

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 ON THIRD REMAND

May 23, 2005

Mr. Daniel A. Pinkus, Chair
Mr. William E. Code
Mr. Germain Denis
Judge Milton Milkes
Professor Daniel G. Partan

The Panel also wishes to recognize the invaluable contribution of Panel Law Clerk Idalia Mestey-Borges.

Appearances:

M. Jean Anderson, Gregory Husisian, John M. Ryan, Melanie A. Frank, Timothy J. Hruby, Jahna M. Hartwig, Alicia Cate, Weil, Gotshal & Manges, LLP on behalf of The Government of Canada and the Governments of the Northwest Territories and the Yukon Territory.

Michele D. Lynch, Elizabeth C. Seastrum, Marguerite E. Trossevin, Peter G. Kirchgaber, Mark A. Barnett, William J. Kovatch, Scott D. McBride, Barbara J. Tsai, John D. McInerney, Philip J. Curtin, Christine J. Sohar on behalf of the United States Department of Commerce.

John A. Ragosta, Harry L. Clark, John W. Bohn, Navin Joneja, Nathaniel Friends, David A. Yocis, Brent L. Bartlett, Economist, Dewey Ballantine LLP on behalf of the Coalition for Fair Lumber Imports Executive Committee.

Claire E. Reade, Lawrence A. Schneider, Michele T. Dunlop, Arnold & Porter on behalf of The Government of Alberta.

Spencer S. Griffith, Karen Bland Toliver, Bernd G. Janzen, Thea D. Rozman, Akin, Gump, Strauss, Hauer & Feld, LLP on behalf of The Government of British Columbia.

Michele Sherman Davenport, Dennis James, Jr., Cameron & Hornbostel LLP, on behalf of the Governments of Manitoba and Saskatchewan.

Mark S. McConell, Lynn G. Kamarck, Christopher S. Stokes, Deen Kaplan, Ajay Kuntamukkala, Behnaz Kibria, Johnathan T. Stoel, Hogan & Hartson, LLP on behalf of The Government of Ontario.

Matthew J. Clark, Keith R. Marino, F. Alexander Amrein, Christina Benson, Nancy A. Noonan, Arent, Fox, Kintner, Plotkin, & Kahn on behalf of The Gouvernement du Québec.

W. George Grandison, John R. Labovitz, Anthony C. Epstein, Mark A. Moran, Matthew S. Yeo, Mary T. Mitchell, Asron R. Hutman, Steptoe & Johnson; Brian R. Canfield, Farris, Vaughn, Wills & Murphy on behalf of the British Columbia Lumber Trade Council.

Elliot J. Feldman, John J. Burke, Arland M. DiGirolamo, Michael S. Snarr, Baker & Hostetler LLP on behalf of Tembec Inc., the Ontario Forest Industries Association and the Ontario Lumber Manufacturers Association.

Robert C. Cassidy, Jr., Wilmer Cutler Pickering Hale and Dorr, LLP on behalf of the Québec Lumber Manufacturers Association.

John E. Corette, III, Piper Rudnick LLP; Michael A. Hertzberg, Howrey Simon Arnold & White LLP, on behalf of the Maritime Lumber Bureau, The Maritime Provinces, and the producers located in the Maritime Provinces.

Stephen S. Spraitzar, Law Offices of George R. Tuttle, on behalf of Anderson Wholesale, Inc.

Veronique Lanthier, O'Melveny & Myers on behalf of Bowater Incorporated.

Jamie M. Wilks, McMillan Binch on behalf of the Canadian Lumber Remanufacturers' Alliance.

Julie C. Mendoza, Donald B. Cameron, Kaye Scholer LLP on behalf of Canfor Corporation.

Charles Owen Verrill, Wiley Rein & Fielding LLP on behalf of Doman Industries and Enyeart Cedar Products, LLC.

Harvey M. Applebaum, Covington & Burling on behalf of Domtar Industries Inc., and Domtar Inc.

Livingston Wernecke, Betts, Patterson & Mines, P.S. on behalf of Fred Tebb Sons, Inc.

Mark R. Sandstrom, Thompson Hine LLP on behalf of Goodfellow Inc.

Robert B. Luce on behalf of Idaho Timber Corporation.

William D. Kramer, Verner, Lipfert, Bernhard, McPherson and Hand on behalf of J.D. Irving, Limited.

Kenneth G. Weigel, Kirkland & Ellis on behalf of Lindal Cedar Homes, Inc.

C. Charles Lumbert on behalf of Moose River Lumber Company.

Susan Casey-Lefkowitz on behalf of the Natural Resources Defense Council.

Charles M. Gastle, Shibley Righton LLP on behalf of NorSask Forest Products, Inc., and the Meadow Lake Tribal Council.

Richard Bennett on behalf of Shearer Lumber Products.

Charles Thomason behalf of Shuqualak Lumber Company.

Thomas Peele, Baker & Mckenzie on behalf of Slocan Forest Products, Ltd.

Jeffrey E. Livingston, Holland & Knight on behalf of Tolko Industries, Ltd.

W.J. Rusty Wood on behalf of Tolleson Lumber Company, Inc.

Sam Kalen, Van Ness Feldman on behalf of the U.S. Red Cedar Manufacturers Association.

William Silverman, Hunton & Williams on behalf of Weldwood of Canada Limited.

Gracia Berg, Lisa A. Murray, Gibson, Dunn & Crutcher, LLP on behalf of West Fraser Mills, Ltd.

Matthew M. Nolan, Miller & Chevalier on behalf of Weyerhaeuser Company.

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,” “the Department,” or “The Investigating Authority”) relating to certain softwood lumber products from Canada. See *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. The Department calculated the subsidy to be 19.34 % *ad valorem*.

Following extensive briefing, three days of oral argument were held in Washington, D.C. on April 15, 16 and 17, 2003. On August 13, 2003 this Panel issued its first decision which ruled that the Final Determination properly found the elements necessary to support the conclusion that the Canadian Provincial governments provided a countervailable subsidy to timber harvesters, but that the Investigating Authority had not properly calculated the benefit flowing from the subsidy. The case was remanded to the Department to, *inter alia*, redetermine the benefit. In order to accomplish this task the Department sought additional information from the Canadian parties following which, on January 12, 2004, Commerce issued its Remand Determination (“First Remand Determination”). In that document the Investigating Authority calculated a revised countervailing duty rate of 13.23 percent *ad valorem*. In so doing, the Department, pursuant to the August 13, 2003 Decision of the Panel, revised its benefit methodology.

Both the Petitioner, The Coalition for Fair Lumber Imports Executive Committee, and the Canadian parties raised numerous objections to the Department’s First Remand Determination. After briefing by the parties, a second oral hearing was held on April 1, 2004 in Washington, D.C. On June 7, 2004 this Panel rendered a second decision, remanding the matter to the Investigating Authority once again, to address certain issues and redetermine the benefit, if any. This the Department did in its Second Remand Determination of July 30, 2004, finding a revised subsidy rate of 7.82%, *ad valorem*.

