

REMAND DETERMINATION

In the Matter of Certain Softwood Lumber from Canada:
Final Affirmative Countervailing Duty Determination,
Secretariat File No. USA-CDA-2002-1904-03
NAFTA Binational Panel Review

SUMMARY

In accordance with the Panel's August 13, 2003, decision in the above-referenced case, the Department of Commerce (the Department) provides this remand determination with regard to four issues: the benefit from Crown stumpage systems, product exclusions, company exclusions, and the denominator in the *ad valorem* rate calculation. Specifically, the Department has reconsidered: 1) its benefit methodology and established an alternative benchmark by which to measure the adequacy of remuneration; 2) whether reprocessed Maritimes-origin lumber and used railroad ties should be excluded from the scope of the order; 3) whether the small group of companies that produce lumber from railroad ties, barnboard and old wood from demolished buildings should be excluded; and 4) whether a category of merchandise, referred to as "residual products," should be included in the denominator of the *ad valorem* subsidy rate. Each of these issues is discussed in detail below. After addressing each of the Panel's concerns, the Department has recalculated the aggregate subsidy rate applicable to all producers and exporters exporting certain softwood lumber products from Canada except for those companies excluded from the order. Finally, relying on the stumpage subsidy rate determined in this remand determination, the Department reconsidered its analysis of the eight

company-specific exclusion requests which were analyzed and not granted in the Final Determination.¹

ANALYSIS AND REDETERMINATION

I. Benefit/Adequacy of Remuneration

In the Final Determination, we determined that provincial stumpage programs confer a benefit on Canadian softwood lumber producers,² pursuant to section 771(5)(E) of the Act. Specifically, section 771(5)(E)(iv) of the Act states that a benefit is conferred when the government provides a good or service for less than adequate remuneration.³ Section 771(5)(E)(iv) of the Act further provides that 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.

As explained in the Issues and Decision Memo, in accordance with the statute, we sought to

¹ *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada*, 67 FR 15545 (April 2, 2002) (Final Determination) and accompanying *Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada* (March 21, 2002) (Issues and Decision Memo). The Final Determination was subsequently amended. See *Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products From Canada*, 67 FR 36070 (May 22, 2002).

² In accordance with section 771(5) of the Act, to find a subsidy countervailable, the Department must determine that a government made a financial contribution, that a benefit was conferred, and that the benefit is specific within the meaning of section 771(5A) of the Act. The Panel affirmed the Department's Final Determination with respect to the issues of financial contribution and specificity.

³ In affirming the Department's financial contribution determination, the Panel agreed with the Department that the standing timber provided by the provincial governments is a good. The Department's determination as affirmed by the Panel that standing timber is a good governs which section of the Act applies when examining whether a benefit has been conferred, *i.e.*, section 771(5)(E)(iv).

determine the existence of a benefit by comparing the provincial government timber prices to a market benchmark price for timber in Canada. To determine the market benchmarks, we applied section 351.511(a)(2) of the Department's regulations, which sets forth a hierarchy of three categories of market benchmarks for determining whether a government good or service is provided for less than adequate remuneration. The validity of the hierarchy identified in section 351.511(a)(2) has not been contested. These potential benchmarks, in hierarchical order, are: (1) market prices for the good or service from actual transactions within the country under investigation (including imports); (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; and (3) 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.

The Panel concluded that with respect to the first tier benchmark significant government involvement may lead to distortion of prices in the country under investigation and such prices could properly be rejected as a market benchmark under 19 CFR 351.511(a)(2)(i). The Panel then found that the Department's decision to reject private timber prices in Canada on this basis is supported by substantial evidence that the provincial governments' domination of the Crown stumpage market influences the relatively small private stumpage market.

Regarding the second tier regulatory benchmark, the Panel disagreed with the Department's determination that U.S. stumpage prices, adjusted to account for prevailing market conditions in Canada, constituted world market prices for timber, within the meaning of 19 CFR 351.511(a)(2)(ii).

The Panel found that standing timber is not a good which is commonly traded across borders. As a consequence, there is no world market price for timber that satisfies U.S. statutory or regulatory requirements. The Panel also observed that because the Department's adjustments did not adequately account for differences in Canadian market conditions, the Department construed the statute in a manner contrary to law. The Panel concluded that the Department's determination was not supported by substantial evidence and remanded the determination of benefit "for further analysis under the statute and regulations in light of the Panel's decision."

We disagree with the Panel's conclusion that there was not substantial evidence to support the Department's determination that market conditions in Canada and the United States are comparable, and that the adjustments the Department made adequately account for differences. We continue to believe that the resulting benchmarks constitute world market prices for timber that are commercially available to purchasers in Canada, within the meaning of 19 CFR 351.511(a)(2)(ii). Nevertheless, consistent with the Panel's decision, the Department has established a new methodology to determine the existence of a benefit.

In developing the new benefit methodology, the Department was guided by certain basic principles. The first, of course, was that the methodology must be consistent with the statutory mandate to determine the adequacy of remuneration in relation to prevailing market conditions in Canada. Second, the methodology must fulfill the statutory objective to determine whether a benefit exists, *i.e.*, whether Canadian lumber producers are better off than they otherwise would have been absent the provincial stumpage system. Thus, the methodology should be based on market values that are not

distorted by the very government financial contribution at issue, *i.e.*, provincial stumpage systems.

Third, where available, the methodology should rely on prices and costs in Canada. Finally, the methodology should seek to utilize the most robust database of available information to achieve the best possible estimate of market values in Canada. As discussed further below, these core principles formed the basis for the Department's remand methodology.

Consistent with our desire for a robust database to establish a new benchmark methodology, the Department sought additional information and comment from the parties.⁴ The Department issued questionnaires to the GOC soliciting additional data on timber and log prices, including information on the log markets in Canada, and data on private stumpage prices in the Maritime Provinces.⁵ We also requested information regarding species, grade, and delivery terms for logs. In its questionnaire responses, the GOC did not provide any information regarding private Maritime stumpage prices but did provide additional log pricing data and information regarding Canadian log markets.⁶ In addition,

⁴ The Government of Canada, the Governments of Alberta, British Columbia, Manitoba, Ontario, and Saskatchewan, the Gouvernement du Quebec and the Governments of the Northwest Territories and the Yukon Territory (collectively the "GOC") as well as the Governments of New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador (Maritime Provinces) responded to the Department's questionnaires and provided comments on the benchmark methodology and the non-benchmark issues. We also received comments from, among others, the British Columbia Lumber Trade Council and its constituent associations (the Coast Forest & Lumber Association and the Council of Forest Industries), the Ontario Forest Industries Association, the Ontario Lumber Manufacturers Association, and the Quebec Lumber Manufacturers Association. Additionally, the Coalition for Fair Lumber Imports Executive Committee (petitioner) filed comments during the remand.

⁵ The Department also collected information pertaining to residual products in the denominator. To the extent that parties filed comments relating to non-benchmark issues, those submissions are discussed in the relevant portions of this remand redetermination.

⁶ See Certain Softwood Lumber Products from Canada: Response to NAFTA Remand Questionnaire, submissions by Weil, Gotshal & Manges LLP dated October 14, 15, 17, 21, and 31, 2003; November 4, 19, 20, and 24, 2003; and December 2 and 11, 2003 (GOC's questionnaire responses).

the parties submitted comments on the data and what they viewed as an appropriate benefit methodology.⁷ Having reviewed the data and considered the comments of the parties, the Department has, for the reasons discussed below, established a new benefit methodology using market principles pursuant to 19 CFR 351.511(a)(2)(iii). Based on that analysis, we continue to determine that provincial stumpage programs confer a benefit on Canadian softwood lumber producers.

Benefit Methodology

In the course of the remand, parties have presented arguments in favor of analyses under tier one or tier two of the regulatory hierarchy. We will briefly address those arguments before discussing the market principles analysis.

Tier One: Private Timber Prices In Canada

The Panel's decision affirming the Department's rejection of the distorted private provincial stumpage prices in British Columbia (B.C.), Quebec, Ontario, Alberta, Saskatchewan and Manitoba, precludes an analysis under the first tier of the regulations. Notwithstanding the Panel's ruling in this regard, the GOC requested that the Department reconsider its tier one analysis and use the private stumpage prices that the Department has already rejected. Nothing in the Panel's decision requires use of those prices that the Department determined to be distorted by the financial contribution at issue.

