Secretariat File No. USA-CDA-2002-1904-02
Decision of the Panel Respecting Remand Determination
March 5, 2004

ARTICLE 1904 BINATIONAL PANEL REVIEW
Pursuant to the
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA: FINAL AFFIRMATIVE ANTIDUMPING DETERMINATION	:	**Secretariat File No. USA-CDA-2002-1904-02**

DECISION OF THE PANEL RESPECTING REMAND REDETERMINATION

March 5, 2004

Panelists: Jeffery Atik, Ivan R. Feltham, W. Roy Hines, John M. Peterson (Chairman), Leon Trakman[1]

Appearances:

Dewey Ballantine LLP (Bradford L. Ward, John A. Ragosta, Linda Andros, David A Bentley, Monica Welt, Rory Quirk) for Coalition for Fair Lumber Imports Executive Committee

United States Department of Commerce, Office of the Chief Counsel for Import Administration (John D. McInerney, Berniece A. Browne, Robert J. Heilferty, D. Michael Stroud, Jr., William G. Isasi, Scott D. McBride, James K. Lockett, Christine J. Sohar, Linda

1 The panelists wish to express their appreciation for the excellent support received from Panelist Assistants Jacqueline Weisman, Esq. and Ramnarayan Aiyer.

Chang, Mark Barnett) for United States Department of Commerce, International Trade Administration

Arnold & Porter (Michael T. Shor) for Abitibi-Consolidated, Inc. And Scieres Saguenay Ltee.

Baker & Hostetler, LLP (Elliot J. Feldman, John J. Burke, Arland M. DiGirolamo, Michael S. Snarr), for Tembec, Inc.

Baker & McKenzie (B. Thomas Peele III, Kevin M. O=Brien, Lisa A. Murray) for Slocan Forest Products, Ltd.

Piper Rudnick LLP (John E. Corette, III, David M. Rubinstein) and Howrey Simon Arnold & White LLP (Michael A. Hertzberg, Juliana M. Cofrancesco) for The Provinces of New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, The Maritime Lumber Bureau, and Lumber Producers in the Maritime Provinces

Kaye Scholer LLP (Donald B. Cameron, Julie C. Mendoza) for Canfor Corporation

Wilmer Cutler & Pickering (Robert C. Cassidy, Jr., John M. Greenwald, Jack A. Levy) for the Quebec Lumber Manufacturers Association

Steptoe & Johnson LLP (W. George Grandison, Matthew Frumin, Lesley Stone) and Farris, Vaughan, Wills & Murphy (Brian R. Canfield) for British Columbia Lumber Trade Council and its Constituent Associations

Gibson, Dunn & Crutcher LLP (Daniel J. Plaine, Gracia M. Berg, Lisa A. Murray, Gregory C. Gerdes) for West Fraser Mills Ltd.

Miller & Chevalier (Matthew M. Nolan, James B. Altman, Sydney Mintzer, Sylwia A. Lis) for Weyerhaeuser Corporation

Law Offices of George R. Tuttle (Steven S. Spraitzar) for Anderson Wholesale, Inc.

Patterson, Betts & Mines, P.S (Livingston Wernecke) for Fred Tebb & Sons, Inc.

I. INTRODUCTION

This Panel was constituted under Article 1904 of the North American Free Trade Agreement (NAFTA) to review the amended Final Determination by the United States Department of Commerce that certain softwood lumber was exported from Canada to the United States during the period April 1, 2000 to March 31, 2001 at prices that were less than fair value (LTFV). Notice of this amended determination was published in the *Federal Register* on May 22, 2002.[2]

On July 17, 2003, the Panel rendered its Decision, familiarity with which is presumed. The Panel upheld several aspects of the Commerce final LTFV determination, and also remanded a number of issues to Commerce, directing the agency to amend its final determination, or to furnish additional explanation for its actions. On October 15, 2003, Commerce issued its *Remand Redetermination* in this investigation. Having considered that determination, together with additional briefing by parties to this proceeding, the Panel now issues its determination on remand.

2 *See Certain Softwood Lumber Products from Canada* (Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order), 67 Fed. Reg. 36, 068 (May 22, 2002), *corrected*, May 30, 2002, 67 Fed. Reg. 37,775 (May 30, 2002).

II. STANDARD OF REVIEW

As in its original determination, the Panel proceeds on remand in accordance with Article 1904 of the NAFTA, which provides in pertinent part that:

> 3. The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

NAFTA Article 1911 prescribes the standard of review which this Panel must apply:

> **standard of review** means the following standards, as may be amended from time to time by the relevant Party: ...
>
> (b) in the case of the United States,
>
> > (I) the standard set out in section 516A(b)(l)(B) of the *Tariff Act of 1930*, as amended, ...

The referenced statute provides that a reviewing court "shall hold unlawful any determination, finding, or conclusion found . . . in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

In reviewing a remand decision of the United States Department of Commerce, this Panel must be guided by the same principles and rules as would the United States Court of InternationalTrade.

III. DISCUSSION

1. Commerce's Definition of "Foreign Like Product" for Purposes of Calculating Constructed Value (CV) Profit is Lawful and Reasonable

In its final less than fair value (LTFV) determination, Commerce determined that the Normal Value (NV) of certain subject merchandise should be determined on the basis of computed value pursuant to 19 U.S.C. §1677b(e)[3]. In determining the "computed value profit"

---

3 19 U.S.C. § 1677b(e) defines " constructed value " as follows:

> (e) Constructed value
>
> For purposes of this subtitle, the constructed value of imported merchandise shall be an amount equal to the sum of -
>
> > (1) the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of business;
> >
> > (2)(A) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, **in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country**, or
> >
> > (B) if actual data are not available with respect to the amounts described in subparagraph (A), then -

component of this figure, Commerce purported to follow the "preferred" methodology set out in 19 U.S.C. §1677b(e)(2)(A), on the basis of "the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country". In determining "foreign

---

> (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
>
> (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (I)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
>
> (iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (I)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise; and
>
> (3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the subject merchandise in condition packed ready for shipment to the United States.

For purposes of paragraph (1), the cost of materials shall be determined without regard to any internal tax in the exporting country imposed on such materials or their disposition which are remitted or refunded upon exportation of the subject merchandise produced from such materials.

like product" for purposes of the CV profit calculation, Commerce looked to each exporter's aggregate home market sales of subject merchandise which were made at or above cost. This definition of "foreign like product" differed from that which Commerce had used in making priced-based LTFV comparisons[4].

---

4 The term " foreign like product " is defined at 19 U.S.C. § 1677(16) as:

> . . . merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:
>
> > (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
> >
> > (B) Merchandise -
> >
> > > (i) produced in the same country and by the same person as the subject merchandise,
> > >
> > > (ii) like that merchandise in component material or materials and in the purposes for which used, and
> > >
> > > (iii) approximately equal in commercial value to that merchandise.
> >
> > (C) Merchandise -
> >
> > > (i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
> > >
> > > (ii) like that merchandise in the purposes for which used, and
> > >
> > > (iii) which the administering authority determines may reasonably be compared with that merchandise.