The Canadian parties raised a number of issues in opposition to the Second Remand Determination. In addition, the Petitioner contested the overall methodology used by the Department in both of the Remand Determinations. Petitioner also filed briefs in support of the Department's decision. This Panel rendered another decision on December 1, 2004 remanding to the Department once again with instructions to address a number of issues involved in the calculation of the subsidy. Commerce, on January 24, 2005, issued its Third Remand Determination, and several parties have now sought review of this Determination.

Familiarity with the history of this matter and with the prior decisions of this panel will generally be assumed. However a brief summary of the posture of this case will be helpful to the reader. In the Final Determination, the Investigating Authority found that stumpage systems administered by the Canadian provincial governments conferred a benefit upon producers of softwood lumber within the meaning of 19 U.S.C. 771(5)(E).¹ Paragraph (iv) of subsection (E) further provides that a benefit is conferred when the government provides a good (standing timber, in this case) for less than adequate remuneration. The adequacy of remuneration:

...shall be determined in relation to prevailing market conditions for the good or service being provided...in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of...sale. 19 U.S.C. 771(5)(iv).

In order to determine whether the prices the Provinces charged for stumpage conferred a benefit, the Investigating Authority created benchmark prices for comparison purposes. Commerce sought to apply its regulations which call for, in the first instance, "market prices for the good or service from actual transactions within the country under investigation (including imports)."² However, it rejected the use of prices for Canadian timber. Although the Panel expressed some skepticism regarding the justification for Commerce's refusal to use transactions in Canada, under the deferential standard of review applicable to panel reviews, we upheld Commerce's decision.

Commerce, in the Final Review, then applied the standard set out in the second tier of the hierarchy set forth in the regulation, which provides, in pertinent part:

¹ The Department also found other necessary elements for the imposition of countervailing duties under section 771(5), namely that the government provided a financial contribution, and that the benefit was specific. This Panel's previous opinions did not disturb these findings, and accordingly only the benefit part of the formula is at issue at this time.

² 19 U.S.C. 351.511(a)(2).

... if actual market-determined prices are unavailable in the country under investigation, world market prices that would be available to purchasers in the country under investigation. 19 U.S.C. 351.511(a)(2)(ii).

In applying this standard, the Department created benchmark prices based upon prices for U.S. stumpage, adjusted for various factors intended to reflect market conditions in Canada. This Panel ruled that the use of benchmark prices so derived was not supported by substantial evidence and was therefore contrary to law. Accordingly, the matter was remanded to the Department for further consideration.

In its First Remand Determination, the Investigating Authority created a new methodology for establishing benchmark prices, this time under the third tier of the cited regulation, which provides:

if there is no world market price available to purchasers in the country in question, an assessment of whether the government price is consistent with market principles. 19 U.S.C. 351.511(a)(2)(iii).

This methodology was based upon the premise that a benchmark could be developed if there were sales of logs which were traded without the intervention of government programs. The Department stated its rationale as follows:

... in considering what prices to use as benchmarks to measure the adequacy of remuneration for standing timber, we started with the fact that log markets and standing timber markets are both primary markets from which lumber manufacturers obtain wood fiber. Lumber manufacturers start with finished lumber prices and subtract their own, non-wood production costs to determine the maximum amount they would be willing to pay for logs. The independent log seller, in turn, starts with the price of the log it could receive, and subtracts harvesting and transportation costs to arrive at the maximum it would be willing to pay for stumpage. The landowner, in turn, will charge the maximum stumpage price the independent logger would pay.³ (*footnote omitted*)

Both the Petitioner and the Canadian parties raised objections to the use of benchmarks derived from sales of logs from private forests. However, the Panel found that the approach taken by Commerce was not unreasonable. It did find, however, that the calculations were not wholly supported by substantial evidence. Therefore, the matter was, once again, remanded to the Department to address these issues. In addition, the Investigating Authority requested that the Panel remand for further consideration of several items.

³ First Remand Determination at 11 (Jan. 12, 2004).

While the issues to be reconsidered generally fall under the rubric of calculation methodology, there are sharp differences among the parties on several of these issues.

II. STANDARD OF REVIEW

While in prior opinions of this Panel, we have, by way of introduction, discussed the standard of review required to be applied by a binational panel created pursuant to Chapter 19 of the North American Free Trade agreement, we find an extended discussion of the law unnecessary at this time. Therefore, we see no reason to once again recite the case law interpreting this standard. Reference is made, in this connection, to the previous decisions of this Panel. Suffice it to say at this time, that the Panel is required by Section 516A(b)(1)(B) of the Tariff Act of 1930, as amended, to “hold unlawful any determination, finding, or conclusion found...to be unsupported by substantial evidence on the record, or otherwise not in accordance with law...”

In applying the standard of review to this case, where the Department has faithfully followed its stated methodology, the Panel will not re-weigh the evidence leading to its findings of fact, but will give due deference to those findings.

III. REMAND ORDERS

The Third Remand decision of the Panel directed the Department of Commerce as follows:

- (1) To reinstate the C\$3.46 profit figure in computing the log-seller profit in Alberta.
- (2) To include in the Québec benchmarks the volume of logs for which the Syndicate data does not indicate prices, or to explain why it should not do so, or why it cannot do so.
- (3) To adjust the Québec benchmarks by deducting log-seller profit from both the import and Syndicate prices.
- (4) To consider the conversion factor to be used to convert Syndicate prices in Québec to cubic meters where the data is reported in other forms.
- (5) To include Balsam Fir and Larch in the Ontario SPF benchmark.

- (6) To correct the clerical error in the import statistics for Ontario, which grossly inflated the benchmark.
- (7) To examine the issue of log-seller profit in Ontario. The Department was directed to explain its choice if it determined that it is appropriate to use a surrogate profit figure from some other province.
- (8) To redetermine the net benefit for Ontario.
- (9) To recalculate the British Columbia benchmark taking into account actual market conditions in that province. In so doing, the Department was to perform separate benefit calculations for the Coast and for the Interior using the data available for each region.
- (10) To apply recalculated profit figures for Alberta and Québec in calculating British Columbia stumpage benefits.
- (11) To eliminate the import data in the surrogate benchmarks for Saskatchewan and Manitoba.
- (12) To exclude additional sales that might erroneously be attributed to Bois Omega.

IV. THE REMAND DECISION

Remand Order (1). The Department, as directed by the Panel has, notwithstanding its continuing objection, reinstated the figure of C\$3.46 as representing log seller profit in Alberta.

