zero or *de minimis* rate. The relevant section of the governing statute provides that the "estimated country-wide rate . . . shall be based on industry-wide data regarding the use of subsidies determined to be countervailable." 19 U.S.C. § 1671d(c)(5)(B).

The Panel notes that the phrase "industry-wide data regarding the use of subsidies" purports to guide the Department in determining the numerator of the subsidy rate calculation. In other words, it requires the Department to collect information about the amount of benefit that is provided to the industry, in this case the lumber manufacturing and remanufacturing industry, as a whole. This is in contrast to the methods used to calculate the company-specific and all-others rates as such rates are based on investigations of individual companies and thus rely on company-specific data. The problem in this instance, however, is not the amount in the numerator but rather the correct sales value to which the numerator should be allocated.

In a paradigm case involving a country-wide investigation, the numerator, calculated on basis of industry-wide data, would be allocated to industry-wide sales, and the resulting CVD rate would be applied to all producers. *See* 19 U.S.C. § 1677f-1(e)(2)(B). The Department's regulations clearly contemplate that individual companies may be excluded from the CVD order if their company exclusion requests are granted. *See* 19 C.F.R. § 351.204(e)(4) (providing that in an aggregate investigation, the Secretary shall consider requests for exclusion to the extent practicable). Neither the statute nor the regulations address how the Department should treat sales of excluded companies.

The Panel understands the Department's argument to assert that the "use" language in the statute mandates that sales of companies that have been found not to use the subsidy must be disregarded in the denominator. Since the numerator must match the

denominator, counting sales of excluded companies would place these values in the denominator without the benefit to the companies being present in the numerator.

The Panel is persuaded by this argument. The Panel finds additional support for this principle in the statutory provision governing the calculation of the all-others rate. *See* 19 U.S.C. § 1671d(c)(5)(A)(i). The functional similarity of the all-others and the country-wide rates, and the fact that the all-others and country-wide rates are always grouped together and contrasted with the company-specific method in the governing statute, indicates that principles derived from one of these two methods are relevant in interpreting the other.

The two methods are juxtaposed against the company-specific method in § 1677f-1(e)(2), where the statute affords the Department a choice between calculating an all-others rate or a country-wide rate in the event that the preferred method, the company-specific rate, is not practicable owing to the large number of producers involved. *See* 19 U.S.C. § 1677f-1(e)(2). Second, the Panel notes that the statute describes both methods under a common provision entitled "Methods for determining the all-others rate and the country-wide subsidy rate". *See* 19 U.S.C. § 1671d(c)(5). Finally, an additional indication of the two methods' functional similarity is the fact that under the pre-URAA statute, the country-wide rate was calculated in the same way as the all-others rate is calculated in the present statute. *See IPSCO, supra*, 899 F.2d at 1196.

More specifically, an "all-others" rate is a combination of company-specific rates and the country-wide rate. When many producers are involved in an investigation, the Department may determine individual rates for some producers either by relying on a statistically valid sample or by selecting those producers that account for the largest volume of exports of subject merchandise. *See* 19 U.S.C. § 1677f-1(e)(2)(A). That means that the selected producers will be countervailed at company-specific rates. The calculation does not stop there, however. The Department must calculate an all-others rate which will be applied, as the name suggests, to all other producers not individually investigated. The all-others rate is equal to weighted average of rates established for individually investigated producers. *See* 19 U.S.C. § 1671d(c)(5)(A)(i). The statute specifically provides that such an average shall not include any zero or *de minimis* subsidy rates or rates determined under the "facts available" in situations in which an interested party fails to cooperate. *Ibid.*; *see also* 19 U.S.C. § 1677e(a)(2)(D) (providing that when an interested party fails to provide the requested information, the Department may "use facts otherwise available in reaching the applicable determination"). In other words, where any of the producers that the Department individually investigates is subsidized at a rate of zero or at a *de minimis* rate, that rate is not included in the weighted average that produces the all-others rate.

To use the aid of an example, assume that the Department individually investigates companies A, B, and C, and determines that company A is subsidized at a rate of 15%, company B at a rate of 20%, and company C at a rate of 0%. For purposes

of calculating the all-others rate, the Department would average only the rates for companies A and B, and not the rates for all three producers. This reflects the principle that only those producers that use the subsidy may provide the basis for the all-others rate calculation. This position is further bolstered by the fact that rates calculated on the basis of adverse facts available are also not used in calculating the all-others rate. Thus Congress wanted to arrive at a methodology that would allow the Department to determine rates that most appropriately reflect the level of subsidization in investigations in which it is not possible to use the most reliable method – the company-specific rate. By excluding zero and *de minimis* rates, Congress wanted to avoid artificial deflation in the all-others rate. Similarly, excluding rates based on adverse facts available, which would most likely exceed the actual level of subsidization, prevents inflation of the all-others rate.

