

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

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

DECISION OF THE PANEL

June 7, 2004

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

Appearances:

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

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

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

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

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

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

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

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

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

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

Robert C. Cassidy, Jr., Wilmer Cutler & Pickering on behalf of the Québec Lumber Manufacturers Association.

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

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

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

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

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

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

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

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

Robert B. Luce on behalf of Idaho Timber Corporation.

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

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

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

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

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

Richard Bennett on behalf of Shearer Lumber Products.

Charles Thomason behalf of Shuqualak Lumber Company.

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

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

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

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

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

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

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

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I. INTRODUCTION

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

On August 13, 2003 the Panel issued its decision which ruled, in essence, that the Final Determination properly found the elements necessary to support the conclusion that the Canadian Provincial governments provided a countervailable subsidy to timber harvesters, but that the Investigating Authority has not properly determined the benefit flowing from the subsidy. The case was remanded to the Department to, *inter alia*, redetermine the benefit. In order to accomplish this task the Department sought additional information from the Canadian parties following which, on January 12, 2004, Commerce issued its Remand Determination. It is this Determination which is the subject of this opinion. Following briefing, oral argument in this matter was held in Washington, D.C. on March 31, 2004.

The background and history of this matter, up until the time of the remand, was set forth in the Panel’s determination of August 13, 2003. Subsequently, in order to comply with the determination, the Investigating Authority, on September 25, 2003, issued to the Government of Canada questionnaires asking, in part, for statistical information concerning the import and export of softwood logs. The Provinces were asked among other things, for information concerning private log prices, harvesting costs, log hauling distances, and information concerning the numerator and denominator of the subsidy calculation. Subsequent questionnaires were issued on November 11 and November 24, 2003. Based upon the administrative record, as expanded by the responses to the questionnaires, and additional information submitted by the Petitioner, the Department issued a Remand Determination, revising the subsidy rate from 18.79 percent to 13.23 percent *ad valorem*. The Petitioner, the Coalition for Fair Lumber Imports and the Government of Canada, and Canadian parties have appealed this Determination.

In its new ruling the Department created benchmark prices for timber based upon the price for logs and compared these prices to the prices for Crown timber to determine the amount of the subsidy. The methodology used was based upon the principle of derived demand, *i.e.*, that the price for timber is driven by the demand for logs which, in

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turn, is driven by the price for lumber. This, and the other elements of the Remand Determination, will be discussed in turn.

II. PANEL JURISDICTION AND THE STANDARD OF REVIEW

This Panel's authority derives from Chapter 19 of the NAFTA. Article 1904(1) of the NAFTA provides that "each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review." Article 1904(2) directs the Panel to assess whether a final countervailing duty or antidumping duty determination is in accordance with the laws of the importing country, in this case, the United States. The laws consist of the "relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority." NAFTA, Chapter 19, Article 1904(2).

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

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

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." [*Id.* at 842-43.]

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An agency's statutory interpretation is to be upheld if it is "sufficiently reasonable," even if it is not "the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding." *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986) (citing *Federal Election Committee v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981) and *Chevron*).

The U.S. Court of Appeals for the Federal Circuit has held that Commerce's statutory interpretations enunciated in an administrative determination are "entitled to judicial deference under *Chevron*." *Pesquera Mares Australes Ltda v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001). Commerce's regulations adopted after notice-and-comment rulemaking are also entitled to a high level of deference. See *Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1347 (Fed. Cir. 2001). Additionally, "[w]e must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citing *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150-51).

Nonetheless, the Panel must "assure that the agency has given reasoned consideration to all the material facts and issues" and that Commerce has explained how its legal conclusions follow from the facts in the record. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968)). Commerce must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.'" *Avesta AB v. United States*, 724 F. Supp. 974, 978 (CIT 1989) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), *aff'd*, 914 F.2d 233 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 1308 (1991)). The reviewing court "must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974)).

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

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

III. METHODOLOGY

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

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

The implementing regulations of the Department, section 351.511(a)(2), define “adequate remuneration” as follows:

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

(ii) Actual market-determined price unavailable. If there is no useable market-determined price with which to make the comparison under paragraph (a)(2)(i) of this section, the Secretary will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to

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conclude that such price would be available to purchasers in the country in question. Where there is more than one commercially available world market price, the Secretary will average such prices to the extent practicable, making due allowance for factors affecting comparability.

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

In the Preamble to the regulations, the Department indicated that:

[w]e normally do not intend to adjust...prices to account for government distortion of the market. While we recognize that government involvement in a market may have some impact on the price of the good or service in the market, such distortion will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market. Where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to the new alternative in the hierarchy. [63 Fed. Reg. 65377.]