Remand Order (4). Commerce revised the factor used to convert volumes of logs in Québec to cubic meters where the data was provided in other measurements. No party takes issue with this action at this time.

Remand Order (5). The Department has included the species Balsam, Larch and Fir in the Ontario SPF benchmark. No party has objected.

Remand Order (6). Commerce corrected a clerical error in the import statistics used to calculate the Ontario benchmark. This, too, has been carried out without objection by the parties.

Remand Order (9). The Investigating Authority recalculated the benchmark prices in British Columbia taking into account actual market conditions in that Province, and specifically developed separate benchmarks for the interior and coastal regions. The Petitioner objects to the calculation of the B.C. benchmark prices.

Remand Order (10). The Department applied to British Columbia a profit figure determined with reference to Alberta and Québec. Since it found that no profit was earned by Québec log sellers, it weight averaged the C\$3.46% (Alberta) and 0% (Québec) according to the Crown harvest volume from the two Provinces, and determined a profit figure of 1.156% for B.C. The Investigating Authority found no subsidy for B. C., and this point is therefore moot.

Remand Order (12). The last (12) Remand instruction concerned the possible impact on the benefit calculations of sales which might erroneously be attributed to Bois Omega. The conditions which might have given rise to this concern did not come into being, and the point is moot.

The Department's treatment of the balance of the remand orders is in issue.

V. THE VOLUME OF PRIVATE LOGS IN QUÉBEC

In our Second Remand Decision, the Panel discussed the fact that in calculating the prices for private timber in Québec the Department relied upon data reported by private marketing syndicates.⁴ While in some cases, the syndicates reported both the volume and the price of the sale, some of the syndicates reported only the volume, with no associated prices. The Department calculated the benchmark prices without taking into account the sales for which no price was included. Consequently, as the benchmark prices were calculated from imports and private Canadian sales, the volume of import transactions assumed a greater weight in the benchmarks. It was the Panel's view that as a result of this distortion, the benchmark prices did not reflect actual market conditions in Québec. The Panel therefore directed the Investigating Authority to include the volume of logs for which the syndicate data showed no price, or to explain why it should not, or could not do so.

Commerce, in its Third Remand Determination, refused to make the calculation which the Panel suggested, but did not indicate that it could not do so. The Department states that if information had been reported for both volume and price, the sales in question would have been used in calculating the benchmarks. The Panel accepts this as a given. Commerce reasons that it is required to base its determinations upon record evidence, and that, lacking pricing data, there is no evidence to support the use of the sales in question. Further, Commerce observes that where the syndicates in question did report prices (namely in sales to non-sawmills, such as pulpmills), those prices were higher than the prices of all other marketing boards. The inference of this, as we understand it, is that inclusion of the volume of sales to sawmills, would somehow distort the benchmarks.

For its part, the Petitioner points to record evidence supporting the proposition that prices in the sales of these syndicates both to sawmills and to non-sawmills are

⁴ Decision of the Panel on Second Remand at 16 (Dec. 1, 2004).

uniformly higher than the average prices of reported sales of the other syndicates. This, it attributes, in part to the proposition that the logs sold by the syndicates in question were of a higher quality than those sold by the other syndicates. In addition, Petitioner observes that failure to report the “missing” data was the fault of Québec, not of the Department.

Canada argues that the Department’s position is based upon the flawed premise that sales of private logs in Québec to sawmills must be at higher prices than sales to other customers (presumably mostly pulpmills), and that there is no record evidence to support this premise. It argues that the opposite is the fact, and therefore, there would be no price distortion if the disputed volumes were assigned the same price as the logs for which volume and price were both reported.

The Panel is troubled by the Department’s position. On the one hand, it correctly observes that its determinations must be made on the basis of record evidence, and that it should strive to avoid distortions in the benchmark prices. At the same time, the record evidence points to the fact that a great deal of lumber was sold by the syndicates in question, and that not accounting for this lumber distorts the benchmarks in favor of imported logs.

The Panel is not informed as to why the two syndicates involved did not report the prices in question. We do understand that this information is not derived from statistics maintained either by the Province or by the Government of Canada. Since the Department implicitly recognizes the possible distortion of the benchmarks in question, and states that it would have used the data if available, it is ordered to reopen the record for the limited purpose of developing the information. Respondents shall advise the Department within 10 days of this decision whether they wish to pursue this matter, and, if so, whether the Syndicates can, and are willing to supply the missing prices. If not, the record will not be reopened, and the Department’s remand determination on this point is upheld. If the marketing boards in question indicate that the prices in question can be retrieved, Commerce is directed to grant sufficient time to accomplish this task.

If the record is opened on remand, the Department shall recalculate the Québec benchmarks including this syndicate price information to the extent that it is provided.

VI. LOG SELLER PROFIT IN QUÉBEC

The Investigating Authority, in its First Remand Determination, set forth the methodology it would use to calculate log-based benchmark prices in order to measure the adequacy of remuneration. Specifically, it stated⁵ that it would determine a species-specific log price (including import prices and domestic prices), from which it would deduct harvesting costs, forest planning costs, and, where available, profits. This methodology permits getting “back to the stump”. It is the view of the Panel that, as we

⁵ First Remand Determination at 14 (Jan. 12, 2004).

have stated, in the light of the limited standard of review applicable to Panel review, and the substantial deference owed to the Department, we should not disturb calculations made following Commerce's stated methodology. In the case of profits, because they are an essential element of the methodology, where the amount of profit can be gleaned from the record as a whole, the Investigating Authority is required to account for log seller profit.

In our First Remand Decision, we addressed the question of whether prices of imported logs should be used in developing Provincial benchmarks, along, of course, with logs from private forests in Québec. Notwithstanding that the imports were, on average, 27.8% higher than the prices of domestic logs reported by the marketing syndicates, it was the Panel's view that it was not unreasonable to treat imported logs in the same manner as other freely traded private logs. It is for this reason that the Panel directed the Department to begin its residual value (or "derived value") computation with a blended price combining both private logs and imported logs.

In the Second Remand Determination, the Department did not make a profit adjustment with respect to imported logs. Rather, it only considered the question of profit with respect to the domestically sourced logs.

It would not have been unreasonable for Commerce to have developed its log benchmark prices without the use of imports.⁶ Having determined to use imports, however, the above stated methodology requires that all logs in a benchmark are to be treated the same for all purposes.

The Third Remand Determination indicates that what the Department did was to calculate a (0%) profit with respect to private logs, and *then* apply that (0%) profit to the derived benchmark (including imports). Thus, all the logs in the benchmark were not treated the same for all purposes.