As the above discussion shows, in the all-others rate provision Congress has affirmed that the calculation of subsidy rates should be based on the rates of companies that actually use the subsidy. The Panel notes the similarities to calculation of all-others and country-wide rates. The Panel also notes that the calculation of a country-wide rate does not involve averaging of company-specific rates but rather an allocation of the industry-wide data on the use of the subsidy to the relevant sales. Even so, when faced with the problem of how to account for sales of an excluded company, the Department is faced with essentially the same problem as when it must average several company-specific rates that include zero or *de minimis* rates. In both situations, inclusion of the zero-rate company would deflate the subsidy rate. The Panel finds that the statute clearly expresses the command that such a deflation is not authorized.

This approach is reasonable. The basic purpose of countervailing duty discipline is to reach a CVD rate that will adequately offset the benefit provided without exceeding the actual level of the benefit received. The Canadian Parties' approach could result in a CVD rate inadequate to implement the statutory purpose. Since unsubsidized producers are excluded from the numerator, leaving their sales figures in the denominator could provide an unwarranted reduction in the subsidy rate calculated for other producers. Producers of subject merchandise could be assigned a subsidy rate that is less than the benefit they are receiving.

Application of the methodologies proposed by the parties in this proceeding may be illustrated as follows. Assume that there are only two groups of producers of the subject merchandise in an exporting country, and assume that the government provides a subsidy benefit of \$100. Assume further that group A receives no benefit while group B receives the whole \$100. Total sales in the investigating country amount to \$1,000, of which \$200 are sales by producers in group A, and \$800 are sales by producers in group B. Thus, group A is subsidized at a rate of 0% while group B is subsidized at a rate of 12.5%. Companies in group A are granted exclusion orders.

According to the Department's approach, sales of group A would be excluded from the denominator, and thus the country-wide CVD rate would be set at 12.5%. Group A would pay no countervailing duties while the Customs Service would collect \$100 in CVD from group B. This procedure would successfully offset the benefit of the subsidy.

Under the Canadian Parties' approach, sales of group A would be included in the denominator, but the products of group B would not be subject to CVD. The country-wide CVD rate would be set at 10%. Customs would collect \$80 in countervailing duties on imports from group B and nothing on imports from group A. Under this approach, group B would retain \$20 of the \$100 benefit received. In different terms, the Canadian Parties' approach would allow group B to remain subsidized at a rate of 2.5%.

The Panel holds that excluding from the denominator sales of companies that were found to receive a zero or a *de minimis* subsidy is consistent with the statute and affirms the Department's determination.

Claim V: The Department used unreliable data to calculate final mill values

The Canadian Parties claim that the Department abandoned its prior practice that favored the use of first mill data in calculating the subsidy rate but included final mill data as well. "First mill" data represents sales of lumber coming out of sawmills while "final mill" data refers to sales of remanufactured products.

The main problem with this approach, according to the Canadian Parties, is the lack of reliable data upon which to determine final mill values. Canada maintains rigorous and reliable statistics on first mill values, but not on final mill sales. However, most of the data the Department required to assess final mill sales is confidential and cannot be disclosed according to Canadian law. There are two possible sources of data for final mill sales: the 1997 Statistics Canada report (called "Exhibit 36" in this proceeding) and a report compiled by the Pacific Forestry Center ("PFC report"). Canada worked with economists from the Pacific Forestry Center to estimate the value that remanufactured products add to the shipments of softwood lumber. The Canadian Parties contend that the Department relied on Exhibit 36 although the data used in Exhibit 36 is far less accurate than the data used in the PFC report. According to the Canadian Parties, Exhibit 36, prepared in 1997, does not contain data relating to the period of investigation nor does it contain price indices that could be used to project "final mill" sales values to the period of investigation. An additional problem with the Exhibit 36 data is that it consists of sales of in-scope remanufactured products that do not originate from sawmills. Finally, the Canadian Parties assert that Exhibit 36 is based on understated sales figures from only two provinces, which sales figures the Department used to extrapolate to a country-wide "final mill" value for six other provinces and territories. Hence the

Canadian Parties argue that the Department's constructed value based on Exhibit 36 is not supported by substantial evidence on the record.