In the Final Determination, in view of the presumed market distortion caused by the Provincial stumpage systems, Commerce found that it could not use actual market prices in Canada for stumpage, and accordingly did not apply tier one of the regulation. Instead, it applied the second tier, namely the world market price. It did so by creating benchmark prices based upon prices for timber in the United States. This Panel held, in its decision of August 13, 2003, that there is no "world market price" for timber, and that the use of benchmark prices for U.S. timber was improper. The Investigating Authority was directed, in effect, to apply the third tier of the regulation, *i.e.*, to develop a benchmark which was consistent with market principles.

The Remand Determination states the objective of the exercise to be to determine "...whether Canadian lumber producers are better off than they otherwise would have been absent the provincial stumpage system.", and to seek "market values that are not distorted by the very government financial contribution at issue..." Remand Determination, P.R. 336, p.4. In so doing, the Department sought to create the largest data base possible to develop the market based benchmarks.

The central market principle cited by Commerce in explaining its methodology is that the market value of timber is derivative of the value of the things made from it, namely lumber. Thus:

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...we started with the fact that log markets and standing timber markets are both primary markets from which lumber manufacturers obtain wood fiber. Lumber manufacturers start with finished lumber prices and subtract their own, non-wood, production costs to determine the maximum amount they would be willing to pay for logs. The independent log seller, in turn, starts with the price of the log it could receive, and subtracts harvesting and transportation costs, to arrive at the maximum it would be willing to pay for stumpage. The landowner, in turn, will charge the maximum stumpage price the independent logger would pay. [*Id.*, p.11-12.]

Commerce then determined that there were independent sellers of non-crown, or private, logs whose prices could be used to develop benchmarks. In addition, it found that prices paid for imported logs were indicative of market conditions in Canada. Lastly, for Québec and Ontario, it factored in what the Department characterized as log purchase offers obtained from a trade publication.¹

Although the Remand Determination is somewhat vague concerning the details of the subsidy calculations, it is clear from the calculation memos, that, in general, the Investigating Authority weight-averaged, by species, the import prices for each province, and weight-averaged domestic log prices, again by species. Then, it simple-averaged the domestic and import prices for each province. Finally, in order to bring the log prices back to stumpage values, the Department deducted harvesting costs, and in the case of Alberta, the log seller's profit. For each province Commerce then compared the constructed stumpage values with the stumpage charged in that province for crown timber, and calculated a benefit in dollar terms. The total benefit was then added together to arrive at a country-wide rate. The details of these calculations are the subject of Section IV, *infra*.

PRIVATE LOG PRICES

In its Remand Determination the Investigating Authority's methodology is based upon the use of private log prices.

In the Final Determination Commerce found that market distortion caused by the dominance in the market of the provincial governments precluded the use of private timber prices under tier one of the regulations. The Department notes that the tenure system includes domestic processing requirements, minimum harvesting requirements and appurtenancy requirements. However, trade in private logs is largely free of these requirements and, unlike the case of crown timber, the harvester is not required to use its own mill. Thus, the Investigating Authority concluded that "...there is an insufficient

¹ For the Province of Alberta, additional data was used which will be discussed, *infra*.

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basis in the record to reject the use of private log prices in Canada.” Remand Determination, P.R. 336, p. 13.

The Determination does not discuss the evidence in the record which tends to support or detract from this conclusion. While the Government of Canada agrees that the private log trade is open and competitive, the Petitioner vigorously contests this proposition. First, both in its presentations before the Department, and in its briefs and at oral argument, the Coalition argues that since the Panel decision did not foreclose the use of cross-border comparisons, Commerce should have revisited tier two of the regulations and found a subsidy based upon world market prices.

Also, the Petitioner strongly urges the Panel to find that the provincial stumpage systems depressed the market price for privately traded logs so that they cannot provide market based prices. The Coalition observes that in Lumber III the Department found that log sales were depressed. In addition, it contends that the existence of export restraints suppresses prices and amounts to a subsidy.

The argument is that if the price for stumpage is distorted by the financial contribution of the government, the price of logs must also be seen as distorted. The overwhelming quantity of wood used to make timber is supplied from crown forests. Therefore, private logs compete with crown timber, and sawmills have an adequate supply of crown timber at subsidized prices. Under the stumpage system, the government is a supplier of logs, either through sales of timber to tenure holders which own sawmills, or, less commonly, through sales by independent loggers who are required to sell to provincial sawmills. Either way, the prices are determined by government policies.