Although the Panel was perhaps careless in drafting the remand order to require only that profit be deducted from both the import and private log prices, there can be no doubt from our analysis⁷ that what we intended was for the profit calculation to start with the weigh-averaged blended price of the imported and private logs. This is the only way to apply Commerce's stated methodology discussed above. Yet, the Department, in its Determination proffers that it faithfully followed the methodology (not which it proposed in the First Remand), but which it *intended* (in this instance only). It stated:

In calculating the profit adjustment, we intended to rely upon the weighted-average Syndicate price, not the derived benchmark which includes import prices.

⁶ The Department considered, and rejected the idea of including in the benchmarks, logs exported from Canada as urged by Petitioner. The Panel upheld the reasonableness of this decision.

⁷ Second Remand Determination at 18 (Dec. 1, 2004).

The use of import prices as adjusted by Québec stumpage and cost components tells us nothing about a Québec harvester's and/or land owner's profit.⁸

By the same token, does the use of import prices tell us anything about a Québec harvester's costs? Or Canadian stumpage costs? If this is a requirement for the creating of benchmark prices, the Department should not derive its benchmarks using imports at all. Accordingly, the Department is free, on remand, to remove the imports from its benchmark calculation, and use only the private woodlot prices (which, logically are more reflective of market conditions in Canada).

If, however, it chooses to continue to use imports, the Department is to treat the imports in the same manner as private logs, and follow *its own stated methodology* as set forth in the First Remand Determination (see, *supra*), and derive a profit component from the blended import/private price. Stated another way, Commerce's methodology makes sense only if it calculates the profit which would have been earned on the sale of the imported logs had they been harvested in Canada, just as the harvesting costs represent what it would have cost to harvest the logs had they been grown in Canada.

This is not, as suggested by the Department, a question of whether there is substantial evidence supporting Commerce's determination to which the Panel owes deference. The Panel is only requiring that Commerce apply its own rules in a consistent manner, and it is not a question of evidence at all.

In both the Second and the Third Remand Determination, the Department calculated a *negative* profit for Québec.⁹ In other words, Commerce concluded that the private woodlot owners sold their logs for less than their costs. Petitioner takes the position¹⁰ that an upward adjustment should be made to the benchmark log prices to account for this loss. Petitioner correctly observes that this argument was made at the time of the Second Remand and that the Panel did not discuss the issue at that time. The reason we did not discuss the issue is that, in view of our remand instructions, the Department was to recalculate the benchmarks, and it was anticipated that the Department would find a profit for private log sellers in Québec. In that case, Petitioner's argument would be moot. The same reasoning holds here.¹¹

Commerce is directed to recalculate the profit starting with a blended price combining both private logs and imported logs.

⁸ *Id.* at 26.

⁹ Calculation Memoranda (Jul. 30, 2004 and Jan. 24, 2005).

¹⁰ Petitioner's Rule 73(2)(b) Brief (Feb. 22, 2005).

¹¹ The Department has not commented on this argument. Presumably, the Department's practice, calls for "zeroing" the negative profit figure, and not adjusting the benchmark prices.

VII. HAUL AND HARVESTING COSTS IN QUÉBEC

Canada raises a further issue with regard to the benchmark calculations in Québec, namely the appropriate adjustment to be made to the log benchmarks to account for haul and harvesting costs. In developing the benchmark prices, the Department used selected haul and harvesting cost data which was put forth by Canada in connection with its proposed profit calculations.¹²

Canada now argues, as it did in its challenge on the Second Remand Determination,¹³ that the Department must use a subsequent set of data showing lower haul and harvesting costs.¹⁴ The GOC asserts that it provided the Department with the first data set showing haul and harvesting costs adding to C\$ 39.66 at a time when it considered the average domestic log price to be the average price of domestic logs (Sawlog Journal and Syndicate prices) and not the Syndicate log price for SPF alone.¹⁵

Canada claims that both data sets were verified by the Department. But Commerce states that "[t]he only species for which a complete data set¹⁶ is on the record is Québec's private, SPF," containing the first data set put forth by Canada.¹⁷ And it adds that the only verified data set is that found in Exhibit 48.¹⁸ It alleges that "[t]he [GOC's] current quest for a different methodology does not make the original methodology

¹² This haul and harvesting cost data added to C\$ 39.66/cubic meter. GOC Questionnaire Response, Québec vol. 8 at Exh. QC-S-48 (P.R. 255) (June 28, 2001). When deducted from the weight-averaged Syndicate log price for SPF (C\$ 56.76) together with the private stumpage price (C\$ 19.74), this cost data leads to a log seller loss of (C\$ -2.64), i.e., [C\$ 56.76 - (C\$ 39.66 + C\$ 19.74)] = C\$ -2.64. See Second Remand Determination at 6 and Jul. 30, 2004 Calculation Memorandum at Tab 2, Attachment 4B.

¹³ See Canadian Parties' Joint Rule 73(2)(b) Brief at F-22 - F-23 (Aug. 24, 2003).

¹⁴ The GOC alleges that Québec provided the Department with the second cost data set for independent harvesters in the Québec private forest. It points out that it is found in the 2001 Private Forest Survey at 2201 and that the Department reviewed and verified it. The GOC cites the Department allegedly attesting to this fact. See GOC Joint Rule 73(2)(b) Brief at 20 (Feb. 22, 2005), citing Québec Verification Report at 6. In its cited observations, Commerce states that, during the POI, the MNR relied on calibrated models to estimate many of the operating costs for private land. It adds that the MNR subsequently completed a survey of private operating costs for the fiscal year ending in March 2001. See Québec Verification Report at 6.

¹⁵ This first data set for haul and harvesting costs, when deducted from the average domestic private log price for Sawlog Journal and Syndicate prices (C\$ 69.46) together with the average private stumpage costs for the private forest (C\$ 18.57) leads to a log seller profit of C\$ 11.23, i.e., [C\$ 69.46 - (C\$ 39.66 + C\$ 18.57)] = C\$ 11.23. See Canadian Parties' Submission at n.83 (Feb. 9, 2004).

¹⁶ Comparison of log prices, harvesting costs, and stumpage prices by species

¹⁷ Department's Rule 73(2)(c) Brief at 35 (Mar. 21, 2005).

¹⁸ See Québec Verification Report at 5-7 and Exh. 5 (P.R. 735).

unreasonable - it merely demonstrates that the GOC's story shifts to accommodate its desired result."¹⁹

The Petitioner notes that the second data set was never verified by the Department because it was submitted after the administrative record had been closed.²⁰ And it repeats what was mentioned by the Department on its Response Brief to challenges on its Second Remand Determination, namely, that some aspects of the second data set raise significant questions about its accuracy. It finishes by arguing that any claims in this regard are barred either by virtue of the doctrine of exhaustion of administrative remedies, or by the basic rule that the Department cannot address issues not embraced within remand orders.²¹

The Panel did not address, or for that matter, remand on this issue in its Decision on Second Remand.