The Court of Appeals for the Federal Circuit has ruled that there is a rebuttable presumption that Congress intended the term "foreign like product" to be defined the same way in different sections of the antidumping statute. *SKF USA, Inc. v. United States*, 263 F.3d 1369 (Fed. Cir. 2001): see also *RHP Bearings, Inc. v. United States*, 288 F.3d 1334 (Fed. Cir. 2002). However, Commerce must furnish a reasonable explanation of why it used different definitions of the "foreign like product" in a particular case. As Commerce provided no such explanation in this case, the Panel remanded this matter, directing the agency to provide an "explanation of why, in this case, its decision to define foreign like product (FLP) for purpose of calculating CV profit as each respondent's aggregate sales of subject merchandise is reasonable and in accordance with law".[5]

On remand, Commerce noted that the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA)[6] requires the use of constructed value to determine the Normal Value where "home market sales of the subject merchandise….are either nonexistent, in inadequate numbers, or inappropriate to serve as a benchmark for a fair price such as where sales are disregarded because they are sold at below cost prices"….and that because the CV serves as a "proxy for a sales price, and because a fair sales price would…include an element of profit, {CV} must include an amount for profit."

---

5 Decision of the Panel, July 17, 2003 Certain Softwood Lumber Products from Canada, USA-CDA-1904-02

6 *Statement of Administrative Action, Uruguay Round Agreements Act*, H.Doc. 316, Vol. I, 103d Cong. (1994), at 839.

Remand Determination, at 8. The "preferred" methodology requires the agency to use those sales of foreign like product that are "made in the ordinary course of trade", i.e., which are sold at or above cost.

Commerce justified its determination to define the "foreign like product" according to each exporter's above-cost sales of subject merchandise, as follows:

> In our view, the question in the preferred CV profit context is whether the same general class or kind of merchandise (e.g., softwood lumber) sold in the comparison market by a producer or exporter is reasonably comparable to the subject merchandise sold by the same producer or exporter to the United States. Section 771(25) of the Act defines subject merchandise as "the class or kind of merchandise that is within the scope of an investigation, {or} a review . . . ." We interpret section 771(16)(c) of the definition of "foreign like product", i.e., the same "general class or kind of merchandise to be that category of merchandise that corresponds to the subject merchandise. *Id*. at 10.

Having thus identified the "foreign like product", the second step of Commerce's methodology, according to the *Remand Determination*, was to identify those sales of foreign like product that were made in the ordinary course of trade, i.e., at or above cost. *Id.*

With this explanation, Commerce then concludes that the use of "aggregate data" did not distort the constructed value profit calculation, since, as a result of the remand, Commerce has reallocated costs not only based on grade, but also based on dimension, and that "the Department

has, in effect, redistributed the profit generated by the varying grades and dimensions of lumber"[7].

As an initial matter, the Panel is struck by the fact that Commerce's definition of "foreign like product" in the CV profit context appears to be taken directly from 19 U.S.C. §1677(16), i.e., the agency looks to the sales of merchandise of the "same general class or kind" to determine whether such merchandise is "reasonably comparable" to the exported merchandise undergoing antidumping appraisement. This definition is then imported into the "preferred" definition of CV profit, set out at 19 U.S.C. §1677b(e)(2)(A), and subjected to the requirement that sales of the defined "foreign like product" be in the "ordinary course of trade", i.e., made at or above cost. It follows that, in Commerce's view, the "general class or kind" of merchandise is something narrower than the "same general category of products as the subject merchandise", as set out in the alternative CV profit definitions, see 19 U.S.C. §1677b(e)(2)(B)(I), (ii)[8].

This general approach has been sanctioned by the Federal Circuit. In *FAG Kugelfischer, Inc. v. United States*, 332 F.3d 1370 (Fed. Cir. 2003), the appellate court rejected the proposition that, in determining the "foreign like product" for purposes of the CV profit calculation, Commerce must work its way through the hierarchy of definitions set out at 19 U.S.C. §1677(16), and approved a definition substantially identical to that used in this case:

---

7 Whether the Department's determination of "foreign like product" for purposes of the CV profit calculation would have been distortive in the absence of the Panel's remand for the reallocation of production costs was not stated.

8 By the same logic, the "same general category of products as the subject merchandise" must encompass goods broader in scope than subject merchandise, i.e., goods not covered by the antidumping proceeding.

Section 1677(16), however, offers three alternative definitions for foreign like product, which increase in the scope of products that may be included. *See* 19 U.S.C. 1677(16). The first available category of merchandise, with which differing determinations may be satisfactorily made, is to be applied. *Id.* There is no restriction that Commerce use just one subsection per proceeding. *Id.* Accordingly, we believe that Commerce reasonably explained that the determinations for the variables at issue require different sets of foreign like product data. The bearing market, with its wide disparity in products, necessitates that direct price comparisons be done on a model-by-model basis. Therefore, the use of price comparisons requires the identical model and product family data of sections 1677(16)(A) and (B). And CV profit may be based on a broader scope of products because use of aggregate data, as described in section 1677(16)(C), results in a practical measure of profit that can be applied consistently and with administrative ease over the range of included products.

FAG and SKF argue that Commerce did not work its way through the hierarchy of definitions in section 1677(16), in contravention of Congress's direction, when it defined foreign like product to calculate CV profit. FAG and SKF suggest that if Commerce had started with sections 1677(16)(A) and (B) data it would not have eliminated below cost or non-contemporaneous data because the constructed value sections of the statute do not so require. This logic fails, however, because calculating constructed value under section 1677b(e)(2)(A) requires that the sales of foreign like product occur within the ordinary course of trade. And the definition of ordinary course of trade requires that the sales used must not be below cost, id. 1677b(b)(1) (disregarding below cost sales that meet the requirements of subsections (A) and (B), and must be contemporaneous to the exportation of the subject merchandise, see id. 1677(15).

Seeking to avoid the ordinary course of trade limitation in section 1677b(e)(2)(A), FAG and SKF argue that Commerce should have calculated constructed value under subsections 1677b(e)(2)(B)(I) or (iii). FAG and SKF assert that the scope of the data identified

> by Commerce as section 1677(16)(C) data was overbroad and should instead be characterized as the "same general category of products" in subsections 1677b(e)(2)(B)(I) and (iii). Pursuant to our conclusion above, Commerce's use of aggregate sales within the same level of trade and class or kind of merchandise as foreign like product under section 1677(16)(C) was reasonable and not overbroad. And because section 1677b(e)(2)(A) is the preferred methodology to calculate CV profit, *SKF USA Inc. v. United States*, 263 F.3d at 1374, its application by Commerce was reasonable. *Id.* at 1373.