Further, the Coalition argues, economic studies in the record demonstrate that the price of the marginal supply of private timber is determined by the overwhelming supply of crown timber. In addition, the domestic processing requirements free sawmills from having to compete in the marketplace for supply.

The Petitioner contends that Commerce itself does not dispute this analysis, noting the comment that logs and timber are “close substitute goods” both on the demand and supply side, although the Department further noted that, in the short run, it may not be easy for a woodlot owner to switch from selling timber to logs. Petitioner reasons that if timber prices are set artificially low, but log prices are not, and the government offers to supply even more timber, sawmills will switch to buying timber until the prices for both are equalized at the subsidized rate.

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The Department recognizes the existence of the economic studies dealing with price suppression; however it notes that most of these studies dealt with price suppression in timber, not in log trade.²

Canada argues that the Petitioner's economic analysis to the effect that sawmills will switch to buying timber until the price for timber and logs is equal may have a theoretical basis, but that the Department here is trying to assess actual market conditions so that there is no basis to say that timber and logs are essentially equal. We agree with Canada that Commerce could properly find that the economic studies do not establish that logs are not freely traded.

As to export restraints, the record in this proceeding does not establish that the existence of export bans could amount to a countervailable subsidy. While export bans may act to limit the available market for logs, there is nothing in the remand record which we have seen which quantifies the effect on in-country log sales. In its Remand Determination the Department stated that it was unable to assess the impact of export bans on log sales. The Panel sees no error in Commerce's position.

In our decision we expressed scepticism that the involvement of the government, *alone*, served as a basis for rejecting stumpage prices under tier one of the regulations. We noted that in Lumber III Commerce itself found that in Québec, at least, private timber prices were determined by market forces. Nonetheless, we deferred to the Department since the Panel will not reweigh the evidence so long as there is substantial evidence to support the Department's finding of facts.

In sum, we do not have the benefit of knowing what evidence the Department considered in saying that there was insufficient evidence to reject the use of private log sales. Since there appears to the Panel to be substantial evidence on both sides of the issue, we will not disturb the Department's finding here that private log prices are useable as benchmarks. Accordingly, we reject Petitioner's claim that the private log trade cannot be used to measure market conditions.

The Panel also rejects the argument of Ontario parties that we should revisit tier one of the regulations. That issue has been decided.

² In this connection, we note that the Canadian parties also introduced economic studies which, from a theoretical point of view supported the proposition that timber prices were not distorted by the presence of the government in the market.

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U.S. PRICES

The Petitioner argues that the Panel, in its ruling, did not hold that the use of cross-border benchmarks was incorrect as a matter of law, but rather that the Panel held that the Department *as a matter of fact* had failed to properly develop benchmarks which reflected market conditions in Canada. Therefore, it is argued, nothing prevented Commerce from trying, again, to develop benchmarks based upon prices for standing timber in the United States. Alternatively, the Coalition argues, log prices from proximate U.S. markets should have been used in an analysis under tier two of the regulations.

The Petitioner misreads our opinion. We did not say that it was lawful under the statute to use U.S. benchmarks to reflect conditions in Canada. The Panel restrained itself from making a legal determination on this point since the matter could be disposed of as a factual matter. We will do so again. Whether or not Commerce read our opinion as precluding the use of cross-border benchmarks under tier three, it was not obligated to do so. In order to arrive at the methodology it thought best to measure the benefit, the Department was permitted to reject Petitioner's proposed methodology.

The Department reasoned that it would, where possible, prefer market determined prices in the country under investigation, to world market prices, and it found that such prices, in Canada, were available. We see no error in this reasoning.

The same reasoning applies to the concept of U.S. log prices under tier three. Petitioner points out that in some markets, due to the proximity of sawmills, Canadian and U.S. sawmills compete for logs. In this regard, the Coalition has placed in the record a map showing the 100 mile log haul radius for both U.S. and Canadian major sawmills demonstrating that there is considerable overlap in their territory. Therefore, since the law of one price obtains, U.S. sales would be probative of the Canadian market. We think that even if this argument is correct, the Department was still reasonable in its decision to use only in-country price information as reflective of market conditions in the country under investigation.

Accordingly, the Panel upholds the rejection by the Department of cross-border comparisons.

EXPORT PRICES

The Investigating Authority also considered the contention by the Coalition that export sales from Canada would be probative of in-country market conditions, and that a weighted average of import and export prices could be used to measure the subsidy.