The evidence and applicable law show that the Department's use of the first data set was reasonable. The GOC asserted that it was actual haul and harvesting cost data for the private forest and repeatedly asked the Department to use it for its Québec profit calculation. Even though there might be a question as to whether the second set was verified by the Department, the fact that the GOC did not raise the issue in a timely fashion bars it from doing so now under the exhaustion doctrine. Its assertion regarding the changes in circumstances brought about by the change in the selection of log prices to be weigh-averaged is not persuasive. The change in the selection of log prices to be weight-averaged does not have any bearing on the selection of private cost data.

The Department's selection and use of the first data set presented by Québec was reasonable. Therefore, the Panel affirms the Department's choice.

¹⁹ Department's Rule 73(2)(c) Brief at 35 (Mar. 21, 2005). On Second Remand, the Department argued that the Canadians themselves asked for the utilization of the data set it applied when calculating Québec's profit using GOC-proposed methodology. It alleged that given the GOC's own continued requests to have the Department use this data, the GOC failed to exhaust its administrative remedies with respect to the issue and waived its right to raise it before the Panel at that late stage in the proceeding. It also pointed at the numerous infirmities plaguing the second data set and argued that its choice to use the first data set was reasonable given the facts and applicable law. Department's 73(2)(c) brief at 33-43 (Sept. 17, 2004).

²⁰ Verification takes place seven days after the closing of the administrative record. 19 C.F.R. § 351.301 (b)(1). The Department's practice is not to consider new evidence submitted during the verification period. See Chia Far Indus. Factory Co. v. United States, 343 F. Supp. 2d 1334, 1354 (Ct. Int'l Trade 2004).

²¹ See Corus Staal BV v. United States, 279 F. Supp. 2d 1363, 1368 (Ct. Int'l Trade 2003).

VIII. NET BENEFIT IN ONTARIO

In our First and Second Remand Decisions, the Panel directed Commerce to recalculate the net benefit in Ontario (Remand Order # 8).

Now, the Ontario parties claim that Commerce did not follow the Panel's instructions. They request that the Panel provide the Department with explicit remand instructions to do so.

In its Decision on First Remand, the Panel specifically directed the Department to "recalculate the benchmark price in Ontario taking into account the actual market conditions that govern the sale of timber harvesting authority in that province."²² In its subsequent remand calculations, the Department found no benefit for the SPF category of logs²³ and calculated a positive benefit that can only be attributed to the other two species categories.²⁴ The Ontario parties argued that prevailing market conditions call for the harvesting of all of the trees in a particular stand, so that the adequacy of remuneration must be determined with respect to the entire harvest. They also pointed out that the issue of "zeroing" had been addressed by the WTO's Appellate Body and found impermissible. The Department replied succinctly. It briefly asserted that the Ontario parties were asking for an impermissible "offset" and that U.S. law does not prohibit the practice of zeroing.²⁵ Commerce never explained how or why its "zeroing" practice was applicable to this case. The Panel decided to direct the Department to consider the *net* benefit, if any, which accrued to all of the species when considering the benchmarks for all species in Ontario.²⁶

In its Third Remand Determination, the Department continued calculating profit the same way as before. It explained that it is not "consistent with market principles to make an additional *adjustment* to also account for any profit associated with the private land owner because the result would be a price for private stumpage sales less any profit earned on such sales."²⁷

²² Decision of the Panel on First Remand at 33 (June 7, 2004). This Panel has previously concluded that the prevailing market condition in Ontario is that Ontario prices its stumpage based on three different species categories: SPF, Red and White Pine, and Hemlock and Cedar. See Panel Decision on First Remand at 19 (June 7, 2004).

²³ When the Department calculated the benefit for the SPF species category of logs, it derived a negative benefit, i.e., it found private stumpage to be higher than Crown stumpage.

²⁴ The Department did not combine the total "negative" remuneration paid for the SPF species category with the positive remuneration paid for the other two species categories, Red and White Pine and Hemlock and Cedar, when calculating a final benefit rate for stumpage in Ontario.

²⁵ See DOC Rule 73(2)(c) Response Brief at 69 (Sept. 17, 2004).

²⁶ See Decision of the Panel on Second Remand at 26 (Dec. 1, 2004).

²⁷ Third Remand Determination at 12 (Jan. 24, 2005).

To the extent that we can understand what the Department is saying through its statement, we agree. If the Department is now saying that it will not eliminate any countervailable benefit found to have been received by two species categories in Ontario owing to the lack of benefit received by the SPF species category, where private stumpage was priced lower than Crown stumpage, we find its determination reasonable. As mentioned above, the Department's benefit determination is limited to the identification of a benefit from which to calculate a countervailing duty rate. Therefore, the Department may not deduct from that benefit the above-market returns derived from the other two species categories.

The Panel therefore affirms the Department's net benefit calculation for the Province of Ontario.

IX. ONTARIO PARTIES

The Ontario Forest Industries Association, Ontario Lumber Manufacturers Association, and Tembec, Inc. ("Ontario parties") ask the Panel to consider their request for exclusion from the country-wide calculations from two different standpoints. They also ask the Panel to redirect the Department to calculate the "net" benefit for Ontario.

A. CALCULATING A NET BENEFIT INCLUDING NEGATIVE MARGINS/EXEMPTING PROVINCES OR SOFTWOOD LUMBER

The Ontario parties characterize the Department's determination to exclude British Columbia's negative net countervailable stumpage benefit from its country-wide CVD rate for Canada as illegitimate. They assert that once Commerce calculated a negative net benefit for B.C. (C\$ - 431,530,267.00) and a *de minimis* (0.37%) benefit for Ontario, the Department had only two legitimate courses of action. The Department must either combine B.C.'s negative benefit with the positive benefits of the other provinces to calculate a Canada-wide rate, or treat each province separately, and as a result exclude B.C. and Ontario from its country-wide determination due to the lack of benefit conferred on these two provinces.²⁸ The Ontario parties now ask the Panel to direct Commerce to do either one.

²⁸ The applicable statutory authority cited by Ontario provides:

§ 1671d. Final determinations

(a) Final determination by administering authority.

(3) De minimis countervailable subsidy. In making a determination under this subsection, the administering authority shall disregard any countervailable subsidy that is de minimis as defined in section 703(b)(4) [19 U.S.C. § 1671b(b)(4)].

[19 U.S.C. § 1671d(a)]

1. CALCULATING A NET BENEFIT INCLUDING NEGATIVE MARGINS

The Ontario parties first argue that the Department's analysis is flawed because, instead of adding and subtracting each province's profit to derive a "net" benefit, it has chosen to average each province's benefit using the province-specific calculations methodology already rejected by the Panel. This results-oriented approach eliminates B.C.'s negative benefit from the picture and results in an illegitimate positive country-wide benefit. The Department responds by stating that the Ontario parties are asking for a statutorily-impermissible offset. Commerce lists the three narrow offsets permitted by U.S. law²⁹ and asserts that deducting B.C.'s negative benefit from the positive benefit derived after "zeroing" B.C.'s negative benefit does not fall within any of the three offsets.