⁷ Petitioner suggested three possible benchmarks that would be consistent with the Panel's determination: 1) a comparison with U.S. stumpage prices set in an open and competitive market adjusted adequately to reflect market conditions in Canada; 2) a comparison of U.S. and Canadian log prices, adjusted adequately to reflect market conditions in Canada, or 3) a comparison of Canadian log import/export prices, *i.e.*, prices in Canada, compared to the depressed price of government logs in Canada for internal consumption.

The GOC objected to each of the petitioner-suggested benchmarks and offered instead, two possible benchmarks: 1) re-evaluating the viability of the first-tier benchmarks (*i.e.*, private stumpage prices in Canada) or 2) under the third tier, consideration of government stumpage prices in terms of market principles based upon a cost-revenue test. Petitioner objected to the GOC's proposals.

Moreover, no new information has been submitted that would cause us to revise our analysis or revisit this decision. For the reasons underlying our original rejection of such prices as a market benchmark, we continue to do so in this remand determination.

We note that we did seek information concerning private stumpage prices in the Maritime Provinces from the GOC, for potential use as a tier one benchmark. However, the Maritime Provinces responded to the Department's remand questionnaire in the same fashion that they responded to the original investigation questionnaire – by stating that they were not able to provide such information.⁸ Thus, there is no record information that would allow us to consider prices from the Maritime Provinces for benchmark purposes. Consequently, there are no first tier benchmarks available for use by the Department.

Tier Two: World Market Prices

The Panel's decision that there are no world market prices for stumpage similarly forecloses an analysis under the second tier of the regulations for purposes of this remand determination. Petitioner argues that log prices in the United States constitute world market prices for use under tier two of the hierarchy. We disagree that such an analysis is appropriate in this case. First, the regulations contemplate that world market prices under the second tier are world prices for the good in question. 19 CFR 351.511(a)(2)(ii). Second, actual log prices in Canada (domestic and imports) are available to establish whether prices for Crown timber in Canada are consistent with market principles, within the meaning of tier three of the hierarchy. We therefore find it would be inappropriate to resort to a "world

⁸ See GOC's November 4, 2003, questionnaire response.

market price” for logs based on log prices in the United States. Our reasoning is the same as that which underlies our application of the hierarchy when considering prices for the good in question, *i.e.*, where possible we use market-determined prices in the country under investigation (including imports). Only where such prices are not available, would we resort to a world market price. That rationale, in our view, is equally compelling when relying on log prices to derive a market price for timber in Canada.⁹

Tier Three: Market Principles

In the absence of first tier and second tier benchmarks, the third tier of the regulatory hierarchy provides that the Department “will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.” 19 CFR 351.511(a)(2)(iii).

The regulations do not specify how the Department is to conduct a market principles analysis. By its nature such an analysis depends upon available information concerning the market sector at issue and therefore must be developed on a case-by-case basis. Of the cases in which the Department has conducted such an analysis under the current regulations,¹⁰ two involved the government as the sole

⁹ In the Issues and Decision Memo, we considered log import prices together with Canadian purchases of U.S. stumpage as potentially relevant under tier one of the regulations. *Id.* at 40. Upon further consideration of the facts before us, the law, and the Panel’s decision, we determine that log import prices are more appropriately considered under the third tier of the regulations.

¹⁰ Prior to issuing the regulations the Department had applied the adequacy of remuneration standard in only three cases, two of which involved the government provision of electricity. *See Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Trinidad and Tobago*, 62 FR 55003, 55007 (Oct. 22, 1997) and *Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Venezuela*, 62 FR 55014, 55022 (Oct. 22, 1997). In the third case, the government provision of a land lease was involved. *See Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Germany*, 62 FR 54990, 54994 (Oct. 22, 1997). Based on that experience, the Department provided some illustrative guidance in the preamble to the regulations, but stated that circumstances of each case may vary widely. *See* Preamble to Department’s Regulations, Countervailing Duties; Final Rule, 63 FR 65348, 65378 (Nov. 25, 1998). The actual basis for the analysis therefore necessarily varies as well.

supplier of electricity.¹¹ Others involved the provision of port facilities,¹² land and/or land leases,¹³ railway services,¹⁴ or the government's purchase of a good.¹⁵ In each case, the Department conducted its market principles analysis based on information concerning the market sector and the availability of data.¹⁶ Likewise, as discussed below, the Department has structured the market principles analysis in this case based on the market principles that apply in the timber sector and the availability of relevant data.

Market Principles Analysis

In conducting a market principles analysis, petitioner argues that U.S. timber prices adequately adjusted to account for differences in market conditions would be a satisfactory third tier benchmark.

¹¹ *Notice of Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 FR 50410 (Oct. 3, 2001) (the government controlled the entire domestic market and there were no commercially available world market prices for electricity); *see also Notice of Preliminary Affirmative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago*, 67 FR 6001, 6007 (Feb. 8, 2002) (government provision of electricity).

¹² *Notice of Preliminary Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Products from South Africa*, 66 FR 20261 (April 20, 2001) (government was the sole operator of ports and charged country-wide wharfage fees).

¹³ *Final Affirmative Countervailing Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products from the Republic of Korea*, 67 FR 62102 (Oct. 3, 2002) and accompanying Issues and Decision Memorandum at Comment 8 (Korea Cold-Rolled) (sale by the government of industrial land); *see also Final Affirmative Countervailing Duty Determination: Certain Stainless Steel Wire Rod From Italy*, 63 FR 40474, 40481-82 (July 29, 1998)(government's lease of industrial site)(Italy Wire Rod).

¹⁴ *Final Affirmative Countervailing Duty Determination: Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 FR 52747 (Sept. 5, 2003) and accompanying Issues and Decision Memorandum at Comments 6 and 7 (Canadian Wheat).

¹⁵ *Preliminary Results of Countervailing Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From the Republic of Korea*, 68 FR 53116 (Sept. 9, 2003)(government purchase of bar and pipe facility).

¹⁶ *See, e.g., Korea Cold-Rolled*, using private land developers costs, plus 10 percent profit; Canada Wheat, using ownership costs for railway cars rather than cost to government for leasing railcars.

We disagree as we find that petitioner's proposal that we use U.S. timber prices is inconsistent with the panel's decision.

The GOC, on the other hand, maintains that the Department should rely on whether or not the provincial governments' revenues cover their operational costs as reflective of the market principles underlying the pricing of stumpage. This "cost-recovery" methodology is undermined by record evidence concerning provincial stumpage practices. The record evidence demonstrates that the provinces administratively, rather than competitively, set prices for timber, set minimum and maximum cut requirements, set minimum processing requirements, and designate where the timber must be processed (appurtenancy requirements). In addition, tenures are normally long-term to ensure a stable supply of timber to Canadian mills. The provinces also restrict mill closures even in down markets. The objectives of these provincial mandates are to keep Canadian mills supplied with timber and to keep the mills operating and the workers employed, regardless of what the market might otherwise dictate. For example, in 1999, in Quebec, the province's allegedly market-based pricing formula called for a 23 percent increase in stumpage fees, but the government only increased fees by 6.8 percent after provincial lumber producers complained.¹⁷ Similarly, in 2000 the increase in stumpage fees should have been 7 percent under the pricing formula,¹⁸ but Quebec increased the fees by only 3.6 percent.¹⁹ None

¹⁷ Michel Corbeil, *Quebec Steps Back*, in *Le Soleil* (April 2, 1999) (translated), appended to Petition, at Exhibit IV I-12.

¹⁸ See Loic Hamon, *Stumpage Rate Increase, Federation Begg the Minister to Stand Tall*, in *La Terre de Chez Nous* (March 16, 2000) (translated), appended to Petition, Exhibit IV I-2.

¹⁹ Quebec Ministry of Natural Resources Press Release, *Forest dues; the Minister of Natural Resources announces an average increase of 3.6%, all species combined, for 2002-2001* (translated) (March 28, 2000),

of these practices can be considered market based. Rather, they distort the operation of normal market forces, and fundamentally undermine the GOC's claim that provincial stumpage prices are established in accordance with market principles.