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While export prices are probably more probative of market conditions in the country to which the logs are sent, we understand the Department's position to be that in certain circumstances, it would consider export prices to reflect the market in the country of export. Indeed, in its questionnaires to Canada information was sought both from StatsCan and from the provinces regarding exports.

In the end, Commerce determined not to use exports in developing its benchmark prices, in part because it was unable to measure the effect of log export restrictions during the period of investigation. Given that there was information available concerning actual in-country sales, this conclusion seems sound.

The Panel considers that the rejection of export prices is not contrary to law.

IMPORT PRICES

In order to expand the pool of information from which to craft benchmark prices, the Investigating Authority sought, and obtained information from the Canadian government regarding imports of softwood logs, as probative of market conditions in Canada. This information, indicating entered values for imported wood, was taken from import entries, and compiled by Statistics Canada. At least some data was provided for each of the provinces covered by this investigation, although imports to the Province of Québec accounted for about three-quarters of the imports and the only other provinces which had significant imports were Ontario and British Columbia. The Petitioner has not objected to the use of import statistics in the benchmark calculations, and this Panel sees no reason, in principle, to why the use of such data would not be appropriate.

Unmanufactured softwood is reported under the Canadian tariff under a catchall basket provision, "wood in the rough". Therefore, from the statistics alone, there is no way to know whether a particular shipment consisted of sawlogs intended to be made into softwood lumber. Canada objects to the use of this information.

First, Canada argues that the import values cannot be representative of in-country market conditions because they are too high, in some cases higher than the value of the lumber that could be derived from them. The Panel, however, views this question as one concerning the application of the data, rather than whether the use of import data is methodologically sound, and will discuss this argument in due course. Suffice it to say that whether the values are high or low does not, in itself, render use of the data unlawful.

But Canada raises a more serious question based upon the speculative nature of the statistics. It contends in its brief that the basket tariff provision, other coniferous "wood in the rough" is so broad that it could include, in addition to sawlogs:

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...logs that have been debarked, sawn logs such as roughly squared logs, house logs, pulp logs, round logs for veneer production, tree stumps and roots of special woods, and “certain growths for making special furniture veneers or smoking pipes.

Canada argues that in British Columbia, for example, several importers of wood included as “wood in the rough” do not own sawmills and, in fact, import wood used for telephone poles and industrial applications, which products are valued much higher than sawlogs. Additionally, Canada points to the inclusion in this category of another high value product, namely logs used to make veneers for plywood or furniture.

In its Decision Memorandum Commerce seems to agree that veneer logs often have a higher value than sawlogs, but counters that the “wood in the rough” basket category also includes low value products, and the two tend to balance each other out. In addition, the Department’s investigation showed that veneer logs are not always a premium product, that the distinction between veneer logs and sawlogs is not always clear, that some provinces do not have a separate category for veneer logs, and that the cores of veneer logs are sometimes used to make lumber.

The Coalition, for its part, argues that subsidized prices in Canada artificially lower the price sawmills will pay for imported logs, and that the relatively low volume of sawlogs which were imported only serves to demonstrate that in-country prices were depressed by the availability of subsidized crown timber. It points out with reference to Québec, that sometimes mills will mix higher priced U.S. logs with lower priced crown in order to utilize the full capacity of the facility. The total production in this case would still be lower priced than lumber produced in Maine.

Nonetheless, Petitioner seems to support the proposition that import prices may be informative of market conditions in Canada for softwood logs.

The Panel is of the view that the Department acted reasonably in examining import statistics in creating its log benchmarks. There are many sawmills, particularly in Québec, which are close to the U.S. border, and it is clear that they can, and do, import sawlogs. There is no evidence in the record of which the Panel is aware, which suggest that the statistics do not fairly represent prices for sawlogs, and the Investigating Authority was reasonable in reaching this conclusion where there exists a sufficiently large volume of lower and higher value imports to balance the mix.

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COST/REVENUE

Canada argues that the Department was wrong in using benchmarks derived from log prices in examining whether there was a benefit conferred by the provincial stumpage programs, because the provinces earned adequate remuneration under the “market principles” tier of the regulations.

The Preamble to the regulations, in discussing “market principles”, indicates that the Department will look to “...the government’s price-setting philosophy, costs, (*including rates of return sufficient to insure future operations*), or possible price discrimination. We are not putting these factors in any hierarchy, and we may rely on one or more of these factors in any particular case.”³ (emphasis added)

Canada says that under this standard Commerce should have concluded that the provincial governments earned adequate remuneration because they earned far more than enough to ensure future operations, *i.e.*, that their revenues comfortably exceeded their costs. Further, since the Department had used this cost/revenue test in other cases under the third tier of the regulations, it cannot now deviate from this standard. The revenues in this context consist of the stumpage fees collected. The costs consist of the amounts expended in administering the stumpage programs.