The Ontario parties reject the characterization of the consideration of B.C.'s "negative benefit" as an "offset" by arguing that the proper calculation of a country-wide rate does not seek to "offset" one part of Canada against another, but to have a country-wide benefit - or adequate remuneration - be determined for Canada as a whole. They ask the Panel to direct the Department to calculate the Canada-wide "net" benefit by combining B.C.'s negative rate with the other five provinces' positive rates. This would result in a no-subsidy finding for the whole of Canada.

ZEROING PRACTICE

As applied to antidumping investigations, the Department's "zeroing" practice has been determined to be authorized by statute. In Timken Co. v United States, the Court of Appeals for the Federal Circuit concluded that Commerce based its zeroing practice on a reasonable interpretation of the dumping statute, the Department's methodology for calculating dumping margins made practical sense, and its practice of zeroing negative dumping margins comported with the approach set out by 19 USC § 1675(a)(2). Timken

²⁹ The three offsets permitted by U.S. law are found in 19 U.S.C. § 1677(6) which provides:

Net countervailable subsidy.

For the purpose of determining the net countervailable subsidy, the administering authority may subtract from the gross countervailable subsidy the amount of--

- (A) any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the countervailable subsidy,
- (B) any loss in the value of the countervailable subsidy resulting from its deferred receipt, if the deferral is mandated by Government order, and
- (C) export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the countervailable subsidy received.

[19 U.S.C. § 1677(6)]

Co. v United States (2004, CA FC) 354 F3d 1334, reh den (2004, CA FC) 2004. Also in the dumping context, the CIT has determined that the "practice of considering negative margins as zero ensures that sales made at less than fair value on a portion of a company's product line to the United States market are not negated by more profitable sales." Serampore Industries Pvt. Ltd. and The Engineering Export Promotion Council of India v. U.S. Department of Commerce, ITA, 11 C.I.T. 866 at 874 (Nov. 25, 1987) citing Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value, 51 Fed. Reg. 9089, 9092 (Mar. 17, 1986). "Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce's interpretation is reasonable and is in accordance with law." Serampore at 874.

Unlike dumping investigations, where the Investigating Authority determines whether a company or group of companies' sale of goods were at less than fair value, the objective of a countervailing duty investigation is to determine whether a country's government has made a financial contribution conferring an unfair benefit on its domestic industry. See 19 U.S.C. § 1677(5)(B).³⁰ The logic behind the need to prevent masked dumping cannot be transferred to CVD investigations. In the CVD context, a benefit is either conferred or not conferred. A benefit conferred on producers in one part of the country cannot be masked by virtue of practices resulting in a "negative" benefit in another part of the country.

In the present case, the objective of the investigation is to find whether the Canadian Provinces, taken as a whole, are conferring a country-wide benefit on the Canadian softwood lumber industry. If a benefit is received by producers in one province, then that benefit must be added to the benefits received by producers in the other provinces. If a province's producers have not received a benefit because the prices they paid for Crown stumpage were above market prices, then this province's "zero" benefit is added to the other provinces' benefits. Where Crown prices exceed market value, the province may derive profits, but the return to the province is not a benefit to Canadian producers. Thus, there is no analogy to the antidumping practice of "zeroing" negative benefits, which is inapplicable in the CVD context.

³⁰ 19 U.S.C. § 1677(5)(B) provides:

Subsidy described.

A subsidy is described in this paragraph in the case in which an authority--

- (i) provides a financial contribution,
- (ii) provides any form of income or price support within the meaning of Article XVI of the GATT 1994, or
- (iii) makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments, to a person and a benefit is thereby conferred. For purposes of this paragraph and paragraphs (5A) and (5B), the term "authority" means a government of a country or any public entity within the territory of the country. [19 U.S.C. § 1677(5)(B)]

2. EXEMPTING PROVINCES, SOFTWOOD LUMBER, OR COMPANIES

The Ontario parties also ask the Panel either to exclude Ontario and B.C. from the country-wide calculations due to their respective *de minimis* and negative margins, or, in the alternative, either to exclude Ontario-origin wood from the countervailing duty order consistent with the Panel's prior decisions regarding exclusion of lumber originating from unsubsidized timber, or to exclude companies whose Ontario "input source" was unsubsidized.

a. EXCLUDE ONTARIO AND B.C. FROM THE COUNTRY-WIDE CALCULATIONS DUE TO THEIR RESPECTIVE *DE MINIMIS* AND NEGATIVE MARGINS

The Ontario parties propose what the Panel understands to be the re-delineation of Canada as a country. They state that since neither Ontario nor British Columbia have been found to confer a benefit, both should be excluded in the same vein that the Maritimes were. The Ontario parties explain that Canada is made up of 10 provinces and 3 territories, but that throughout this case, the Department has been treating Canada as consisting of 6 provinces and 3 territories, excluding the geographic region identified as the Maritime Provinces (hereinafter "The Maritimes")³¹ from countervailing duties on softwood lumber. The Ontario parties allege that Department excluded the Maritimes because the petitioners did not allege a subsidy, over 60% of stumpage is privately owned, and stumpage pricing policies are market based; that consequently, the Department decided to treat the remaining provinces as the whole country. Against this background, according to the Ontario parties, the Department must either be consistent and apply one properly-calculated country-wide rate, weight-averaging the B.C. and Québec results with the other 4 provinces', or exclude both B.C. and Ontario because they, like the Maritimes, have received no stumpage benefit.

i. THE MARITIMES EXEMPTION

The Panel cannot exclude Ontario or B.C. from the country-wide calculations. This is a country-wide investigation and Canada is and has consistently been treated as a Subsidies Agreement country within the meaning of 19 USCS § 1671(b)³² consisting of different provinces and territories throughout this entire investigation.

³¹ The Maritime Provinces ("The Maritimes;" "The Atlantic Provinces") are located in Eastern Canada. They are New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island.

³² 19 U.S.C. § 1671(b) provides:

Subsidies Agreement country.

According to the Department's *Amendment to the Notice of Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products From Canada*, 66 FR 40228 (Aug. 2, 2001), "*exports of certain softwood products* produced in the Maritimes" were exempted from the investigation because "[a]ll parties have generally recognized that there are unique circumstances associated with the Maritime Provinces and have supported those exemptions." *Id.* at 40229. (emphasis added) The unique circumstances associated with the Maritime Provinces are that they substantially increased their stumpage fees from Crown land at a level substantially above the appraised values, and 60% of their timber is privately owned. In fact, most of the privately-owned timber in Canada is in the Maritimes. As a result, the Maritimes were exempted from payment of the export charge under the MOU of 1991.