Additionally, in our view, given the circumstances of this case, the best method to determine whether provincial stumpage prices are consistent with market principles is deriving stumpage prices from log prices.²⁰ It is generally accepted that the market value of timber is derivative of the value of the downstream products.²¹ This is the basic market principle that underlies the Department's benefit analysis in this case.²² Lumber producers obtain wood fiber in several ways: 1) purchasing logs, 2) purchasing standing timber and hiring loggers, and 3) purchasing forest land and hiring loggers.

Therefore, 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

contained in Petition, Exhibit IV 1-2 (April 2, 2001).

²⁰ We note that in Canadian Wheat, the GOC argued that the Department should not use the government's lease costs for railcars to measure the adequacy of remuneration because such costs reflect the cost to the government and would not adequately measure the benefit to the recipient. The GOC thus recognizes that government cost-recovery may not be an appropriate market principles analysis in some cases. As we have stated, the facts in this case do not support such an analysis, and we see no basis for the GOC's contrary position in this case to apply a government cost-based analysis

²¹ "Stumpage is a raw material. If it has a value at all, it is because some firm or individual believes that this raw material can be fashioned into a finished or semifinished product that can be sold profitably. It follows that the starting point for determining stumpage price should be the selling price of the product or products that are to be produced from the raw material." See G. Robinson Gregory, Resource Economics for Foresters, at 213-214 (1972) app. to Letter from Dewey Ballantine LLP to Department of Commerce (Aug. 1, 2001).

²² Neither party has contested the viability of deriving market stumpage prices from log prices, and actual log prices in Canada are available for such an analysis.

primary markets from which lumber manufacturers obtain wood fiber.²³ 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 transport 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.²⁴

Petitioner argues that there is an established link between timber and log prices to demonstrate that the suppression of prices in the timber market results in price suppression in the log market as well. Petitioner also argues that provincial log export bans further suppress Canadian domestic log prices by lowering the domestic demand for logs. Based on these arguments, petitioner claims that Canadian domestic log prices cannot serve as a suitable benchmark for the same reasons that the Department determined that Canadian stumpage prices could not be used. While we acknowledge petitioner's concern, we are not persuaded that the alleged suppression eliminates Canadian market log prices as an appropriate benchmark for purposes of this remand determination.

²³ As a forestry economist has stated: "The demand for timber is a *derived* demand. That is, it is derived from the market demand for final goods produced from wood. Final products are those wanted by consumers; those that depend most heavily on wood are familiar: housing, newspapers, toilet tissue, wrapping paper, furniture, and so on. The consumer demand for these products creates a demand for the materials needed to produce them; and in this sense the demand for timber standing in the forest is derived from the demand for consumer products that can be made from wood." Peter H. Pearse, Introduction to Forestry Economics, University of British Columbia Press, Vancouver (1990) at 48 (emphasis in original).

²⁴ The analysis in the derived demand model is closely related to the concept of residual value, which is another economic model discussed in the same economic text books. The residual value approach starts with lumber prices and subtracts non-wood, production costs to determine the residual value of logs. From the residual value of logs, the costs of harvesting and transporting logs is subtracted to arrive at the residual value of standing timber.

As we already stated in the investigation, the majority of Canadian logs are acquired by the lumber mills through the tenure system and are subject to constraints such as domestic processing requirements, export taxes, minimum harvest requirements, and appurtenancy requirements. We also found that timber acquired under tenure generally does not enter the log market because the tenure holder is under obligation to utilize it in its own mills. Our research indicates that the great majority of the logs which are freely traded in Canada originate in private forests and are not subject to such constraints, except the log export bans. We do not have sufficient evidence in the record of the potential effect of the log export restrictions, which we did not investigate as a potential subsidy. Therefore, we do not have the means to assess the potential effect, if any, of the log export ban on the market prices of logs. Further, as to any effect an overwhelming supply of Crown logs may have on the propensity of the mill owner to pay high prices for private wood, there is insufficient evidence concerning the effect on the prices of the logs that are actually traded. Thus, we find there is an insufficient basis in the record to reject the use of private log prices in Canada.

Petitioner claims that logs and timber are extremely “close substitute goods” both on the demand and the supply side. We recognize that. While it is true that the wood lot owner can switch from selling timber to selling logs in response to market price fluctuations and the mill owner can also acquire its wood input in the form of timber or logs, we also believe that these are significantly different types of transactions and that the substitution of one product with the other may not be as easily performed in the short run, as petitioner describes. Therefore, while we recognize that there is a correlation between these two prices, we find that the information in the record does not provide a

sufficient basis to reject the use of private log prices in Canada for purposes of the market principles analysis.²⁵

For the reasons discussed above, therefore, to derive the market value of Crown timber we are relying on the market principle of derived demand. Accordingly, to calculate the market benchmark to determine whether the provinces received adequate remuneration, we begin with species-specific log prices, where available, for each province in Canada. We then derive species-specific market stumpage prices for each province by deducting harvesting costs, including costs that are unique to harvesters of government stumpage, *i.e.*, forest planning, from those species-specific log prices. Finally, we compare the provincial stumpage prices to the derived market price to determine the existence of a benefit. This calculation is described in detail below.

Calculations

As detailed in the province-specific calculation memoranda, we are using log price data placed on the record during the investigation as supplemented by the remand questionnaire responses and independent research. The available log price data is as follows:

1. Vancouver Log Market (BC)
2. Vernon Log Market Data (BC)
3. Forestry Cooperative Log Prices (BC)
4. Statscan Log Import Data (all provinces)
5. Statscan Log Export data (all provinces)
6. Log Export Data (from provincial questionnaire responses)
7. Sawlog Bulletin (Quebec, Ontario)
8. Timber Damage Assessment Survey (Alberta)
9. KPMG Study (Ontario)

²⁵ Our methodology may be conservative, *i.e.*, the actual benefit may be higher than the one calculated.

10. Syndicates Price Report (Quebec).

As noted above, the adequacy of remuneration is to be determined in relation to prevailing market conditions in the country under investigation – in this case, Canada. As reflected in the regulatory hierarchy, the Department will use prices in the country under investigation, whenever possible, to determine the adequacy of remuneration. Accordingly, in the market principles analysis we have used all available data on the record for log prices in Canada, both domestic and imports.²⁶ Because log prices in Canada are available, we rejected petitioner's suggestion to use prices for logs exported from Canada to the United States, which do not represent actual log prices in Canada.

Log import prices are market-based, actual transactions that occurred in Canada and, therefore, reflect prevailing market conditions in Canada. The GOC asserts, however, that the use of log import prices is inappropriate because the HTSUS categories include products such as high value veneer logs. We disagree. The HTSUS categories are basket categories that include low value products, such as pulpwood, as well as high value products and the possible inclusion of veneer logs, which may but do not always have a higher associated price,²⁷ does not diminish the validity of our use of import prices. Further, the information available to the Department indicates that veneer logs comprise a very small portion of the import data and that the majority of imports are sawlogs.²⁸ Moreover, the potential impact of a small portion of veneer logs is diminished by averaging with the

²⁶ See 19 CFR 351.511(a)(2)(i), which includes actual import prices for the good in question.

²⁷ Veneer is not always a premium product; in some instances sawlogs are more valuable.

²⁸ See Memo to File Regarding Use of Import Prices.

lower value products. Therefore, we conclude that these import prices are appropriate for use in our market principles analysis.

In approaching our calculations we were faced with a number of issues related to using information from a wide range of information sources. For example, while The Sawlog Bulletin contains data on log price purchase offers from sawmills in Quebec and Ontario, it does not identify the quantity of sales associated with such prices. Additionally, the Syndicates Price Report noted that in some cases, in standardizing the data, conversion factors may have varied slightly. Nonetheless, to the extent possible, we relied on all pricing information available. Further, some log price data has information on grade and some does not. Differences in grade, however, are not relevant to our calculations because provincial stumpage charges do not generally vary by grade. Thus, even though the value of logs may vary by grade, differences in grade have no impact on our analysis.