For example, in *Certain hot-rolled Carbon Steel Flat Products from South Africa*⁴ the Investigating Authority found that when the government furnished port facilities and rail infrastructure, the fees it charged were designed to recover its capital and operating costs. Both the Department and the Petitioner distinguish the determinations cited by the Canadian parties, arguing that Canada’s analysis is faulty.

More importantly, Commerce maintains that, while in certain cases, it has looked to whether the government has covered its costs sufficiently to ensure future operations, the Department has never established a consistent practice of using a cost/revenue standard in measuring adequacy of remuneration under tier three of the regulation.

Indeed, the question before the Panel is not whether the Investigating Authority could have used the cost/revenue test as the standard to measure the adequacy of remuneration. Although it could be argued that the costs which Canada would have the Panel use to measure the return on operations would not include capital costs, or in effect would value the forests at zero, the Panel need not address this argument.

³ 63 Fed. Reg. 65378.

⁴ 66 Fed. Reg. 20,261, (*Prelim. Determination*), April 20, 2001.

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Rather, the question for the Panel is whether the Department was required to use the cost/revenue test in this investigation. We think not. Under the standard of review applicable in this case, the Panel may not substitute its judgment for that of the Department. Where the statute does not precisely speak to a question, the panel must only determine whether the Department's position, under *Chevron*, is based upon a permissible construction of the statute.

Congress has delegated to Commerce as the administrating agency the authority to carve out the specific methods to apply... There is no requirement that the methodology adopted by Commerce be the most comprehensive or the most exact — it need only be reasonable and in accord with the legislative intent.”⁵

As we find that the methodology used by the Department was not inconsistent with the statute, and was a reasonable approach, it was not required to use the cost/revenue standard proposed by Canada.

IV. BENCHMARK CALCULATIONS

SPECIES-SPECIFIC BENCHMARKS

In developing benchmarks consistent with market principles pursuant to the third tier of its regulations, the Department chose to derive the market value of standing timber from the value of the logs used to make the lumber that is the subject of this investigation. The methodology used by the Department is said to be based on “the market principle of derived demand.” Remand Determination, P.R. 336 at 14. The Department briefly describes that methodology in the passage quoted from the Remand Determination at page 9 of this opinion. *See id.* at 11-12. The Department further outlines its process as follows:

[T]o calculate the market benchmark to determine whether the provinces receive 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. [*Id.* at 14.]

Canada objects to the Department's selection or grouping of species for calculation of the species-specific benchmarks in two provinces: British Columbia and

⁵ *Geneva Steel, et. al v. United States* 20 C.I.T. 7, 914 F. Supp. 563, 578 (1996).

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Ontario. In British Columbia, the Department calculated benchmarks for individual species and applied those benchmarks individually, disregarding British Columbia's practice of collecting stumpage fees for the relevant woodlot or "stand" as a whole rather than for each individual species represented by trees in the woodlot. In Ontario, the Department calculated benchmarks for three groups of species ("spruce", "pine", and "other conifer") rather than for individual species, in spite of Ontario's differing grouping of species ("spruce, pine & fir" termed "SPF", "red & white pine", and "hemlock & cedar").

As requested by the Department, both British Columbia and Ontario reported species-specific volume and value data to the Department. However, the Panel considers that compliance with the Department's request does not bar raising in this proceeding the question of the appropriate application of species-specific data in the Department's benchmark valuation methodology. The Department's use of species-specific pricing for tier three benchmarks arose only on remand where no opportunity was provided for the parties to review and comment on a draft decision on remand.

SPECIES-SPECIFIC BENCHMARKS IN BRITISH COLUMBIA

The issue with regard to British Columbia involves the Department's practice of "zeroing" or disregarding so-called "negative" benefits in its ultimate benefit calculation. As explained by Canada, "[i]f a given stand contained four species, British Columbia would charge, and the harvester would pay, a single stumpage rate applicable to all four species in that stand." Canada Brief at C-43. In this example B.C. would not collect different stumpage fees for each separate species; rather it would calculate a single stumpage rate applicable to all the species in the stand by estimating the quantity of each species present in the stand and then derive a total price for the stand that reflects the quantity of each species in the stand. Thus there would be no problem with the Department's benefit calculation for B.C. if each of the four species the Department's species-specific benchmarks exceeded B.C.'s individual species stumpage rates. In that case, for the stand as a whole, the shortfall in B.C.'s stumpage revenue should be approximately the same as the Department's calculation of the stumpage benefit compared with the Department's species-specific benchmarks.