Commerce's statement that its decision to base the "foreign like product" for purposes of the CV profit calculation on sales of the same general class or kind of merchandise "did not distort the CV profit calculation" is largely unexplained. To have reached such a determination, Commerce must presumably have conducted a comparison of the CV profit derived by using its elected methodology and a CV profit derived from an examination of sales which includes sales which are below cost or not in the "ordinary course of trade". If such a comparison was conducted, Commerce has not favored the Panel with an explanation or calculation. However, the methodology used by Commerce having been explained, and being a methodology approved by the Federal Circuit in *FAG Kugelfischer*, the Panel is constrained to conclude that the methodology was in accordance with law and reasonable, and there is no basis for the Panel to venture further and consider what alternative methodologies might have been used. Commerce's remand determination on this point is sustained.

2. Commerce's Determination Not to Treat Finger-Jointed Flangestock (FJF) as a Separate Class or Kind of Merchandise is Supported by Substantial Evidence on the Administrative Record

The Panel previously ruled that Commerce had failed to provide sufficient reasoning for its determination that finger-jointed flangestock (FJF) should not be considered a separate "class or kind" of merchandise. Specifically, Commerce's final less than fair value (LTFV) determination did not adequately explain how the agency had applied the "class or kind" criteria established in *Diversified Products, Inc. v. United States*, 572 F. Supp. 883 (Ct. Int'l Tr. 1983).[9] Commerce's final determination noted that FJF had unique properties of length, occupied a "distinct channel of trade" (sales to producers of I-beams) and was advertised for direct sale to I-beam producers. Commerce also found that FJF had particular characteristics of construction, strength rating, dimension and use, but asserted that these factors "cannot be the sole basis for their treatment as a separate class or kind." P.R. Doc. 1263, at 31-32. Despite these

9 In *Diversified Products*, the Court the Court of International Trade held that, in determining and interpreting the "class or kind" of merchandise governed by an antidumping investigation, Commerce should consider the following factors:

(1) The physical characteristics of the merchandise;

(2) The expectations of the ultimate purchasers;

(3) The ultimate use of the product;

(4) The channels of trade in which the product is sold; and

(5) The manner in which the product is advertised and displayed.

See also *Bohler-Uddeholm Corp. v. United States*, 978 F. Supp. 1176 (Ct. Int'l Trade 1997). No single *Diversified* factor is necessarily dispositive with respect to a "class or kind" determination.

distinguishing characteristics of FJF, however, Commerce concluded that "we have not found any differences which would satisfy any of the *Diversified Products* criteria to the extent that we would treat flangestock as a separate class or kind." P.R. Doc 1302, Comment 52.

The Panel concluded that it could not "discern the factors on which Commerce relied in determining that FJF was included within the class or kind of merchandise subject to this investigation, and included within the ambit of the resulting antidumping order. It is particularly unclear how Commerce applied the *Diversified Products* factors to this product." Panel Decision at 166. However, given the broad discretion which Commerce enjoys in defining the "class or kind" of merchandise subject to an antidumping determination, the Panel remanded this matter, with instructions for the agency to explain (1) how it applied each of the *Diversified Product* factors in respect of FJF, (2) the determination reached with respect to each such factor, and (3) how it weighed these factors in reaching its determination. *Id.* at 170.

On remand, Commerce addressed each of the *Diversified Products* criteria at length. With respect to physical characteristics, Commerce noted that FJF is produced from two or more pieces of solid lumber which are finger-jointed together in such a way that they meet specific strength and dimension requirements for their intended use as a component of an I-joist. However, Commerce asserts that the scope of the antidumping order encompasses a variety of finger-jointed products, such as finger-jointed studs, finger jointed garage door cores, and finger-jointed lumber for structural applications. These products may or may not be machine-stress rated (MSR), as FJF is. Commerce also noted that finger-jointed products compete to some

extent with non-finger-jointed products which are included within the scope of the antidumping order (for example, noting that finger-jointed studs are competitive against, and interchangeable with, regular studs). Further, Commerce noted that many other products within the scope of the antidumping order are also manufactured to customer specifications. While acknowledging that FJF are sometimes produced in lengths of up to 66 feet, Commerce noted that FJF may be made in lengths as short at 16 feet, and that FJF is produced in a range of lengths which overlaps, to some extent, with the lengths of other softwood lumber products subject to the order. Commerce concluded that because the class or kind of merchandise under investigation included a number of specialty lumber products, including engineered products, and other products having physical characteristics which overlap those of FJF, "clear dividing lines based on physical characteristics do not exist for purposes of making FJF a separate class or kind or merchandise".

With respect to end use, Commerce conceded that FJF has a singular end use as a component of an I-joist, but concluded that other types of products within the class or kind were, like FJF, used as components in the manufacture of engineered carpentry or joinery products. Commerce concluded that "the ultimate use of FJF provides no grounds for separate class or kind treatment." Commerce also noted that FJF engenders specific expectations among ultimate purchasers, specifically, producers of I-joists. "I-joist producers expect 2 x 3 and 2 x 4, lumber provided in specific lengths, stress ratings and product quality." Remand Dec. at 35-36. However, Commerce held that purchasers of lumber components for a host of other assembled products which are included within the class or kind of merchandise subject to the investigation

engendered "similar and certainly equally specific, expectations regarding their lumber component purchases." The agency concluded that it could not isolate the end use of FJF for I-joist production from the end use of other lumber products as components of further manufactured wood products, stating that it "cannot establish a clear dividing line between FJF and such other lumber component products in the scope on the basis of the specific expectations of I-joist producers." *Id.* at 36.

With respect to channels of trade, Commerce concluded that FJF is normally sold by lumber companies directly to I-joist producers. However, while Commerce asserted that "we have not found any evidence to distinguish this direct sales channel from those employed by many other lumber producers that sell their lumber components to remanufacturers", Commerce did concede that the channel of trade for FJF is different from channels of trade for most dimension lumber sold for building construction.

As to the manner in which FJF is advertised or displayed, one Canadian producer indicated that it does not advertise FJF, which it sells directly to established customers, while another Canadian producer advertises FJF as a "distinct product". However, Commerce indicated that the administrative record shows that other speciality lumber products are also advertised as distinct products.

While the Panel asked Commerce not only to analyze the *Diversified Product* factors in respect of FJF, but to explain "how it weighed these factors in reaching its determination", Commerce's remand determination does not explain how the various factors were weighed.

Perhaps this is because, with respect to each of the *Diversified* factors, Commerce found FJF to be included in the class or kind of subject merchandise.

The panel reviews Commerce's "class or kind" determinations according to a deferential standard, and must uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law". Substantial evidence is defined as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusion of the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 620 (1966). This Panel may not substitute its judgment for that of the agency when the choice is between two fairly conflicting views, even if the Panel might have made a different choice had the matter been before it *de novo*. See, *American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984).