As an illustration of the inaccuracy of the Department's constructed data, the Canadian Parties point to the discrepancy between the PFC report and Exhibit 36 regarding the value of final mill sales from British Columbia. According to the PFC report, which the Department verified, in-scope value-added shipments in British Columbia alone amount to C\$1,366,109,265. Yet, the value the Department constructed in the final determination for six provinces and two territories, including British Columbia, was only C\$272,895,026 – less than one fifth of the verified amount for British Columbia alone.

Canada also complains that the Department named new products as subject merchandise late in the investigation. The data from Exhibit 36 does not contain the value of shipments for those new products since the Department did not request that information at the time Exhibit 36 was provided.

Both the Department and petitioner agree that to arrive at an accurate final mill shipment value, there can be no double-counting. When assessing the value of remanufactured products, the Department must deduct the value of the input lumber that is already counted in the first mill value. Statistics Canada had no way to perform this deduction in preparing Exhibit 36.

The Department also conceded that in order to use the 1997 Statistics Canada data in Exhibit 36, an inflation adjustment should have been performed. The Department failed to perform the inflation adjustment.

The Canadian Parties argue that, by using the 1997 Statistics Canada data and rejecting PFC data, the Department in effect applied an "adverse inference". The Department may do this only if the interested party fails to cooperate. However, the Government of Canada cooperated fully. Nevertheless, the Department based its adverse inference on the fact that the lack of data for every province in Exhibit 36 is the "direct result of Statistics Canada's refusal to provide the data on a Province-specific basis." H-48 (quoting Commerce Decision Memo). But provincial information on "final mill" sales could not be disclosed as it is illegal to do so under Canadian law that protects competitive information. The United States has similar laws.

The Canadian Parties argue that the Department's final mill values bear no rational relationship to country-wide sales of remanufactured products. The Department purported to calculate the rate on final mill values but effectively did so on first mill data. If the Department intended to use a final mill calculation, it was required to use an estimate that reasonably reflects the value of Canadian final mill sales.



Canada also argues that the Department's past practice in Lumber III is to prefer final mill values unless first mill data is much more reliable and Canada has made every effort to provide accurate first mill values. In the latter case the Department will calculate the subsidy rate using first mill data. U.S. Customs must then collect duties on that value as well. In the present case, however, the subsidy rate was calculated using a sawmill shipments denominator ("first mill") but that rate was applied to the total value of shipments by value-added remanufacturers.

The Department argues that since the scope of this investigation included both lumber and certain remanufactured products, the Department was correct in using final mill data. This method is in accordance with the Department's practice of using final mill values in the calculation of subsidy rates. In spite of the preference for final mill values, the Department will use first mill data if final mill values are not available or are not reliable.

Commerce points out that the problem in this case is that the U.S. Customs Service assesses the amount of duty to be paid based the entered value of a product. Under the Canadian Parties' proposed methodology, duties should be assessed on the value of the lumber after being processed only by the first mill. But, this method would ignore the value added by the remanufacturing process and would depart from the Department practice of assessing the countervailing duty based on entered value.

The Department claims that it repeatedly asked the GOC to provide reliable information on final mill values. The GOC had available information compiled by Statistics Canada which collects information through three different procedures: (1) an Annual Survey of Manufacturers; (2) a Monthly Survey of Manufacturers; and (3) a Monthly Survey of Sawmills and Planing Mills. The Government of Canada's position had been that the Statistics Canada information was not reliable. On December 17, 2001, Canada submitted the Statistics Canada 1997 Annual Survey of Manufacturers ("Exhibit 36") for British Columbia and Alberta. As for the remaining provinces, the GOC indicated that it could not provide the requested information due to confidentiality restrictions. Then, on January 7, 2002, the GOC submitted a study from the Pacific Forestry Center ("PFC"), which estimated the total value of remanufactured lumber shipments in British Columbia.

Commerce claims it uncovered serious flaws in the PFC study and instead used the information contained in Exhibit 36 to calculate an estimate of the value of remanufactured products. According to Commerce, it may reject evidence that is demonstrably inaccurate. Commerce asserts that the flaws in the PFC report made it impossible for the Department to establish the reasonableness of the methodology used.