However, where the Department's species-specific benchmarks are lower than B.C.'s individual stumpage rates for some species, which is the case with respect to a number of species present in both B.C. regions, for the stand as a whole the shortfall, if any, of B.C.'s stumpage revenue will likely be significantly lower than the Department's calculation of the stumpage benefit. This disparity exists because the Department will "zero" any "negative" benefit in its species-specific benefit calculation. In other words, in its benefit calculation the Department will disregard – *i.e.*, count as zero – any instance in which B.C. in effect achieves greater revenue for stumpage of individual species for which the Department's calculation of a benchmark price is lower than the stumpage price for that species calculated by B.C. and factored into B.C.'s stumpage price for the particular stand.

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The issue for the Panel is whether, based upon the record, it was reasonable for the Department to apply its individual species benchmark method to stumpage pricing in B.C. despite the B.C. practice of collecting its stumpage fees stand-by-stand, based on each stand as a whole. Citing the statutory requirement that “the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being purchased”, 19 U.S.C. § 1677(5)(E), Canada argues that since stumpage is the “good” provided, “prevailing market conditions” refers to the B.C. stumpage “conditions of sale”, one of which is to pay stumpage fees charged for each stand as a whole, and not on the basis of the artificial species-specific prices calculated by the Department. *See* Canada Brief at C-40-45. According to Canada,

The Department’s arbitrary species-specific methodology would imply that the province provides massive subsidies for the harvest of some species and vastly overcharges for the others. But the fact that the province charges the same rate for all species in a stand makes that implication absurd. Commerce must examine the stumpage program as it is administered – as a province-wide program where tenureholders cannot and do not pick and choose which species they harvest on species-specific stumpage charges. [*Id.* at C-45.]

The Department characterizes Canada’s argument as an impermissible effort “to offset the benefit derived from below market sales with non-beneficial transactions”, contrary to the statutory limitation of “offsets” to three specific types of charges. According to the Department “[t]here is no basis in the countervailing duty statute, the Department’s regulations or past practice to support the GOC’s claim that so-called ‘negative’ benefits should offset ‘positive’ benefits.” *See* DOC Brief at 74-75. Further, the Department adds that 19 U.S.C. § 1677(6) defines “net countervailable subsidy” as allowing the Department to deduct three specific types of charges from the “gross countervailable subsidy”, which in effect offsets such charges against countervailable benefits.

While the Panel can agree with the Department that the “net countervailable subsidy” provision limits “offsets” to the three charges specified in the statute, Canada’s claim does not call for an “offset”, but rather for valuation of the “good” that B.C. provides, namely the authority to harvest standing timber, in accordance with the “market conditions” under which that good is provided. Under B.C.’s stumpage programs, the tenureholder must harvest all trees in the stand and must pay for timber cutting rights by the stand, not by individual species. Thus, the stand is the market unit in British Columbia, not the species.

The Department argues that its task under the third tier of the regulations is to calculate a benchmark in accordance with market principles, not to “mimic provincial stumpage systems”. *See* Hearing Transcript at 137-40. But the regulations give effect to the statute, which calls for determining the adequacy of remuneration “in relation to prevailing market conditions for the good ... purchased”. 19 U.S.C. § 1677(5)(E). Species-specific pricing may well be an appropriate method for valuing stumpage and for constructing benchmark prices under tier three, but it is not necessarily the exclusive

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method for doing so. The Panel believes the statutory language directs the Department to determine third tier benchmarks in accordance with the market conditions that apply to the sale of the particular good at issue, which here is the authority to harvest standing timber which B.C. sells by the stand, not by the individual species.

Accordingly the Department is directed to recalculate the benchmark price for stumpage taking into account the actual market conditions that govern the sale of timber harvesting authority in British Columbia, including the fact that Crown stumpage fees are charged for stands rather than for the individual species.

SPECIES-SPECIFIC BENCHMARKS IN ONTARIO

As summarized above, Ontario's stumpage program groups species differently from the species grouping adopted by the Department in its calculation of the benefit afforded by the Ontario stumpage program. Ontario calculates benchmarks for three groups of species: "SPF" which groups spruce, pine, fir & larch; "red & white pine", and "hemlock & cedar". For its benchmarks, the Department chose three different groups: "spruce"; "red & white pine", priced separately; and "other conifer" which includes fir, larch, hemlock & cedar.