On a provincial basis, we calculated simple-average species-specific log prices. While we typically weight average across data sources, we cannot do so here because not all data sources contained quantity information. However, as noted above, we determined to rely on all pricing information available. Therefore, in instances where we had more than one data source for domestic prices, we calculated a simple average. Where there was only one data source, we relied on that source. We then calculated a simple average of the domestic and import price.

For adjustments for harvesting costs, we relied on the studies that the provinces themselves use in their own stumpage calculations (and as provided on the record). These studies report information on a province-wide basis, and not on a regional or local basis. We find that it is appropriate to use

these province-wide average harvesting costs.²⁹ We expect that reliance on average harvesting costs, when in fact market price is determined by lowest (marginal) cost buyers, may serve to understate the value of the benchmark.³⁰ Finally, where data is available on profit, we made an adjustment.

However, we are unable to make the adjustment in each province, because the record does not contain sufficient information to allow us to do so.

In our calculations, we compare the market derived species-specific stumpage prices (derived from the species-specific log prices) to the provincial stumpage prices using the same species, where possible. Because of the way the data are reported, however, we are matching a variety of different log prices to one stumpage species category, *i.e.*, Spruce Pine Balsam Sawlog to an SPF stumpage price. Where there is no exact match between the Crown stumpage and the market-derived stumpage prices we chose the best surrogate from the available prices.

Thus, using all available data on log prices in Canada, as noted above, we are establishing benchmarks by first identifying log prices, by species, for each province. We then are adjusting for harvesting costs, the result of which are species-specific, province-specific market benchmarks for timber. We then compare these market benchmarks to the provincial stumpage charge to determine the benefit. *See* Province Specific Calculation Memos for a description of each of these decisions.

²⁹ Hauling distance is one of the factors in this comparison. The reported harvesting costs generally include an average haul cost from stump to mill. The price sources sometimes had different delivery terms, *e.g.*, road side or mill gate. However, because both pricing and cost data sources reflect typical practices within the province, we assume that hauling distances are comparable. *See* Memo to the file on Use of Import Data for a discussion of hauling distance on imported products.

³⁰ For example, in Coastal B.C. the average harvesting cost includes the cost for helicopter logging. However, this harvesting method is generally only employed for high value products. Reliance on average harvesting costs, therefore, may result in a negative derived market value for low-value products.

II. Product Exclusions

A. Reprocessed Maritimes-Origin Lumber

The Panel did not agree that the Department's rejection of an exclusion request for reprocessed Maritimes-origin lumber lies within the Department's discretion. The Panel noted that 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. The Panel stated that, in determining the scope of a proceeding, the Department may choose to be guided by the intent of the petition, but neither the petition nor the concerns of the petitioner can give the Department a legal basis to impose countervailing duties where none are warranted.

The Panel stated that neither U.S.-origin nor Maritimes-origin lumber receives the subsidy at issue in the case. The Panel recognized that when such lumber is reprocessed by companies that also process subsidized lumber, there may be a legitimate concern that the resulting product may be "indistinguishable" from lumber that the reprocessing company produces from subsidized logs. However, the Panel noted that the petitioner and the Department agreed to exclude U.S.-origin lumber that underwent "minor processing" in Canada; an exclusion that does not require that the exporting company process U.S.-origin wood *exclusively*.

The Panel stated that the burden will fall upon the producer/exporter to show that, in fact, a particular shipment is derived from unsubsidized Maritimes-origin lumber. Referring to the requirement that Maritimes-origin lumber must be accompanied by a certificate from the Maritime Lumber Bureau, the Panel stated that nothing in the record shows that U.S. imports of reprocessed Maritimes-origin

lumber cannot be handled in a manner similar to U.S. imports of reprocessed U.S.-origin lumber. The Panel stated that such a procedure would focus the countervailing duties on the subsidized merchandise and ensure that countervailing duties are not imposed on the Maritimes-origin lumber when it does not, in fact, benefit from the subsidies at issue.

The Panel concluded 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 remanded the matter of excluding reprocessed Maritimes-origin lumber for reconsideration in light of its opinion.

In their submissions concerning non-benchmark remand issues, the petitioner stated that the appropriate way to address the Panel's remand is to provide a narrow exclusion for Maritimes-origin lumber remanufactured in Quebec under certain tightly-defined conditions. The petitioner argued that a certificate of origin from the Maritime Lumber Bureau is necessary, but not sufficient. Therefore, the petitioner proposed a number of additional requirements for certified documentation to be provided by the importer. For example, the petitioner suggested that, among other requirements the Department and U.S. Customs and Border Protection (CBP) may impose, the importer must be required to provide certified documentation of agreement by the importer that certifications are subject to verification and potential loss of exemption if erroneous certifications are discovered. Finally, the petitioner argued that if any reprocessed Maritimes-origin lumber is excluded from the scope of the order, the value of those sales must be removed from the denominator and the country-wide CVD rate must be recalculated.

In their November 25, 2003 submission, the Canadian parties³¹ asserted that Maritime lumber remanufactured in other provinces must be excluded from the scope on the same basis as U.S. lumber remanufactured in Canada.³² Additionally, they argued that the Department should explicitly instruct the CBP that the existence of a Maritime Lumber Bureau Certificate of Origin is enough to establish Maritime origin where entries are accompanied by such a certificate. Finally, the Canadian parties argued that neither the facts of this case nor the Department's practice permits the exclusion of the value of any excluded products from the denominator.

Analysis

On remand we determine that unsubsidized Maritimes-origin lumber that is reprocessed in another Province prior to exportation to the United States is excluded from the scope of the countervailing duty order. We intend to apply the same rigorous requirements to entries claiming to be reprocessed Maritimes-origin lumber as we apply to entries claiming to be reprocessed U.S.-origin lumber.³³ Therefore, we will instruct the CBP that softwood lumber products claiming to be reprocessed Maritimes-origin lumber are excluded from the CVD order provided that these products meet the following criterion: upon entry, the importer, exporter, Canadian processor and/or original

³¹ The GOC and the British Columbia Lumber Trade Council and its constituent associations (the Coast Forest & Lumber Association and the Council of Forest Industries), the Ontario Forest Industries Association, the Ontario Lumber Manufacturers Association, and the Quebec Lumber Manufacturers Association (Canadian parties).

³² The petitioner and the Canadian parties agree that Maritime-origin lumber substantially transformed in another province is not subject to this exclusion.

³³ See the scope clarification message (# 3034202), dated February 3, 2003, to the CBP, regarding treatment of U.S. origin lumber on file in the Central Records Unit, Room B-099 of the main Commerce Building.

Maritime producer establish to CBP's satisfaction that the softwood lumber entered and documented as reprocessed Maritimes-origin lumber was first produced in a Maritime Province as a lumber product satisfying the physical parameters of the softwood lumber scope and qualifying for the exemption applicable to Maritime lumber. A claim of non-subject status can be rebutted by evidence demonstrating that the merchandise was substantially transformed in Canada in a non-Maritime Province.

As to the suggestion of the petitioner that we exclude such sales from the denominator and recalculate the country-wide CVD rate, we agree, in principle, that such shipments should be excluded from the denominator to the extent that they were, in fact, included in the denominator and can be quantified. However, we have no information on the record with respect to the value of Maritimes-origin lumber that was reprocessed in another Province prior to exportation to the United States, nor do we have any information regarding the level of value added in such provinces.

According to the information submitted by the Maritime Provinces' representatives, of the 160,848,360 fbm of softwood lumber exported from the Maritimes between April 1, 2001 and March 31, 2002 (the period of investigation or POI), 48,254,508 fbm were remanufactured in other provinces prior to exportation to the United States.³⁴ However, we do not have any information with respect to the value of such shipments and we suspect the adjustment would be insignificant.³⁵ Therefore, rather

³⁴ See charts on exports and remanned exports attached to *ex parte* meeting memorandum of a meeting between Department officials and representatives of the Maritime Provinces (July 17, 2002).

³⁵ Assuming that such shipments were valued at the high end of the spectrum (estimated \$500/mbf) the total value (approximately \$2.4M) would be so insignificant compared to the country-wide denominator (approximately \$8.5B) as to make any adjustment meaningless.

than make any adjustment for reprocessed Maritimes-origin lumber in the context of this remand, we will defer making such adjustment until the administrative review if appropriate.