Having applied the *Diversified Products* factors to FJF in its Remand Determination, Commerce has now provided an explanation for its decision which permits meaningful review by the Panel.

The methodology used by Commerce – analyzing the status of FJF by comparing it to other forms of softwood lumber unambiguously within the "class or kind" of merchandise investigated – is an appropriate one, which has been judicially approved. *Novosteel SA, Inc. v. United States*, 284 F. 3rd 1261 (Fed. Cir. 2002). In the *Remand Determination*, Commerce has pointed to evidence of record establishing that FJF shares physical characteristics in common

with other types of softwood lumber within the class or kind. While FJF has a singular ultimate use, other products clearly within the class or kind are similarly dedicated to similar unique structural uses. While applying the *Diversified Products* criteria, "[t]he ultimate use criterion does not require a complete overlap of uses to be supported by substantial evidence." *Novosteel, SA, Inc. v. United States*, 128 F. Supp. 2d 720, 735 (Ct Int'l Tr. 2001), *aff'd*, 284 F.3d 1261 (Fed. Cir. 2002). While the expectations of FJF purchasers are quite specific, Commerce has noted, based on evidence in the record, other products within the class or kind are also used as structural components, that some of them are machine stress rated (MSR), and that they are often made to customer specifications and exacting tolerances. Accordingly, purchaser expectations for FJF are not dissimilar in kind to purchaser expectations for other types of softwood lumber.

Similarly, while FJF is sold directly to producers of I-joists, other softwood lumber products covered by this investigation move in direct channels of trade. To be sure, FJF is not sold in the same manner as dimension building lumber (which is normally sold through independent wholesalers or retailers); however, other softwood products sold directly include pallets, door and window frames, and other assembled wood products. That a product is sold to a single customer, or to a particular type of customer, does not necessarily mean that it moves in a completely different or dissimilar channel of trade.

Finally, Commerce's determination that the manner in which FJF is advertised and marketed to consumers is not dissimilar to the way other softwood products are marketed find support in the administrative record.

Commerce has discretion concerning how to balance the *Diversified Products* criteria. See, *Koyo Seiko Co., Ltd. v. United States*, 955 F. Supp. 1532, 1547 (Ct. Int'l Tr. 1997). While Commerce did not favor the Panel with a specific discussion of how it weighed the various *Diversified Products* criteria with respect to FJF, the Panel nonetheless concludes that there substantial evidence supporting Commerce's determination that each of the *Diversified* factor support a determination to include FJF in the same "class or kind" of merchandise as other softwood lumber products. Regardless of whether the Panel would have reached the same conclusion had it considered the matter *de novo*, the Panel is compelled to sustain the determination on the basis of "substantial evidence" standard.

3. Commerce's Determination Not to Treat Square-End Bedframe Components (SEBF) as a Separate Class or Kind of Merchandise is Supported by Substantial Evidence on the Administrative Record

The Panel found that Commerce had not properly explained its determination that square end bed frame (SEBF) components (including end fillers, L-braces, center supports and similar products) were within the single "class or kind" of merchandise subject to the antidumping determination. Here again, Commerce had not furnished a sufficient explanation of how it applied the *Diversified Products* factors. The Panel remanded this matter to Commerce, directing the agency to perform a complete analysis of the *Diversified* factors with respect to SEBF, to report its conclusions with respect to each of these factors, and to report to the Panel on how it weighed each factor in reaching its final determination.

In its Remand Determination, Commerce considered the application of each of the *Diversified Products* factors to SEBF. With respect to physical characteristics, Commerce noted that SEBF dimensions are within the range of, and overlap, the dimensions of many other softwood lumber products. Remand Determination at 42. SEBF is produced using operations which include kiln-drying, planing, shaping and sizing to specific dimensions – operations which are common to the manufacture of most softwood lumber products. Like other subject softwood lumber products (pallet stock, truss components, door and window components), SEBF is produced to specific quality and dimensional specifications, and is delivered to the customer ready for use. While holding that SEBF component have "specific distinguishing attributes," Commerce determined that such attributes do not distinguish SEBF from other subject merchandise.

With respect to end use, Commerce agrees that SEBF has a single end use – to become part of a box-spring or mattress support. Commerce noted that while some finished manufactured lumber products are excluded from the scope of the determination, SEBF is a "pre-manufactured softwood lumber product" which is used as an input of a finished product, like many other products included in the order. Finding that the end use of SEBF is specific, Commerce held that this would not make that product "so unique that separate class or kind of treatment is warranted under this *Diversified Products* factor". *Id.* at 46.

With respect to the expectations of ultimate purchasers, Commerce noted that the quality of lumber expected by SEBF purchasers, "Canadian SPF", is the largest represented wood

product covered by the order. Commerce also held that the shaping, moisture content and tolerance requirements applied by consumers of SEBF are "no different from the standards which apply to other pre-finished lumber products for use in specific applications", such as truss components, pallet stock, slates for crates and lumber stock for banisters and spindles. Remand Determination at 48. A specific production specification is insufficient to designate an articles as being of a unique "class or kind", the agency held. *Id.*

Commerce noted that SEBF is sold directly to a single class of purchasers, on the basis of annual contracts, and that no retail marketing is performed. However, Commerce concluded that this type of direct distribution is not unique, and that other producers of softwood lumber sell product components directly to manufacturers who assemble the finished products. Under the *Diversified Products* criteria, Commerce ruled, a unique "channel of trade" is not established "merely because one product out of many covered by the scope is sold exclusively and directly to one type of customer." *Id. At 50.* In determining whether a channel of trade is unique, Commerce "compares the way in which a specific product is marketed with the way other products in the same class or kind of merchandise are marketed." *Id.* As noted above, a comparison of the characteristics or practices pertaining to a particular product with those pertaining to other products that are unquestionably within the class or kind is an appropriate way to apply the *Diversified Products* factors. *Novosteel SA, Inc. v. United States*, 284 F. 3rd 1261 (Fed. Cir. 2002).

With respect to the manner in which the products are advertised and displayed, Commerce found that although SEBF component manufacturers do not use significant printed materials or other advertising to promote their products, the record shows that SEBF components are advertised in product and sales brochures, the same types of vehicles used to advertise other softwood lumber products. Recognizing that the "marketing and advertising approach used for SEBF components is somewhat different from the mass promotion of high-volume standardized construction-grade lumber, because there are no retailers involved in the distribution chain" [Remand Determination at 53], Commerce noted that many other softwood lumber products are distributed directly from manufacturers to final users, and do not rely on extensive advertising, citing such examples as flangestock, furniture parts, refrigerator stock and recreational vehicle products. *Id.*.