Softwood lumber production in the Maritimes was also absent from the petitioners' petition. *Id.* At that time, the Department stated that petitioners' petitions are to be given ample deference and that since the petitioners did not allege that the Maritimes received any subsidies, the Department would not presume otherwise.

Finally, when the Department announced its intention to initiate the investigation, it received comments from the Maritimes, the Maritime Lumber Bureau of Canada, at least one company located in the Maritime Provinces, and the Government of Canada, all asking the Investigative Authority to exclude the Maritimes from the investigation for the above-mentioned reasons.

Softwood lumber production in Ontario and B.C. does not fall within the same fact pattern. These provinces were not exempted from payment of the export charge under the MOU of 1991. Even though the Department's benefit calculation signals that these provinces substantially increased their stumpage fees from Crown land to market level, they do not have the high percentage of privately owned timber as in the case in the Maritimes. Additionally, the Coalition for Fair Lumber Imports has never asked the Department to exclude Ontario or British Columbia from the investigation. And to the best of the Panel's knowledge, when the Department announced its intention to initiate

For purposes of this title, the term "Subsidies Agreement country" means--

- (1) a WTO member country,
- (2) a country which the President has determined has assumed obligations with respect to the United States which are substantially equivalent to the obligations under the Subsidies Agreement, or
- (3) a country with respect to which the President determines that--
 - (A) there is an agreement in effect between the United States and that country which--
 - (i) was in force on the date of the enactment of the Uruguay Round Agreements Act, and
 - (ii) requires unconditional most-favored-nation treatment with respect to articles imported into the United States, and
 - (B) the agreement described in subparagraph (A) does not expressly permit--
 - (i) actions required or permitted by the GATT 1947 or GATT 1994, as defined in section 2(1) of the Uruguay Round Agreements Act [19 USCS § 3501(1)], or required by the Congress, or
 - (ii) nondiscriminatory prohibitions or restrictions on importation which are designed to prevent deceptive or unfair practices. [19 U.S.C. §1671(b)]

the investigation, it received no comments asking it to exclude Ontario or B.C. from the investigation.

Therefore, Ontario and B.C. cannot be afforded the same treatment as that given to the Maritimes.

ii. THE EXCLUSION OF ONTARIO FROM THE CANADIAN SUBSIDIES AGREEMENT "COUNTRY"

The fact that certain softwood lumber products produced in the Maritimes' were excluded from the investigation never meant that Canada was reconfigured as a "Subsidies Agreement country" within the meaning of 19 USCS § 1671(b). By requesting to be excluded from the benefit calculation together with British Columbia, the Ontario parties are asking the Department to redefine Canada as a "Subsidies Agreement country." That is not possible.

The present countervailing duty investigation is of the whole of Canada. The benefit assessment is country-wide and once it is properly determined, Canada as a whole will be affected by it. If producers in one province receive more benefits than producers in another, unless there is a basis for their exclusion, they must still bear the burden of duties averaged for the entire country. The fact such producers receive either no or *de minimis* benefits does not justify their exclusion. The Panel rejects the Ontario parties' argument because it is inapplicable to the present proceedings.

b. EXCLUDE ONTARIO COMPANIES

The Ontario parties argue that since Commerce has found that adequate remuneration was paid for Ontario stumpage in the production of softwood lumber during the POI, it is evident that any alleged financial contribution conferred no benefit on Ontario lumber producers. Ontario-based lumber received no countervailable subsidy and should be excluded from the countervailing duty order. The Ontario parties remind us that the Panel has in the past decided that Commerce does not have discretion to include non-subsidized lumber within the scope of the order.³³ And it asserts that Commerce must therefore exclude all Ontario-origin lumber from the scope of the countervailing duty order.

In its first decision dated August 13, 2003, the Panel decided that lumber receiving no countervailable subsidy must be excluded from the Department's countervailing duty order. This is clearly expressed in the CVD statute, which provides

³³ Citing 19 U.S.C. § 1671(a), the First Panel Decision stated:

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. [First Panel Decision at 55 (Aug. 13, 2003)]

for the imposition of 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).³⁴

The Department's calculation of Ontario's *de minimis* benefit reveals that Ontario-sourced lumber received no countervailable subsidy. Therefore, the sales of companies whose product did not receive or use a subsidy should be excluded from the countervailing duty order.

The Ontario parties ask the Panel to order the Department to grant exclusions from the order to companies whose Ontario "input source" was unsubsidized. They argue that companies which source their timber entirely from Ontario Crown stumpage did not receive a subsidy because the Ontario countervailing duty rate as determined by the Department is *de minimis*.

This Panel has previously observed that 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). Once such companies have been excluded, the Department has discretion to decide how to treat their sales. See First Decision of the Panel at 84-85. In the past, the Department has determined that the statute mandates that sales of companies that have been found not to use the subsidy must be disregarded in the denominator of the countervailing duty rate calculation because the absence of benefit received is reflected in the numerator. Id.

Since the Ontario parties have standing to request this exclusion, the Panel directs the Department to grant exclusions from the order to companies whose Ontario "input

³⁴ 19 U.S.C. § 1671 provides:

Countervailing duties imposed

(a) General rule. If--

(1) the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and

(2) in the case of merchandise imported from a Subsidies Agreement country, the Commission determines that--

(A) an industry in the United States--

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net countervailable subsidy. For purposes of this subsection and section 705(b)(1) [19 USCS § 1671d(b)(1)], a reference to the sale of merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the sale of the merchandise.

[19 U.S.C. § 1671(a)]

source" was unsubsidized. In accordance with the Panel's previous decision, the Panel further directs the Department to ensure that the numerator matches with the denominator, and to exclude sales that have been found not to be subsidized from the denominator of its benefit/countervailing duty rate calculations.

X. PROFIT IN ONTARIO

In our Second Remand Decision, this Panel directed the Department to "examine" the issue of log-seller profit in Ontario. We further stated that "If the Department determines that it is appropriate to use a surrogate profit figure from some other province, it is directed to explain its choice". In its Remand Determination, Commerce suggests that the Panel was merely suggesting that the Department "examine" or "consider" the issue. However, in the context of our Second Remand Decision, it is clear from the Panel's analysis that we intended that an adjustment was necessary to make the proper comparison between private stumpage and public stumpage, the end goal of the log benchmark exercise.

Commerce seems to recognize this, but insists that:

It is not, however, consistent with market principles to make an additional *adjustment* to also account for any profit associated with the private land owner because the result would be a price for private stumpage sales less any profit earned on such sales.³⁵

The Panel cannot fathom what "market principles" Commerce has in mind. However, an adjustment for any profit associated with the private landowner is exactly what the Panel thought it had ordered, and which it again directs.