B. Used Railroad Ties

The Panel stated that the Department failed to address two threshold issues presented by the request of an importer of used railroad ties to be excluded from the CVD order: (1) are the used railroad ties at issue *softwood lumber* products, and (2) do currently imported used railroad ties benefit from the subsidies at issue in this proceeding?

The Panel agreed that the Department has discretion to treat the imports as softwood lumber unless the importer can establish otherwise. The Panel noted that to the extent that a specific shipment can be shown to be of hardwood, that shipment would fall outside the scope of the order.

On the question of whether currently imported used railroad ties benefit from the subsidies at issue, the importer raised two distinct claims: country or province of production and timing of production. With respect to the former, the importer claimed that currently imported used railroad ties may have been produced in the United States, the Maritime Provinces, or, in one of the provinces subject to countervailing duties. The Panel stated that for any particular shipment, where the importer is able to show that the products have not benefitted from the subsidies at issue, the Department must exclude those imports from the scope of the countervailing duty order. On the timing of production, the panel stated that the Department has no basis to apply its findings that currently produced softwood lumber products benefit from current subsidies to imports of railroad ties that were produced in or

before the 1950s or 1960s.³⁶ The Panel concluded that the used railroad ties imported by the importer during the POI were produced forty or fifty years ago under different subsidy practices that have not been identified and have not been investigated by the Department in this proceeding. Accordingly, the Panel remanded the matter of the exclusion of used railroad ties to the Department for reconsideration in light of its opinion.

In its submissions concerning non-benchmark remand issues, the petitioner stated that a certification by the importer, subject to review and verification, and enforcement, which states that all of the used railroad ties in a particular shipment are at least ten years old,³⁷ would be sufficient to meet the age threshold for exclusion established by the Panel. Additionally, the petitioner stated in its September 9, 2003 submission that if used railroad ties are excluded from the scope of the CVD order, the sales value of such products must be removed from the denominator and the country-wide CVD rate must be recalculated. However, in its December 16, 2003 submission, the petitioner did not dispute the Canadian parties' observation that the denominator was limited to certain shipments by sawmills and remanufacturers during the POI and, as such, it did not include sales of used railroad ties.

In its November 25, 2003, submission, the Canadian parties argued that the Department should exclude from the scope of the investigation all used railway ties. They argued that any railway ties more

³⁶ This is similar to the Panel's discussion with respect to company exclusions in which the Panel stated that the companies that salvage used railroad ties, barnboard or other "old wood" from demolished buildings, riverbeds, etc., could not have benefitted from the alleged subsidy as the timber harvesting happened decades ago and was clearly not done during the POI.

³⁷ The petitioner stated that ten years is merely a suggestion for the dividing line between used railroad ties that are clearly unsubsidized and those that may have benefitted from the subsidies at issue in this case.

than one year old cannot have any alleged benefit attributed to them, as the alleged stumpage subsidies are recurring and applied to products in the year of receipt. The Canadian parties argued that if the Department mistakenly adopts the petitioner's suggestion of an age requirement, a conservative five-year age requirement is more than sufficient to ensure that the ties have not benefitted from the alleged subsidies at issue in this case. They also suggested that the Department may wish to require that importers establish to the CBP's satisfaction that the ties are indeed used railway ties; demonstration of which could be relatively easy for future imports since the majority of such ties have stamps at the end that indicate the year they were creosote-treated or pins attached indicating their nature and age. For imports without such indications and for those that have already entered U.S. commerce under suspension of liquidation, the Department and the CBP should work with the importers to establish the realistically available documentation that will satisfy the CBP that an entry contained used railway ties. Finally, the Canadian parties argued that neither the facts of this case nor the Department's practice permits the exclusion of the value of any excluded products from the denominator.

Analysis

On the issue of whether the used railroad ties at issue are softwood lumber products, we agree with the Panel that, 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 because the order extends only to imports of certain softwood lumber products.

As noted in this remand determination with respect to Maritimes-origin lumber, we also agree with the Panel that, where an importer of used railroad ties is able to show that its products have not

benefitted from the subsidies at issue in this proceeding because they were produced in the United States or the Maritime Provinces, they are excluded from the order. We intend to work with the CBP to establish procedures related to imports of used railroad ties produced in the United States and/or the Maritime Provinces.

Finally, on remand, we agree with the Panel that there is no basis in the record to attribute to imports of used railroad ties over a certain age the Department's findings that currently produced softwood lumber products benefit from current subsidies. We note that in the Panel's discussion of company exclusion requests, the Panel stated that companies that salvage used railroad ties, barnboard or other "old wood" from demolished buildings, riverbeds, etc., could not have benefitted from the alleged subsidies. In addition, as noted above, the Panel made clear its view that where, as here, the railroad ties at issue were produced forty and fifty years ago under different subsidy practices that have not been identified and have not been investigated by the Department in this proceeding, such timber could not have benefitted from the alleged subsidies. While the petitioner stated that its selection of ten years was merely an arbitrary line, we note that the average useful life (*i.e.*, the period over which any non-recurring subsidies are allocated) used during the investigation was ten years. Therefore, for any used railroad ties to be excluded on the basis that they have not benefitted from the subsidies covered by the proceeding, such used railroad ties must be at least ten years old.

Additionally, as this reasoning applies to barnboard or other "old wood" from demolished buildings, riverbeds, etc., we determine that such products could not have benefitted from the alleged subsidies. Therefore, we determine that imports of such products are not within the scope of the order.

To implement this determination, we will instruct the CBP that used railroad ties or barnboard or other “old wood” from demolished buildings, riverbeds, etc. is excluded from the CVD order provided that these softwood lumber products meet the following condition: upon entry, the importer, exporter, or Canadian processor establish to CBP’s satisfaction that the softwood lumber entered and documented as used railroad ties was originally produced at least ten years prior to the investigation. A claim of non-subject status can, however, be rebutted by evidence demonstrating that the merchandise was originally produced within 10 years of the investigation.

Finally, it is clear from the record that used railroad ties and other “old wood” are classified under HTSUS 4407.1000. Because our denominator was based on the value for shipments from sawmills, as adjusted to include remanufacturers’ shipments, such used railroad ties and other “old wood” was not included in the shipment data we relied on in the investigation. Therefore, we determine that adjustment of the denominator to remove the value of such shipments is not appropriate.

III. Company Exclusions

The Panel acknowledged the Lumber III panel’s conclusion that a “bright line” criterion was reasonable and that it was proper for the Department to determine a country-wide aggregate rate and apply it to all non-excluded companies, even those claiming exclusion based on zero or *de minimis* subsidies. The Panel stated that Commerce reasonably concluded that consideration of the more than 350 applications was impracticable and, therefore, the Panel concluded that the Department’s decision to consider only 30 of the 350 companies’ requests for exclusion is supported by substantial evidence

and is otherwise in accordance with the law. However, the Panel found that Commerce did not properly apply its own “input sourcing” criterion by failing to grant applications for exclusion submitted by all companies that relied on the source of their lumber as the basis for exclusion.

Specifically, the Panel referred to companies that salvage used railroad ties, barnboard or other “old wood” from demolished buildings, riverbeds, etc. The Panel did not specifically identify the companies to which it was referring. The Panel noted that the timber harvesting happened decades ago and was clearly not done during the POI. The Panel stated that these applicants could not have benefitted from the alleged subsidy. Concluding that the Department failed to provide a rational basis for not considering these exclusion applications, the Panel stated that the Department’s determination in this regard is unsupported by substantial evidence and is contrary to law.

The Panel remanded to the Department for consideration the exclusion requests of those additional companies (*i.e.*, those companies that salvage used railroad ties, barnboard or other “old wood” from demolished buildings, riverbeds, etc.).

In its submissions concerning non-benchmark remand issues, the petitioner stated that it does not oppose the exclusion of the eight additional companies it identified using the Panel’s criteria if it is certified and verified that all of the subject merchandise that they produce or export is obtained from wood that is at least ten years old, and the excluded sales are removed from the denominator. The petitioner, however, suggested that exclusion of any additional companies should be limited to

companies meeting the GOC-developed criteria for the group of “old wood” companies.³⁸ The petitioner also suggested that only three of the eight companies (Westcan Rail Ltd., Forster Management, Inc., and Logs End Inc.) indicated that their wood sources were at least ten years old and otherwise provided sufficient information to enable the Department to consider them for exclusion.