Commerce conceded, in its initial determination, that some of the *Diversified* factors, such as the expectations of ultimate purchasers and the end use of the merchandise, provided "relatively stronger arguments for separate class or kind treatment" under this criterion than under the physical characteristics criterion. On remand, Commerce has conducted the required analysis of the *Diversified Products* factors and has pointed to evidence in the record of a substantial nature indicating that other softwood lumber products which are unmistakably within the class or kind or merchandise subject to the determination are similar to SEBF components in terms of physical characteristics, uses, purchaser expectations, channels of trade and method or marketing and advertising.

Here again, the Panel is obligated to apply a deferential standard of review to Commerce's determination. *American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984). Given Commerce's application of the appropriate factors, and citation to evidence supporting its determination, the Panel holds that Commerce's remand determination, finding SEBF components to be within the class or kind of merchandise covered by the antidumping investigation of *Softwood Lumber Products from Canada* is supported by substantial evidence and is therefore sustained.

4. Commerce Has Adequately Explained its Determination to Value Tembec's Wood Chips For Purposes of Calculating the By-Product Offset Tembec's Cost of Production and Computed Value

By its Decision of July 17, 2003, the Panel remanded the issue regarding the valuation of Tembec's wood chips as an offset to the Cost of Production (COP), "[t]o explain why Commerce's decision to use Tembec's internal prices for wood chips was representative of the cost of producing such wood chips, and why such prices constituted a reasonable and permissible basis for calculating an offset to Tembec's production costs." Commerce offered a further explanation in its Remand Redetermination dated October 15, 2003. Tembec challenged the Remand Determination, and Commerce and the Executive Committee responded with filings.[10]

10 Remand Redetermination filed October 16, 2003, pp. 56-62; 133-135; Tembec Brief, November 5, 2003; Commerce Response November 25, 2003, pp. 31-36; Executive Committee Brief, November 25, 2003

Tembec argues that the benchmark is the price in the relevant market (presumably the averages over the POI), relying on 19 U.S.C. § 1677b(f)(1)(A) and § 1677b(f)(2).[11] In effect, the argument is: if we recorded inflated prices, they would be reduced to market values. By the same token, if our internal prices are below market, we should get the benefit of market values. Commerce's answer is essentially: having regard to the variety of possibly relevant factors, it is reasonable to use the values recorded in the books of the company.

The fundamental point is that wood chips and other by-products (e.g., sawdust, shavings) have no identifiable costs. It is therefore meaningless to talk about profit unless the whole of any amount realized on the disposal of a by-product is regarded as profit. The accepted principle is that any amount realized is factored into the COP of the product.

One might readily be inclined to the view that the market price is the proper test for all companies ("one price fits all"). However, if a company had sufficient arm's length sales at prices that varied from market prices, the company's actual revenue would be the appropriate amount for the offset. Therefore, one-price-fits-all cannot be the exclusive principle.

What is the appropriate benchmark when by-products are disposed of to affiliated corporate entities or to other divisions of the same corporation? Whether transactions are between affiliates or between divisions cannot be relevant. The relevant distinction is between arm's length and non-arm's length sales.

---

11 Tembec Brief, Nov. 5 2003, pp. 19-20

Tembec chose to calculate its COP of softwood lumber with the data recorded in its books. Therefore, one might reasonably conclude that Tembec itself determined that the internal transfer price "reasonably reflect[ed] the costs associated with the production and sale of the merchandise".[12] Having regard to the foregoing, the Panel concludes that Commerce's Remand Redetermination has provided a reasonable explanation. It might not be the only reasonable way to calculate the by-product offset for Tembec, but it is at least one reasonable way to do so.

5. Commerce's Remand Determination Concerning the Calculation of Tembec's General and Administrative Expenses is Not Supported by Substantial Evidence

By its decision July 17, 2003, the Panel remanded the issue regarding the allocation of general and administrative expenses with instructions "To explain the agency's reason for determining why, based upon an examination of the entire record, general and administrative expenses incurred in production of softwood lumber by Tembec Inc. according to parent company consolidated financial statements is reasonable and lawful consistent with the agency's obligation, set out at 19 U.S.C. §1677b(b)(3)(B), to calculate such expenses "based on actual data pertaining to production and sales of the foreign like product". Commerce offered a further explanation in its Remand Redetermination filed October 16, 2003. Tembec challenged the

12 19 U.S.C. § 1677b(f)(1)(A)

Remand Redetermination, and Commerce and the Executive Committee responded with filings.[13]

The issue is whether the amount recorded in the company's books regarding general and administrative expenses (G&A) for the Forest Products Group should be relied upon for the calculation of COP, or whether it is reasonable for Commerce to determine the allocation of G&A based on the overall corporate ratio as a percentage of cost of goods sold. If there is no evidence to show that the books and records of the company are not reliable, there is no substantial evidence to support the determination by Commerce. The issue has been fully explored in the several submissions filed both before and after the hearing and Panel decision, and in the Commerce determinations. It is therefore necessary for the Panel to provide only a brief statement of its conclusion.

The record shows that Commerce had plenty of opportunity to challenge the allocation during verification or later, and apparently did not do so. To argue, as Commerce does, that Commerce did not verify the allocation is not persuasive, especially in the light of the statutory instruction of §1677b(b)(3)(B) to calculate such expenses "based on actual data pertaining to the production and sales of the foreign like product," and to use the books of the company unless there is good reason not to do so.[14] Commerce has not pointed to any evidence that would

13 Remand Redetermination filed October 16, 2003, pp. 62-69; 135-136; Tembec Brief, November 5, 2003; Commerce Response November 25, 2003, pp. 24-31; Executive Committee Brief, November 25, 2003.

14 19 U.S.C. §1677b(f)(1)(A)

indicate that the Tembec's allocation of G&A was not reasonable. Whether or not Canadian GAAP permitted allocation otherwise than in accordance with GAAP is not relevant. The relevant question under the applicable law is whether the producer's records are unreliable.

Having regard to the foregoing, the Panel concludes that Commerce has not provided a satisfactory explanation for disregarding Tembec's books and records for G&A allocation to the Forest Products Group.[15] Accordingly, the issue is remanded to Commerce with instructions to use those amounts to recalculate G&A for the Forest Products Group.