According to Canada, nearly 95% of Ontario's Crown softwood timber is sold in the single "SPF" species category, and all SPF timber is sold at the same price. Canada Brief at C-49. Quoting the statute, Canada argues that "SPF" timber is the "good ... being provided". 19 U.S.C. § 1677(5)(E). Hence the Department violates the statute by "artificially split[ting] Ontario's single SPF category into three ... invented categories": pine, spruce, and "other conifer". *Ibid.*

The Department's response is essentially the same as its response to the similar argument raised by British Columbia: species-specific prices are consistent with market principles and therefore constitute a reasonable methodology for the calculation of tier three benchmarks.

The problem with the Department's approach is that the market for timber in Ontario is essentially a market for "SPF" timber, not for any one of the individual species that make up "SPF" timber. As with our analysis of the statutory requirements for the application of tier three benchmarks in British Columbia, the Panel considers that it is incumbent on the Department to evaluate the prevailing market conditions for the provision of stumpage in Ontario as the basis for the Department's benchmark calculations. And in Ontario it appears that the "prevailing market condition" is for the sale of "SPF" stumpage, not stumpage priced separately for each of the component species.

Accordingly the Department is directed to recalculate the benchmark price in Ontario taking into account the actual market conditions that govern the sale of timber harvesting authority in that province.

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QUÉBEC

For Québec, the Department used three sources of data to construct a “derived stumpage market price”⁶ namely, import statistics from StatsCan, domestic log prices reported by a private organization, The Federation des Producteurs de Bois du Québec (“Syndicates”), and information from a publication, The Canadian Sawlog Journal.

The Import prices were weight-averaged according to species as the StatsCan import data contained quantity information as well as species and price. The Syndicates prices were likewise weight averaged according to species since this data likewise showed volume information.

The third source of information was the Canadian Sawlog Journal.⁷ This publication contains, *inter alia*, advertisements by sawmills for the purchase of logs, both in the United States, and in Canada. The Department selected prices from these advertisements, and averaged them by species. It then simple-averaged the Sawlog Journal prices with the Syndicates prices to arrive at a domestic log price, and this figure, in turn, was simple-averaged with the import prices. The net effect was to assign 50% of the benchmark price to imports, and 25% each to the Syndicates and Sawlog Journal prices. From the averaged import and in-country prices, Commerce deducted harvest and haul costs which were developed from information supplied in the questionnaires.

Commerce explains the use of the three sources as responsive to its effort to construct the most “robust” data base possible. The Coalition would reject the use of the Syndicates prices as artificially low due to the effect of the subsidized crown timber prices. It also argues that the Sawlog Journal prices are too low. The reasoning is that since the advertisements are to purchase logs, it is a natural inference that the buyer would not start at the lowest possible price, and negotiations would undoubtedly result in higher prices. Both sides, in the briefs, select data tending to demonstrate that sawmills which actually purchased logs during the period of investigation, bought them at prices higher or lower than the advertised prices, depending upon the result they wished to reach. It is possible, however, that to some extent, the two results can be reconciled, as the two sides used different conversion factors to translate the Sawlog Journal advertisements (in MBF) to square metres.

⁶ Québec calculations memo, dated January 12, 2004, P.R. Doc. 3002.

⁷ Apparently there were two publications, the Canadian Sawlog Journal and the Sawlog Bulletin, which were merged in April, 2001. In calculating benchmarks for Québec and Ontario, the Department used advertisements from seven editions of the Journal and one edition of the Bulletin. *See* Canada’s Brief, 3.37, p. C-20. Our reference to the Sawlog Journal includes both publications where appropriate.

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The Government of Canada argues that if it had had notice that the Department was considering using the Sawlog Journal (pages of which had been placed in the record early in this proceeding by a Canadian party), it would have been able to demonstrate that these advertisements were nothing more than invitations to negotiate prices, or essentially expressions of interest in purchasing logs. No seller could expect to back up his truck to the mill and expect to receive the advertised price. In this regard, there is considerable dispute about the relationship between Sawlog prices and Syndicates prices. It would seem that if both reflect the market, they should be the roughly equivalent. And, as suggested above, perhaps differences can be reconciled based upon the conversion factor used. But if the two are comparable, there seems to the Panel to be no reason to use the Sawlog Journal prices since there are actual market transaction prices available.