In its November 25, 2003, submission, the Canadian parties argued that the Panel specifically indicated that exclusion applications for salvagers of “old wood” should be considered and, therefore, the Department must investigate certain additional applications for a company exclusion. In addition, the Canadian parties argued that, contrary to claims by the petitioner, the applications do in fact contain information substantiating that the applicants’ source of inputs is “old wood.”

Analysis

The Panel described the additional companies that it was referring to as those companies that salvage used railroad ties, barnboard or other “old wood” from demolished buildings, riverbeds, etc., however, it did not specifically identify the companies. The Panel stated that the timber harvesting happened decades ago and was clearly not done during the POI. As such, the Panel reasoned that these applicants could not have benefitted from the alleged subsidy.

We reviewed the exclusion requests from the underlying investigation and identified eight companies whose applications for exclusion the GOC stated were based on type of input sourcing; *i.e.*, “old wood” (*see* footnote 38). Specifically, we identified the companies by reviewing the October 29,

³⁸ Citing to the GOC’s Oct. 29, 2001, Exclusion Request, the petitioner identifies the “old wood” companies criteria as those applicants that “either acquired old wood such as rail ties or barnboard at arm’s length, or salvaged old wood from rail beds or rivers or lakes. The wood’s age makes it impossible to determine its original source, however, it is clear that the wood in question was not sourced from Crown lands in recent decades.”

2001 submission of the GOC, in which company exclusion requests were submitted. Volume XXXVIII contains the applications of “Remanufacturers or Wholesalers that either purchased at arm’s length or salvaged old wood, held no Crown tenure, were not affiliated with a tenure holder.” This volume contained the applications of the following eight companies: (1) Canadian Pacific Railway; (2) Cando Contracting Ltd.; (3) Forster Management Inc.; (4) Logs End Inc.; (5) Stewart Boles Trucking; (6) Vancouver Timber Services Ltd.; (7) Western Rail Ltd.; and (8) The Rustic Wood Company. A footnote explained that the application of The Rustic Wood Company had been inadvertently placed in Volume XLI, but should have been in this volume as the company purchases and wholesales only salvaged wood from old barns, warehouses, and grain elevators.

The Panel stated that the applicants it was referring to presented the source of their inputs as the basis of their applications. Based on our review of the applications, we agree with the petitioner that only three of the applicants (Forster Management, Inc, Logs End Inc., and Westcan Rail Ltd.) clearly identified the source of their inputs as “old lumber.” For the remainder of the companies in this group (Canadian Pacific Railway, Cando Contracting Ltd., Stewart Boles Trucking, Vancouver Timber Services Ltd, and Rustic Wood), in our view, the applications are not as clear with respect to the source of the inputs. One applicant merely stated that its exports were “made solely from lumber purchased at arm’s length from an unaffiliated company.”

Regardless of whether it was clear on the face of their application, to the extent that each of the companies exports merchandise that is considered “old wood” such as used railroad ties, barnboard or other “old wood” from demolished buildings, riverbeds (*i.e.*, the wood’s age makes it impossible to

determine its original source), we agree with the Panel that these companies could not have benefitted from the alleged subsidy. As such, these companies do not export merchandise subject to the order and consideration of their exclusion requests is no longer necessary. See “Product Exclusion” section of this remand determination.

As noted in the “used railroad ties” section of this remand determination, we intend to instruct the CBP that merchandise claimed to be “old” softwood lumber (softwood lumber that was first produced at least 10 years prior to the investigation, such as used railroad ties, barnboard or other “old wood” from demolished buildings, riverbeds,) is not within the scope of the order. Further, we will instruct the CBP to liquidate all such entries without regard to CVD duties.

IV. Denominator: Residual Products

The Department’s methodology was designed to determine the subsidies to production of softwood lumber in Canada. Moreover, in establishing the *ad valorem* subsidy rate, the Department’s methodology was based on the use of a compatible numerator and denominator. Accordingly, in the underlying investigation, with respect to the numerator (*i.e.*, the total subsidy to softwood lumber production), the Department requested that each Canadian province report the volume of Crown logs that entered sawmills during the period of investigation (POI).³⁹ The Department used the phrase “entered sawmills” to limit its request to logs that were actually “processed by sawmills.” Thus, the Department sought to include in the numerator only those logs that hit the saw blade in the sawmill (*i.e.*, logs used in the lumber production process).

³⁹ See, *e.g.*, page IV-I of the Department’s May 1, 2001 questionnaire (Initial Questionnaire).

Having limited the numerator to Crown logs that were actually processed by sawmills, for purposes of the denominator, the Department requested information on all of the products produced from logs that were processed by (*i.e.*, “entered”) sawmills.⁴⁰ Specifically, the Department’s methodology was to include in the denominator only the sales of those products resulting from logs processed by the sawmill. Those products are not limited to softwood lumber. They also include softwood co-products (*e.g.*, wood chips) that result from lumber production. This broader group of products is what we mean when we refer to products that were the result of the softwood lumber manufacturing process. Accordingly, the Department limited the denominator to softwood lumber products (including remanufactured lumber) and softwood co-products.

In arguments before the Panel, the GOC asserted that the Department should have included an additional category of products, residual products, in the denominator of the subsidy rate calculation. The GOC argued that sales of such residual products (*e.g.*, logs in the rough, poles, posts, railway ties as well as other products such as oriented strand board and particle board) should have been included in the denominator on the grounds that they are products produced by sawmills.

The Department argued before the Panel that it correctly excluded residual products from the denominator. The Department explained that several items included in the GOC’s residual products category were produced from softwood Crown logs that were not processed by sawmills, *i.e.*, were

⁴⁰ A review of the Department’s initial questionnaire makes this evident. *See, e.g.*, page III-1 of the Initial Questionnaire in which it instructed provinces to exclude products made from whole log chippers (a non-sawmill process) in reporting sales of by-products.

not the result of the softwood lumber manufacturing process.⁴¹ Moreover, the manner in which the GOC presented the residual products data made it impossible for the Department to parse out those residual products that were not the result of the softwood lumber manufacturing process. As a result, the Department did not include the residual products value in the denominator used in the subsidy rate calculation.

In its arguments before the Panel, the domestic industry claimed that the Department was correct in its decision not include residual products in the denominator. The domestic industry argued that since the numerator was limited to logs that entered sawmill establishments, which it understood to mean logs that were processed by the sawmill, the Department correctly excluded from the denominator those residual products that were never processed by the sawmill (*e.g.*, logs in the rough). It also pointed out that there were products, such as oriented strand board and particle board, included in the residual products category that could not have been produced by sawmills. As the sawmills did not produce these products, the products' corresponding log inputs were not in the numerator and, thus, should not be included in the denominator.

In its decision, the Panel expressed confusion concerning what it found to be contradictory statements made by the Department regarding the residual products issue. For example, the Panel noted inconsistencies regarding the standard upon which to base inclusion or exclusion of products in the denominator of the subsidy calculation. Specifically, the Panel stated that:

⁴¹ For example, according to information presented by the GOC during verification, the residual category contained logs in the rough as well as oriented strand board and particle board.

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. . . 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.” 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.

Referring to another perceived inconsistency on the residual products issue, the Panel observed 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 production of softwood lumber production process; as such it directly contradicts the Department’s assertions that this case involves subsidies that are not tied to lumber production.

As a result, the Panel determined that it was not possible for it to reasonably discern the path followed by the Department regarding the residual products issue. In particular that Panel stated that, 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 Panel further stated that the Department's approach:

... 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 CFR 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 perceived inconsistencies, the Panel remanded the inclusion of residual products in the denominator of the subsidy calculation to the Department for further consideration. Specifically, the Panel requested that the Department address the following:

1. 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.
2. The Department should clarify the basis for its rejection of residual products on the list supplied by Canadian parties. Did the Department reject residual products because "many" of such products did not result from the lumber manufacturing process, or because the logs used were never processed by sawmills? The Panel found the Department used both justifications.
3. 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.