6. Commerce Did Not Properly Value West Fraser's Sales of Wood Chips to Affiliates for Purposes of Calculating the By-Product Offset to Cost Of Production

By its Decision July 17, 2003, the Panel remanded the issue regarding the valuation of wood chips as an offset to the COP, "To consider the claims of West Fraser Mills that Commerce erred in adjusting the offset to production costs resulting from West Fraser's by-product sales of wood chips to unaffiliated purchasers in British Columbia during the period of investigation, and particularly, to consider whether the timing of West Fraser's wood chip sales to unaffiliated parties during the early part of the period of investigation, and the existence of a long term contract, cause those sales to be not fairly representative of West Fraser's wood chip prices

---

15 Commerce has not based its decision on any evidence showing that Tembec's books are unreliable, i.e., do not reasonably reflect the costs associated with the production of the merchandise..

during the POI." Commerce offered a further explanation in its Remand Redetermination filed October 16, 2003. West Fraser challenged the Remand Determination, and Commerce and the Executive Committee responded with filings.[16]

West Fraser had unaffiliated sales, but they constituted only a tiny portion (0.28%) of its total wood-chip production, and approximately half of the sales occurred during the first two months of the POI.[17]

The applicable statutory provision, 19 U.S.C. §1677b(f)(2), states that "A transaction may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of the merchandise under consideration in the market under consideration." West Fraser has provided substantial evidence to support its assertion that the prices recorded in its books for sales to affiliates did in fact reflect such amounts. The Panel finds that the evidence provided by West Fraser does establish the relevant market values.

The issue then is, did Commerce have a reasonable basis for disregarding West Fraser's

16 Remand Redetermination filed October 16, 2003, pp. 72-81, 136-146; West Fraser Brief November 5, 2003; Commerce Response November 25, 2003, pp. 37-55; Executive Committee Response November 25, 2003

17 We note that the last-mentioned sales were from the McBride mill under a contract made before West Fraser took over management of the mill. We do not consider this fact material to our decision.

inter-affiliate transfer prices that do reflect market values?[18] Commerce takes the position that the preferred method is to consider whether the evidence of unaffiliated sales is substantial. If so, that is the determinant. However, Commerce has, in effect, interpreted substantial to mean any sales, however small in relation to total sales by a producer, let alone relative to the volume of sales in the relevant market. Clearly, "substantial" in the context of the issue under review must mean substantial in relation to total sales of a producer, and not merely substantial in the sense of having substance. The unaffiliated sales by West Fraser had substance in themselves, but were clearly not substantial in relation to West Fraser's total volume. It is therefore not reasonable to use those sales to determine the appropriate offset.

Having considered the Remand Redetermination and the submissions of the parties, the Panel holds that West Fraser's submissions are conclusively persuasive that Commerce failed to follow the prescripts of the statute and that its decision is unsupported by substantial evidence. Accordingly, we determine that West Fraser's recorded revenues from chip sales to affiliates in British Columbia during the POI reasonably reflected market values and therefore are the appropriate values to factor into the offset calculation. It is so ordered.

18 West Fraser has shown that the inter-affiliate transfer prices were on average less than relevant market values.

Petitions for Re-Examination

Following the issuance of its Decision of July 17, 2003, the Panel received certain requests for reconsideration of aspects of that determination, pursuant to Rule 76 of the Rules of Procedure. The Panel has deferred consideration of those requests pending receipt of Commerce's Remand Redetermination. We dispose of those requests now.

In considering the various requests for reconsideration, the Panel is guided by the standard set out in Rule 76 of the Rules of Procedure, which provides:

> (1) A participant may, within 10 days after a panel issues it decision, file a Notice of Motion requesting that the panel re-examine its decision for the purpose of correcting an accidental oversight, inaccuracy or omission, which shall set (a) the oversight, inaccuracy or omission with respect to which the request is made; (b) the relief requested; and (c) if ascertainable, a statement as to whether other participants consent to the motion.
>
> (2) The grounds for a motion referred to in subrule (1) shall be limited to one or both of the following grounds: (a) that the decision does not accord with the reasons therefore; or (b) that some matter has been accidentally overlooked, stated inaccurately or omitted by the panel.

This Panel shares in the belief that "Rule 76 of the Rules of Procedure gives the Panel the power to review a prior decision only if there has occurred an accidental oversight, inaccuracy or omission." *See Flat Coated Steel Products from the USA*, File MEX 94-1904-01 (Binational

Panel Decision on the Second Determination on Remand of the Investigating Authority), pg. 3 at par. 9.

1. Inclusion of Maritime Provinces in Antidumping Investigation

In their request for re-examination, the Maritime provinces ("Maritimes")[19] argue that the Panel should re-examine its decision of July 17, 2003 and remand the matter to Commerce to reconsider the issue of whether the Maritimes should be considered a separate "country" for purposes of the antidumping investigation.[20] In support of this argument, the Maritimes contend that the Panel applied the wrong standard of review in rendering its determination -- that the Panel erroneously applied the "abuse of discretion standard" rather than the proper standard, "unsupported by substantial evidence in the record, or otherwise not in accordance with law." In applying the incorrect standard of review, the Maritimes further contend, the Panel failed to address the argument that Commerce failed to "undertake the mandatory statutory responsibility to decide the proper 'country' for investigation in light of the evidence presented . . . ."[21]

---

19 This term refers to the Maritime Provinces (New Brunswick, Nova Scotia, Price Edward Island, Newfoundland and Labrador), the Maritime Lumber Bureau of Canada, and the softwood lumber producers in the Maritime Provinces. Respondents' Notice of Motion for Re-Examination of the Panel Decision Regarding the Maritimes Issue at 1 (July 28, 2003) ("Motion for Re-Examination").

20 Motion for Re-Examination at 2.

21 Id. At 3.

The Panel rejects the Maritimes request to remand the issue to Commerce and affirms its earlier determination. The Panel did in fact apply the correct standard of review, finding "the Department's determination to include all provinces in the antidumping duty case to be in accordance with law." Panel Decision, at 182, n195. In its decision, Commerce determined that the "country" subject of investigation was Canada – including the Maritime provinces. While the Panel indeed noted in its decision that Commerce "did not abuse its discretion in failing to exclude the Maritime softwood lumber from the antidumping duty investigation,"[22] it does not follow that the Panel applied the abuse of discretion standard. Rather, as a reading of the decision reveals, the Panel based its decision to affirm Commerce on a finding that "Commerce's determination to include the Maritimes in the antidumping duty investigation was "in accordance with the law."[23] The Maritimes' argument for exclusion is based on the claim that these provinces do not subsidize their softwood lumber industries in the same way that other Canadian provinces do. However, this is an antidumping investigation, not a subsidy investigation, and as the Panel noted in its initial decision, the absence of subsidies does not warrant an inference that a region or territory's producers are not selling goods at less than fair value prices. Each producer and exporter in these provinces will be separately considered by Commerce with respect to the question of whether their sales for export to the United States should be subjected to antidumping duties.

22 Panel Decision at 183.

23 *Id.* at 183-84.

Further, the Panel need not specifically respond to the Maritimes' various arguments as to whether Commerce failed to decide the proper "country" for investigation, nor must the Panel discuss each piece of evidence cited by the Maritimes. The Panel found Commerce's determination to include all Canadian provinces in the antidumping duty investigation to be reasonable, applying the appropriate standard of review and according to Commerce the appropriate deference due in determining the parameters of the investigation.[24]

As had been the case in the original consideration of these issues, the Maritimes fail to persuade us that the usual definition of "country" should not be available to Commerce in this case. Nor do the Maritimes give persuasive argument in their motion why Maritimes producers (as opposed to the myriad other Canadian producers equally subject to the "all-others rate") should be excluded from the investigation. The Maritimes' request for re-examination is denied.