The Department concludes that its estimate of the value of remanufactured products was a reasonable exercise of administrative discretion and not an application of adverse facts available, as the Canadian Parties contend. The Department made a reasonable choice between two sets of data to use in the construction of this estimate.

Here, the Panel must review a factual determination made by the Department that the PFC report was not sufficiently reliable. Factual determinations by the Department must be upheld if they are supported by substantial evidence on the record. The Panel may not reweigh the evidence and must affirm the Department's finding even if a contrary result is possible from the record evidence.

The Panel finds that the Department provided a reasoned explanation of its finding that the PFC report is not reliable. Owing to constraints imposed by Canadian law on the release of the relevant data, both studies were limited to data from only one or two provinces. In fact, Exhibit 36, which the Department relied on, contained data compiled by official government agencies for two provinces – British Columbia and Alberta – while the PFC report was compiled by a private company and contained data only for British Columbia. The evidence on the record indicates that the Department considered the PFC report in detail and addressed the arguments made by the Canadian Parties. *See* 19 U.S.C. §1677f(i)(3)(A (3)(A).

The Panel did not consider it necessary or appropriate to examine all the technical aspects of the questions at issue, but is satisfied that the Department's decision to rely on Exhibit 36 is supported by substantial evidence. The Panel affirms that decision.

### **XIII. COALITION ISSUES**

The Coalition, as noted, on May 5, 2002, filed a complaint in this action which alleged errors of both law and fact in the Department's determination.

The legal arguments generally concern the manner in which the Canadian provinces administer the stumpage programs. In substance, they allege that timber is sold by the provinces at administered, non-competitive prices far below market value, thereby providing a subsidy. These issues are dealt with insofar as they are relevant to the panel's decision, elsewhere in this opinion.

The Coalition also raises specific factual aspects of the Department's decision which are claimed to be unsupported by substantial evidence or otherwise not in accordance with the law. These issues consist of claims that the Department incorrectly failed to make proper adjustments in comparing the prices of benchmark timber to subject timber, and issues concerning the calculation of the subsidy.

With regard to the first set of issues, the Coalition agrees that it was proper for the Department to adjust the stumpage prices upwards to account for certain cash payments required by the provinces to be made as a condition of harvesting timber. These payments represented the costs of such things as silviculture levies, road building, and payments to special forestry funds. It is contended that the Department failed, however, to adjust the prices of benchmark timber to account for similar payments made by U. S. timber harvesters. In addition, it is claimed that the Investigating Authority failed to properly value coastal red cedar, sitka spruce, and cypress in Western Washington. Also complained of was Commerce's calculation of sawtimber prices in Michigan for purposes of comparison with Ontario, and the failure to use Montana timber prices in the benchmark for comparison with the Province of Alberta. In light of the Panel's conclusions about the use of U.S. prices as benchmarks by the Department, it concludes that the issues raised by the Coalition are moot.

The other issues regarding calculations are dealt with in the "calculations" section of this report.

#### **XIV. COMMERCE'S REQUEST FOR A REMAND**

The Investigating Authority has requested relief in the form of a remand to address certain issues. These relate to adjustments regarding secondary road construction, the reimbursement of silviculture overhead costs, and forest management and planning costs in Ontario, the calculation of road construction and maintenance adjustment for Saskatchewan and Manitoba, and to explain its rationale for not granting an adjustment for supplemental fire protection costs in Manitoba.

The only objection by the Canadian Parties to remand for these reasons was raised by the Province of Saskatchewan. As the Panel understands the issue related to Saskatchewan, the Department allowed as an adjustment in the final decision, the costs for road building on the basis that the tenure holders were required to construct roads to access the forests. However, the adjustment may have included the building of tertiary roads, while the building of only primary and secondary roads was mandated by the province. The Panel is satisfied that, to the extent that this issue survives the remand, the province will have an opportunity to address this question with the Department. The balance of the issues appears to have been obviated by our decision.

#### **XV. CONCLUSION**

For the reasons set forth in the foregoing opinion, the Panel hereby remands this matter to Commerce for further proceedings consistent with this opinion. Commerce is

directed to report its Determination on Remand within sixty (60) days from the date of this decision.

Daniel A. Pinkus

Daniel A. Pinkus, Chair

William E. Code

William E. Code

Germain Denis

Germain Denis

Milton Milkes

Milton Milkes

Daniel G. Partan

Daniel G. Partan