Before responding to the three items enumerated above, we shall first address the perceived inconsistencies that were noted by the Panel. First, the Panel found inconsistent the standard upon which the Department based inclusion or exclusion of products in the denominator of the subsidy calculation. Although our explanation may not have been clear, our approach on this issue, as

evidenced by our final subsidy calculations, is consistent.

As noted above, under the Department's methodology the numerator and denominator are calculated on a parallel basis, *i.e.*, Crown timber that is actually processed in sawmills (numerator), and the products that result from that processing (denominator). As stated above, the Department requested that each Canadian province report the volume of softwood Crown logs that entered sawmills during the POI. In the Department's view, the term "entered" sawmills was synonymous with softwood Crown logs that were actually used in the lumber production process.

Consistent with the methodology used to calculate the numerator, the Department determined that the denominator should include merchandise that resulted from the processing of logs into lumber. With respect to residual products, the GOC failed to show that those products were products produced from timber entering sawmills. During verification, STATSCAN officials presented a list which they claimed indicated all of the items included in the residual products category. This list contained several items, such as logs in the rough and pulp logs, that the Department concluded never entered and were never processed by sawmills.

As it was our intention to include in the numerator only those softwood Crown logs that were processed by sawmills (*i.e.*, logs that hit the saw blade of a sawmill), we had to correspondingly limit the denominator to the sales of those products resulting from the softwood logs processed by the sawmills (*i.e.*, products that were the result of the softwood lumber manufacturing process). In this manner, the Department employed a consistent standard upon which to base inclusion or exclusion of

products in the denominator of the subsidy rate calculation.⁴²

The Panel stated that the Department's attribution of the subsidy to all products produced during the softwood lumber manufacturing process effectively ties the subsidy to such a production process and, as such, directly contradicts the Department's assertion that the case involves subsidies that are not tied to lumber production. The limitation on products in the denominator does not, however, constitute a "tied" subsidy calculation. Rather, as explained above, the limitation on products in the denominator is the logical consequence of limiting the total subsidy calculation in the numerator to Crown logs that were actually processed by sawmills.⁴³ The Panel has, in fact, stated that, if all logs included in the numerator were used solely to produce softwood lumber products and co-products (which the record indicated was the case), the Department may not include sales of residual products in the denominator.

Having addressed the perceived inconsistencies of the Panel, we now turn to the items enumerated by the Panel. In its first point, the Panel stated that ". . .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."

Though it is the Department's contention that our questions to the GOC regarding the

⁴² The Panel also notes that 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.*" We note that we incorrectly phrased this section our brief. We should have stated that the list of residual products presented by the GOC included products that did not result from the softwood lumber manufacturing process.

⁴³ Further, as the denominator was not comprised solely of lumber, the numerator also was not limited solely to the portion of the log that was attributable to lumber. Rather, the value of the entire log was used in the numerator calculations.

numerator were clear, on remand we took steps to ensure that the data provided was limited to Crown timber actually used in the lumber production process. In our September 25, 2003 remand questionnaire, we asked each province to provide, “the volume of softwood logs that entered and were processed by sawmills during the POI.” In this manner, we conveyed the Department’s intention to limit the numerator to those softwood Crown logs that entered and were processed by sawmills during the POI.

In its questionnaire response, the GOC did not alter any of the numerator information that it previously provided in the underlying investigation for British Columbia, Manitoba, Ontario, Quebec, and Saskatchewan.⁴⁴ Thus, for these provinces, we continue to find that, for purposes of the numerator calculations, the provinces have reported the volume of logs that entered and were processed by sawmills.

Regarding Alberta, the GOC reiterated claims Alberta made in the underlying investigation that the numerator volume originally provided cannot be used as a proxy for log volumes entering sawmills because it includes not only log volumes that went to sawmills, but also volumes that went to pulp, paper, and other wood products industries.⁴⁵ In the questionnaire response, the GOC provided the Department with a numerator volume that it claims represents the volume of sawlogs that sawmills used to produce softwood lumber and lumber co-products. *Id.* The GOC obtained this numerator volume by applying a lumber-to-log recovery rate to the portion of Alberta’s total shipments of lumber during

⁴⁴ See Exhibit 42 of the GOC’s October 17, 2003 questionnaire response.

⁴⁵ *Id.*

the POI attributable to the Crown harvest. *Id.* We note that the proposed numerator volume for Alberta is the same volume that the Department ultimately rejected in the underlying investigation.⁴⁶ Therefore, as the GOC has failed to provide any new information pertaining Alberta's numerator volume, we have continued to use the numerator volume for Alberta that was employed in the underlying investigation.

Thus, in response to the Panel's first question, our methodology limits the numerator to softwood Crown logs that entered and were processed by sawmills during the POI. Accordingly, our methodology for the denominator is to include only products produced during the softwood lumber manufacturing process. In accordance with the Panel's decision, therefore, the Department may exclude residual products from the denominator, unless it is established that those products were produced using material from logs that are included in the numerator.

The Panel also requested that the Department clarify the basis for its rejection of residual products on the list supplied by Canadian parties. Specifically, the Panel asked whether the Department rejected the residual products "because many of such products did not result from the lumber manufacturing process, or because the logs used were never processed by sawmills?" As explained above, by limiting the numerator to softwood Crown logs that were processed by sawmills, the denominator should correspondingly be limited to those products that were produced during the softwood lumber manufacturing process. Thus, we have not included residual products in the

⁴⁶ See Issues and Decision Memo at 127. We further note that the methodology used by Alberta to derive its proposed numerator volume, the recovery factor methodology in particular, was also rejected in the Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 57 FR 22570, 22576 (May 28, 1992) (Lumber III).

denominator because many items included in the category were not the result of the softwood lumber manufacturing process (*i.e.*, oriented strand board and particle board) and because many of the items included on the list were derived from softwood Crown logs that never entered or were not processed by a sawmill (*i.e.*, logs in the rough that were never sawed by a saw blade).

As indicated in the underlying investigation, we noted that there were some residual products that appeared to have resulted from the softwood lumber manufacturing process. Based on our methodology, we would have included such residual products in the denominator of the subsidy rate calculations. However, the manner in which the GOC presented the residual products data left no way of separating such products from the aggregate amount reported for residual products.⁴⁷ As we had no way of breaking out the value of appropriate residual products from the value of inappropriate residual products, we declined to include any of the residual products in the denominator of the subsidy rate calculations.⁴⁸

In its third point, the Panel stated that “[t]o 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.” As explained above, the numerator is based solely on Crown timber that was actually processed by a sawmill, *i.e.*, logs that hit the sawblade. Thus, all of the timber in the numerator went into the softwood lumber production

⁴⁷ However, given the new information provided by the GOC in its October 17, 2003 questionnaire response, this is no longer the case. This new information regarding the residual products is discussed below in further detail.

⁴⁸ See the “Denominator Issues” section of the Issues and Decision Memo.

process, not to other types of processing. Accordingly, the denominator is properly limited to only those products resulting from the lumber production process, *i.e.*, lumber and lumber co-products such as wood chips. As explained below, in our remand questionnaire we provided the GOC with the opportunity to demonstrate that items in the residual products category were, in fact, produced during the lumber manufacturing process. Citing to confidentiality restrictions, the GOC has refused to divulge itemized breakouts of the relatively small amount of residual products that could conceivably have been produced during the lumber manufacturing process.⁴⁹ To be included, the products need to be made during the lumber manufacturing process, but not necessarily from Crown logs, which are the “logs in the numerator.”

Based on the record evidence, therefore, the Department has confirmed its determination to exclude from the denominator the residual products value provided by the GOC. To adequately explain why the GOC has failed to demonstrate that sawmills have produced residual products using material from logs that are included in the numerator additional background information is required.

Subsequent to the issuance of the Preliminary Determination,⁵⁰ the GOC submitted information regarding an additional category of products, residual products, that it argued should be included in the denominator of the subsidy calculations.⁵¹ In its December 17, 2001 submission, the GOC indicated

⁴⁹ See, e.g., Exhibit 43 of the GOC’s October 17, 2003 questionnaire response.

⁵⁰ *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 FR 43186 (August 17, 2001) (Preliminary Determination).