2. Tembec's Request for Re-Examination of Panel Decision on "Zeroing"

In its November 6, 2003 brief, Tembec requests the Panel to "avoid closing the door" on the zeroing issue, given the pendency of a Canadian challenge of Commerce's zeroing practice

24 The Panel notes that Commerce, in its Response Brief, stated that it is "questionable" whether Commerce has the ability to exclude certain geographic locations within particular countries from an antidumping duty order; not that it did not possess the authority to decide the issue as stated by the Maritimes. Response Brief of the Investigating Authority, Vol. II (Oct. 21, 2002). Further, Commerce stated this fact after finding that such an exclusion was not warranted in this case.

in the WTO Dispute Settlement Body. *United States – Final Dumping Determination in Softwood Lumber from Canada* (DS 264).

The Panel notes that as of the date of this Decision – more than four months after Tembec's brief - a panel report in the WTO dispute has not been issued. A communiqué from the WTO panel dated December 8, 2003 indicates that it would not complete its work until "February 2004" (which has passed). Even were this Panel to be assured that the WTO panel would issue its report imminently, this Panel sees no legal basis for "holding the door open."

NAFTA Article 1904(2) requires this panel to apply "the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority." The Panel is charged to decide this case based on the law in effect; it cannot avoid decision based on a speculation of legal change.

3. Inclusion of Western Red Cedar (WRC) and Eastern White Pine (EWP) in "Class or Kind" of Merchandise Under Investigation

The Ontario Forest Industries Association, the Ontario Lumber Manufacturers Association, Tembec and Weyerhaeuser (collectively, "Complainants") request that the Panel re-examine its decision upholding Commerce's determination that Western Red Cedar (WRC) and Eastern White Pine (EWP) are part of a single "class or kind" of softwood lumber under investigation in this case. Complainants allege that (1) the Panel overlooked their proposition that

appearance-grade lumber should be identified as a separate class or kind, or, alternatively, (2) that the Panel's decision is not in accord with its reasoning, in that the Panel recognized in a footnote that WRC and EWP might have been investigated as separate classes or kinds of merchandise.

In support of the re-examination request, the Complainants point to the transcript of the Commerce Department's March, 2002 scope hearing (not part of the Record before the Panel), and a reference in the IDM wherein Commerce mentions that, at the scope hearing, "the representative of the Government of Quebec observed that there should probably be a single separate class or kind of merchandise for all high-end appearance grade softwood lumber." Complainants also note that, in briefing before the Panel, they rejected the Executive Committee's assertion that all softwood lumber was of a "continuum".

Whatever comments might have been offered at the scope hearing, Complainants did not present to the Panel an argument that "high-end appearance grade softwood lumber" should be treated as a separate "class or kind" of merchandise. Indeed, the Joint Brief only offered arguments that WRC and (separately) EWP should each be considered a separate "class or kind" of merchandise. Proceedings before the Panel included detailed descriptions of the specific characteristics of WRC and EWP, and analyses of the *Diversified Products* factors as applied to each type of lumber. These arguments mirrored those presented to Commerce during the antidumping investigation.

It must be observed that the Complainants deliberately chose not to pursue the proposition that all "appearance grade" lumber should be treated as a separate class or kind of merchandise.

As a result, the inclusion of certain types of "appearance grade" softwood lumber as being within the class or kind of merchandise under investigation was not challenged, either administratively or before the Panel. In addressing Complainants' arguments regarding WRC and EWP, Commerce applied the *Diversified Products* factors to these goods, and compared the characteristics of these goods with those of other types of "appearance grade" lumbers whose inclusion within the "class or kind" was not challenged. This is an appropriate methodology for conducting a "class or kind" analysis and the Panel found Commerce's determinations with respect to WRC and EWP to be supported by substantial evidence.

Complainants' request for re-examination is nothing more than an attempt to restructure its class or kind arguments. Such an attempt is not permitted by Rule 76. Complainants have made no showing that the Panel overlooked "matter" before it. Furthermore, the Panel made no finding that "appearance grade" lumber constituted a separate "class or kind" of merchandise; quite the opposite. In a footnote, the Panel noted that, had the Complainants argued that all appearance grade lumber was a separate "class or kind" of merchandise – which they pointedly did not – Commerce would have needed to apply the *Diversified Products* factors in a different way. However, the Panel commented, " That is not to say the Panel would still not uphold a finding of a single Aclass or kind@. See Panel Decision, at 159, n.179. The Panel nowhere declared that appearance grade lumber could be considered a separate class or kind. There is no foundation for Complainants' assertion that the Panel's decision was not in accord with its reasoning. The request for re-examination of this point is denied.

4. **Treatment of Abitibi's Interest Expense**

Abitibi asks the Panel to re-examine its determination with respect to the treatment of that company's interest expense. Specifically, Abitibi alleges (1) that the Panel's decision upholding Commerce's treatment of these expenses was based on the mistaken assumption that Abitibi took into account only capital assets employed in determining the allocation of interest expense to lumber production, and (2) that the Panel overlooked the fact that Commerce erroneously concluded that depreciation allowances respecting capital assets adequately covered the interest costs associated with acquisition of all assets.

With respect to Abitibi's first argument, when the Panel's decision is read as a whole, it is clear that the Panel understood and took into account the fact that interest costs may be related to any and all types of borrowing, whether long term or short term, of any monies necessary to finance the operations. It is obvious that interest costs may be related to anything that requires financing. The reference to capital assets on page 77 of the Panel's decision merely reflects the fact that Abitibi itself emphasized the importance of differences in capital assets as between lumber production and other operations.

With respect to the latter point, this argument was raised before the Panel during the proceedings and successive briefings, and cannot be re-argued at this juncture.

In sum, the fact is that Abitibi created the proposed allocation of finance costs as an alternative to basing such allocation on the cost of goods sold (COGS). Having considered the

record, and the submissions of the parties, the Panel concludes that Commerce's final determination on this subject was not unreasonable.

5. Executive Committee Request for Re-Examination of Abitibi Stock Options

The Executive Committee alleges that the Panel's decision is based on the incorrect belief that "Canadian GAAP *requires* that companies recognize stock option costs the year the option is granted." The Executive Committee also suggests that the Panel stated that stock option costs can be recognized both as a period cost and as a charge to retained earnings.

Abitibi accounted for the redemption cost as a charge to retained earnings, as permitted by Canadian GAAP, and thus did not report the cost as a period expense. Commerce viewed the cost as an employee compensation expense during the period of investigation, and added it to the company's COGS, which in turn was allocated among the company's operations.