XI. BRITISH COLUMBIA

The Petitioner argues that Commerce's calculation of the benchmark prices in British Columbia is not supported by substantial evidence. First, Petitioner claims that the log sales used to calculate the benchmarks for the interior of British Columbia, and the import transactions used were so few in number, that they cannot be consistent with market principles. It points to the fact that under Commerce's calculations, resulting benchmarks are lower than average interior harvesting costs. The Coalition concludes that the resulting benchmarks are so much lower than Crown stumpage that they cannot be consistent with market principles.

The Department, in its briefs, has not commented on this position.

³⁵ Third Remand Determination at 12 (Jan. 24, 2005).

Canada, for its part, argues that the methodology and data sets used by Commerce in British Columbia should not be reviewed by the Panel at this time as Petitioner's contentions in this regard have been argued before this Panel and are, in effect, "law of the case" at this time.³⁶

The Department, notwithstanding the limited data available, has followed its stated methodology in determining the B.C. benchmark prices. Therefore, in view of the deference owed to the Department, the calculations for British Columbia are sustained.

XII. COUNTRYWIDE CALCULATIONS

The GOC argues that the Department must calculate a net countervailable stumpage benefit adding both positive and negative (independently weight-averaged) provincial benefit rates to calculate the country-wide rate. It complains because the Department is treating B.C.'s negative benefit contribution to the country-wide calculation as zero and asserts that counting a negative benefit as such does not amount to offsetting. The GOC asserts that it is only asking for a valuation of the "good" that each province provides, in accordance with the "market conditions" under which that good is provided; that it just wants an accurate calculation of whether there is, in this aggregate investigation, adequate remuneration for stumpage in Canada and therefore, any benefit at all.

Commerce responds by saying that the GOC is seeking nothing more than an impermissible offset: a credit for transactions that did not provide a subsidy benefit. Such an adjustment is impermissible under the statute and is inconsistent with the Department's practice. Accounting for it would be at odds with the purpose of a benefit inquiry. In support, it cites the Preamble to Countervailing Duties; Final Rule notes, which provide:

[I]f there is a financial contribution and a firm pays less for an input than it would otherwise pay in the absence of that financial contribution (or receives revenues beyond the amount it otherwise would earn), **that is the end of the inquiry insofar as the benefit element is concerned.**

63 Fed. Reg. 65348, 65361 (Nov. 25, 1998). (emphasis added)

Commerce adds that 19 U.S.C. § 1677(6) provides an exclusive list of permissible offsets and offsetting the benefit calculated with the "negative" benefit is not consistent with the statute. The Panel agrees. Following the same line of reasoning explained in sections VIII and IX, the Panel affirms the Department's determination to count B.C.'s benefit as zero. Softwood lumber produced in B.C. did not receive a benefit, and this must be reflected in the country-wide benefit calculation. Deducting the difference

³⁶ Petitioner does not, at this time, point to other information in the record for either the interior or coast which would make for a more "robust" data base.

between private market rates and Crown stumpage rates received by B.C. in the benefit calculation would amount to an impermissible offset.

XIII. OTHER PARTIES

Briefs have been filed before this Panel by two private parties. One of these, Canfor Corporation (and its subsidiaries) seeks review of the Department's rulings in its expedited review of under this Countervailing Duty order. Notwithstanding that the same order is involved in this case, and that Canfor had requested exclusion from the order, the Panel does not have jurisdiction to review the related proceeding.

The other party which has filed a brief in this proceeding is Anderson Wholesale, Inc. Anderson is an importer of used railroad ties. In our First Decision we determined that old used railroad ties should be excluded from the CVD order.³⁷ In its First Remand Determination, the Department agreed, and stated:

...we will instruct the CBP that used railroad ties... (and other old wood) is excluded from the CVD order...³⁸

Anderson now claims that Commerce has refused to implement this decision on the grounds that the Panel did not affirm the Remand Determination with regard to used railroad ties. The Panel does not understand why the Remand Determination needed affirming, given that the Department accepted our view. Therefore, notwithstanding that the question of the implementing of the Determination may have come up in the context of an expedited review, to the extent that Commerce is waiting for the Panel to affirm its First Remand Determination in this regard, the Panel does so affirm Commerce's determination, namely that used railroad ties be excluded from the CVD order.

XIV. MATCHING THE NUMERATORS TO THE DENOMINATORS OF ITS SUBSIDY CALCULATIONS

The GOC states that the Department has not matched the numerators to the denominators of in its countervailing duty rate calculations.

It points out that even though the Panel has stated that the denominator must include what is in the numerator, when the Department removed the sales of excluded companies from the denominator, it left the alleged benefit in the numerator. Thus, the Department is not including in the denominator all that it is including in the numerator. Commerce also used denominators that excluded sawmills' co-products and "residual" product shipments, even though uncontroverted record evidence confirms that the alleged benefit in the numerator applied to all production of recipient firms. The GOC requests the correction of these calculation errors.

³⁷ Decision on First Remand at 58 (Aug. 13, 2003).

³⁸ First Remand Determination at 26 (Jan. 12, 2004).

The Panel reaffirms its previous directions to the Department instructing it to match the numerators to the denominators in its countervailing duty rate calculations.

XV. REMAND ORDERS

1. The Department is directed, subject to the conditions set forth at the end of Section V of this opinion, to reopen the record for the limited purpose of developing price information for sales reported by syndicates in the Province of Québec, and to verify such information to the extent it feels appropriate. The Department is directed to grant sufficient time to accomplish this task, and to recalculate the Québec benchmarks including this price information.
2. The Department is directed to recalculate the profit earned by log sellers in Québec starting with a blended price combining both private logs and imported logs.
3. The Department is directed to grant exclusions from the countervailing duty order to sales by Ontario companies for which the “input source” was unsubsidized, and to exclude those sales from the denominator of its benefit/countervailing duty rate calculations.
4. The Department is directed to include in its calculations for Ontario, the profit earned by private log sellers.
5. The Department is directed to match the numerators to the denominators of its countervailing duty rate calculations.

The Department is to issue its remand determination within 45 days of this decision or within 45 days of the receipt of information obtained pursuant to the reopening of the record.

Notwithstanding the clear intention of the Chapter 19 rules that the NAFTA binational panel process provide expeditious review of antidumping and countervailing determinations, the matter before this Panel has been subjected to repeated Panel review and Department of Commerce redeterminations. The current proceeding is this Panel’s fourth review. Measured from the Department’s Final Determination of April 2, 2002, the matter has been under review for over three years. The Panel calls upon the parties to resolve the issues in accordance with the Panel’s orders without further delay. It is the Panel’s hope that the current proceeding will be the last review.

Issued on: May 23, 2005

SIGNED IN THE ORIGINAL BY:

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