⁵¹ See footnote 6 and Exhibit 37 of the GOC’s December 17, 2001 supplemental questionnaire response.

that it obtained the residual products data using commodity-specific data from the 1997 Annual Survey of Manufacturers (ASM).⁵² As the GOC explained, the residual products consisted of the:

total shipment value of all other commodities not requested in the original questionnaire response (*e.g.*, ties, shingles, shakes, and some other products manufactured as secondary activities). This category also includes raw materials such as fuel wood, firewood, and pulpwood harvested by sawmills and sold to other manufacturers. . .

Id. at Exhibit 37.

During verification, officials from the Department reviewed how the GOC derived the denominator data used in its questionnaire responses. GOC officials from STATSCAN explained that they used two surveys as the basis of their denominator data, the 1997 ASM and the Monthly Survey of Manufacturers (MSM).⁵³ STATSCAN officials explained that the MSM contained up-to-date monthly data for the POI regarding the aggregate value of shipments reported by sawmills. The MSM does not contain product specific information. They further explained that the 1997 ASM, on the other hand, contained commodity-specific data reported by sawmill establishments. They added that STATSCAN obtained this commodity-specific information from long-form questionnaire responses that were submitted by sawmill establishments as part of the 1997 ASM.⁵⁴ They further explained that respondents to the 1997 ASM that did not fill out the long-form questionnaire completed a short-form

⁵² The ASM is a survey that the GOC periodically sends to manufacturers. As of the period of investigation, the 1997 ASM survey was the most recent ASM survey completed by the GOC. The ASM surveys are tailored to specific industries. In the case of the lumber industry, the ASM is designed for sawmill establishments, except those mills that produce shakes and shingles. In Exhibit 37 of the December 17, 2001 questionnaire response, the GOC indicated that it obtained the residual products data from line 8.2 of the 1997 ASM.

⁵³ *See, e.g.*, Exhibit 7 of the February 15, 2002, STATSCAN Verification Report (STATSCAN Verification Report).

⁵⁴ *Id.* at page 3.

questionnaire; however, they noted that the short-form questionnaire responses did not contain commodity-specific data.⁵⁵ Neither the GOC nor STATSCAN officials indicated at verification that, unlike the other product categories, long-form, commodity-specific ASM data was not available for residual products.

To derive the denominator data provided in the underlying investigation, STATSCAN used commodity-specific data from long-form questionnaire responses from the 1997 ASM to determine the proportionate share of the aggregate MSM values for the POI attributable to each of the four types of wood products, including residual products.⁵⁶ Thus, it appeared that to determine commodity-specific value data for each of the four product categories, including residual products, STATSCAN applied percentages based on commodity-specific ASM volume data, adjusted for inflation, to the aggregate POI MSM values.

In response to the Panel's decision, we issued a remand questionnaire to the GOC requesting data on the extent to which sawmills produce residual products using material from softwood Crown logs that are included in the numerator.⁵⁷ In the remand questionnaire, we asked the GOC to identify the quantity and value of each of the items included in the residual products category. In its October 17, 2003 questionnaire response, the GOC, for the first time, divulged that, unlike the other product categories used in the denominator, the residual products category was not, in fact, comprised of long-

⁵⁵ See, e.g., page 3 and Exhibit 3 of the STATSCAN Verification Report.

⁵⁶ See *Id.* at Exhibit 7. The other three product categories were: softwood lumber, hardwood lumber, and co-products.

⁵⁷ See the Department's September 25, 2003 remand questionnaire.

form, commodity specific ASM data. The GOC stated that approximately 80 percent of the residual products category is actually comprised of short-form questionnaire data, which does not contain any product-specific information. The GOC further stated that the remaining 20 percent of the residual products category is comprised of a “Not Elsewhere Specified” category, containing no product-specific data, and a very small portion of commodity specific data from long-form questionnaire responses.

Thus, in its October 17, 2003 response and in its November 25, 2003 submission, the GOC cast aside the issue of residual products and argued that the Department should simply include all of the 1997 ASM values from the short-form questionnaire in the denominator, even though they are admittedly outside the POI and not based on commodity-specific data. The sole basis for Canada’s argument is the unsubstantiated claim that a majority of the data in the short-form questionnaire was undoubtedly produced by sawmills during the lumber production process. We strongly disagree with the GOC’s contention.

As explained above, the GOC’s own methodology was based on using commodity-specific ASM data to determine the proportionate share of total shipment values for each of the four product categories purportedly produced by sawmills. Thus, the GOC used the 1997 ASM data strictly for purposes of deriving percentages for each of the four wood product categories and did not derive the POI values added to the denominator directly from the ASM data. There is no basis for the GOC’s suggestion that we should now depart from that methodology for residual products.

The GOC’s own admission that they have little information on what is actually in the “residual

products” category supports the Department’s decision not to include this data in the denominator. Because the short-form questionnaire responses are not commodity-specific, it is impossible to determine the extent to which these short-form respondents produced residual products during the lumber production process.⁵⁸ The GOC did provide a relatively small amount of commodity-specific data for items covered by the residual products category in its October 17, 2003 questionnaire response. For example, in Exhibit 43 of its response, the GOC provided separate line items for such products as softwood rail ties and laminated wood panels. This same exhibit also contained line items for shingles (other than of western red cedar, untreated) and shakes. Given that the GOC produced evidence indicating that these residual products were produced during the softwood lumber manufacturing process, we would have used the 1997 ASM data for these products to derive a POI value for inclusion in the denominator of our subsidy calculations using the GOC’s denominator calculation methodology from the underlying investigation. However, citing confidentiality restrictions, the GOC refused to provide the corresponding values for these products. As a result, we have not included any of these residual products in the denominator.

Further, there is no reason to believe that by excluding the residual products value, the smaller sawmills that responded to the short-form questionnaire are somehow under represented. As noted above, the GOC calculated a *proportionate* value for each product using percentages derived from the product-specific volume data in the long-form responses. As the GOC itself has pointed out, the

⁵⁸ Similarly, we have also declined to include any value data from the “Not Elsewhere Specified” category of residual products.

operations and product mix of smaller sawmills, which account for the majority of the short-form questionnaire responses, “will largely mirror those of larger mills,” which accounted for the majority of the long-form questionnaire responses.⁵⁹ By the GOC’s own admission, therefore, there is no reason to believe that the percentages derived for the product categories from the long-form questionnaires are not representative of sawmill establishments as a whole in Canada.

V. Company-Specific Exclusion Requests

As a consequence of the newly calculated stumpage benefit rate, which is lower than the original calculated stumpage benefit rate, we reconsider the exclusion requests of those eight companies that were not excluded from the order because they did not have a zero or *de minimis* subsidy rate. As we did in the Final Determination, we applied the applicable province-specific rate to all purchases of Crown logs and Canadian lumber to derive any benefit from stumpage programs. We added any benefit from other programs and divided the total company benefit by the total company shipment value to determine whether the requesting company received a zero or *de minimis* benefit. See Calculation Memorandum on Exclusion Requests, January 12, 2004. Where a reviewed company received a zero or *de minimis* benefit during the POI, we have excluded that company from this investigation. Specifically, Produits Forest Dube and Scierie West Brome received zero or *de minimis* benefits during the POI and, therefore, are excluded from the order.

FINAL REDETERMINATION

In accordance with the remand order, we have reconsidered the benefit methodology, two

⁵⁹ See Exhibit 44 of the GOC’s October 17, 2003 questionnaire response.

scope determinations, the exclusion requests of a small group of companies, and a calculation issue involving residual products in the denominator. Additionally, we have reconsidered eight company-specific exclusion requests on the basis of the newly calculated stumpage benefit rate. As a result, we have excluded Produits Forest Dube and Scierie West Brome and have recalculated the *ad valorem* subsidy rate for certain softwood lumber products from Canada for the period April 1, 2000, through March 31, 2001. The revised rate is 13.23 percent *ad valorem*. In addition, we have determined that certain Maritimes-origin lumber and certain used railroad ties and other “old wood” is properly excluded from the scope of the countervailing duty order on certain softwood lumber products from Canada.

James J. Jochum
Assistant Secretary
for Import Administration

Date