What GAAP required is not an issue; Abitibi recorded the stock option costs in accordance with Canadian GAAP. The issue is whether Commerce properly rejected Abitibi's treatment of the option costs in its books of account, and treated those costs as costs of the merger with Donohue, Inc., and specifically as general and administrative expenses incurred with respect to the production of softwood lumber during the period of investigation. The Panel held that Commerce's treatment of these expenses was not proper or reasonable:

> The options at issue in this case were not awarded by Respondent Abitibi, Inc., but rather by Donohue, Inc. The record establishes that all of the options were awarded prior to the POI, and were awarded

> to executives of Donohue, Inc. as compensation. If the options relate to any production at all, they would appear to relate to the pre-POI production of Donohue, Inc. It is not sufficient to note that the cost of redeeming the options was a cost of the merger. Commerce must explain how and why the costs are considered a "cost of production", and particularly, a cost of production during the POI. Moreover, Commerce must explain its reasons for departing from the use and acknowledgement of Canadian GAAP, and must indicate how the use of the GAAP figures would be distortive.

The error which the Panel discerned in Commerce's decision was the agency's decision to treat the stock option expenses as costs of producing softwood lumber during the POI. The Panel found that this treatment was not supported by substantial evidence. This finding stands independent from the question of whether Abitibi's treatment of the option costs, which was permissible under GAAP, was *required* under GAAP.

The Executive Committee's request for re-examination of this aspect of the decision is denied.

6. Treatment of Slocan Futures Trading Profits

Respondent Slocan challenged Commerce=s refusal to grant a circumstances of sale adjustment with respect to gains that the company realized from futures contracts Ahedging@ activities. Slocan argued that these gains should have been treated either as (1) Adirect selling expenses@ incurred with respect to the sale of softwood lumber products in the United States, or alternatively, (2) as an offset to Slocan=s financial expenses incurred in producing softwood

lumber. Commerce treated Slocan=s gains on futures trading as investment revenue, and made no adjustment in its LTFV comparison in respect of these gains.

The Panel sustained Commerce's determination that Slocan=s gains from futures trading were neither direct selling expenses nor financing costs. The gains could not be treated as direct (negative) selling expenses, since they did not satisfy the requirement of 19 C.F.R. §353.410(c) that direct selling expenses "result from, and bear a direct relationship to, the particular sale in question". The Panel also rejected Slocan's request to treat these gains as adjustments to financing costs, since they had no relationship to the cost of producing softwood lumber. *Panel Decision* at 121-29.

The Panel did indicate in a footnote that:

> . . . in certain circumstances, the courts have held that A[p]rofits or losses generated through currency hedging activities relating to transfer of funds generated in the United States have nothing directly to do with the price paid for Respondents= merchandise in the United States market. Gains and losses resulting from currency hedging are part of the indirect expenses of a corporation doing business in the United States market and should be treated as such pursuant to [former] 19 C.F.R. '353.56(b)(2)@. *Federal-Mogul Corp. v. United States*, 862 F. Supp. 384, 412 (Ct. Int'l Trade 1994). Such an adjustment is ordinarily provided for in Constructed Export Price (CEP) situations, however, and there has been no request made of the Panel to treat these expenses as indirect expenses.

Slocan argues that in fact it did request that these expenses be treated as an adjustment to indirect selling expenses. It contends that the Panel must re-examine its decision, and remand the case to Commerce with instructions to grant an adjustment to indirect selling expenses.

It is far from clear that Slocan sought to have its futures trading profits treated as an adjustment to indirect selling expenses. Slocan's August 2, 2002 Brief before this Panel focused on its claims for an adjustment to direct selling expenses or financial expenses. The sole mention to indirect selling expenses appears in a footnote on page 12 of that brief, in connection with a citation to a prior Commerce decision. The main text of its brief addresses the matter obliquely, saying only that "if Commerce feels that the future profits and losses belong in another category of adjustment [other than direct or financial], then Commerce must make that adjustment". Brief at 12. This is a puzzlingly weak claim for an adjustment to indirect selling expenses.

Slocan's November 5, 2002 Reply brief appears to reject the notion that an adjustment to indirect selling expenses is being sought: "The possibility of treating profits and losses from futures hedging contracts as an indirect selling expense is not a rationale offered by Commerce in its final determination, and thus it must be disregarded by the Panel." The Reply Brief also argues (at p. 5-6) that "The Panel should, . . . reject Commerce's proposed treatment as indirect selling expenses and remand with instructions for Commerce to apply a circumstance of sale adjustment to normal value under 19 C.F.R.§351.410 for the profits earned on sales of lumber futures hedging contracts". This language suggests that an adjustment to indirect selling expenses is not a form of relief which Slocan was seeking.

Only in rebuttal statements at the hearing before the Panel [Tr., Vol. II, at p.274] does Slocan state clearly that, in any event, it should get the benefit of an indirect selling expense adjustment. Remarkably, Slocan's counsel did not make the point during his initial presentation.

The antidumping statute does not contain an exhaustive list of those costs which may be treated as direct or indirect selling expenses. Considerable discretion is vested in Commerce to determine what expenses should be treated as selling expenses; Commerce may, for good cause, change its policy regarding the treatment of particular categories of expense. See, e.g., *NTN Bearing Co. of America v. United States*, 248 F. Supp. 2d 1256 (Ct. Int'l Tr. 2003) (Commerce permitted to change its treatment of interest expenses allegedly incurred to finance antidumping duty deposits). Slocan carries the burden of demonstrating, in a specific case, that a given expense should be treated as a selling expenses, whether direct or indirect. Ordinarily, the Panel would conclude that Slocan has not made this showing. However, Commerce does appear to have agreed that this type of futures activity indirectly relates to selling activities and would be an offset to indirect selling expenses. See Commerce Response Brief at III-54. For that reason, the Panel grants Slocan's request for re-examination, and remands this matter to Commerce with instructions for the agency to treat Slocan's futures trading profits as an offset to the company's indirect selling expenses.

Conclusion

For the reasons set out above, the Panel hereby remands this matter once again to Commerce and directs the agency –

> (1) To recalculate Tembec's General and Administrative expenses, using the amounts reflected in the company's books and records as expenses for the Forest Products Group;
>
> (2) To calculate the by-product offset to West Fraser's production costs using the company's recorded revenues from chip sales to affiliates in British Columbia during the period of investigation; and
>
> (3) To treat Slocan's futures trading profits as an adjustment to that company's indirect selling expenses.

Jeffery Atik
Jeffery Atik

Ivan R. Feltham
Ivan R. Feltham

W. Roy Hines
W. Roy Hines

John M. Peterson
John M. Peterson

Leon Trakman
Leon Trakman

Dated: March 5, 2004