That the data can be thus manipulated only reinforces the conclusion of the Panel. The Sawlog Journal advertisements are only invitations to negotiate for the purchase of logs. They do not represent actual market transactions, and they are evidence of nothing. The record is devoid of information that any transactions took place at the advertised prices, or even as the result of these advertisements at any price. There is no substantial evidence supporting the use of Sawlog Journal advertisements.

The Government of Canada argues that the Department should have weight-averaged the data as that is the normal practice. As noted, the Investigating Authority simple-averaged the three sources of information both to calculate domestic log sales prices for Québec and Ontario and to average domestic prices with import prices for all provinces. In the Remand Determination it stated that “[w]hile we typically weight average across data sources, we cannot do so here because not all data sources contained quantity information.” Remand Determination, P.R. 336, p. 16. Of course, for Québec the data source which lacked quantity information was the Sawlog Journal.

While the parties discuss in their briefs various cases in which the use of simple averages has been upheld, none raises arguments which would convince the Panel that, where volume information is available, weight-averaging should not be used. Indeed, in its brief, the Department states it is normal to weight-average multiple data sources.

The Department is directed to recalculate the benchmark log prices for Québec without use of the Sawlog Journal data. In the recalculation the Department must weight-average the import and Syndicates prices.

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ONTARIO

For the Province of Ontario, the Investigating Authority also used three data sets in calculating its log benchmarks, namely imports, the Sawlog Journal, and private log sale data prepared by KPMG LLP which was submitted by the Ontario authorities. The Panel understands that Commerce then went through the same kind of exercise as in Québec. The KPMG study prices were simple-averaged with Sawlog Journal prices to create a “domestic” price which was then simple-averaged with the import prices.

Ontario also points out that the Sawlog Journal pages used by Commerce contained *no* advertisements for SPF logs, notwithstanding that SPF accounts for 95% of the Ontario harvest.

As the Panel finds the same defect in the Ontario calculations as it did for Québec, the Department is directed to recalculate the Ontario benchmarks, without use of the Sawlog Journal data, and weight-average the imports with the KPMG domestic log sales information.

MANITOBA

For the Province of Manitoba there was a dearth of data. The Department developed no data for non-crown domestic log sales. Therefore, the sole source of information was the StatCan import data. This data shows only four import transactions during the Period of Investigation. Of the four, only one shipment was of any appreciable value, namely C\$57,175, and from this shipment, Commerce calculated a “weighted average” price for SPF of C\$88.68.⁸ (It is noted that the import average price for SPF in Québec, where there were significant imports, was C\$72.55. It does not appear that the SPF category was used in any other province with a large data base.)

The problem with this approach is that where there is a significant data base, prices will average out, and it is reasonable to assume that such an average is reasonably informative of the mix of the whole. The Panel does not think that it is reasonable to use the single data point in this case. There is nothing known about this shipment-what kind of wood it was, and, more importantly, whether it consisted of sawlogs. It is interesting to note, in this connection, that the Petitioner, in its brief, references a chart prepared by one of its consultants, which shows major Canadian and U.S. sawmills with each mill’s

⁸ Spruce, pine and fir, a general category intended to match the prevailing harvest in the Province.

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100-mile log haul radius.⁹ From this map, it appears that there is only one Manitoba sawmill which has any U.S. border within 100 miles. In fact, it shows that Manitoba had only three mills *in toto*.

We find, therefore, that there was no substantial evidence to support the Manitoba log benchmark calculation. The Department is directed to recalculate the benchmark log price for Manitoba without use of the import data.

SASKATCHEWAN

The situation in Saskatchewan, while similar, presents a more dramatic extreme. There was only one import transaction to the Province reported by StatsCan; a shipment of C\$5,759.00 of “wood in the rough”. Commerce created a SPF benchmark price of C\$85.96 based upon this shipment. As in the case of Manitoba, there is nothing known about this shipment which would indicate that it consisted of sawlogs. According to the Petitioner’s map there is no major sawmill in Saskatchewan anywhere near the U.S. border.

There is no substantial evidence to base a benchmark log price on this one shipment, and the Department is directed to recalculate the benchmark log price for Saskatchewan without use of the import data.

ALBERTA

The situation in Alberta is somewhat different, as the Department used two data sources, imports and the KPMG consultants’ survey of private log transactions. The latter were adjusted not only for harvesting and stumpage costs, but for imputed profit to the log sellers, as well.

The import data which the Department used to create a benchmark price for SPF consisted of two shipments, one of C\$82.00 and the other of C\$2,576.00. The resulting weighted average benchmark for imports was C\$91.66. This was simple-averaged with the weight-averaged KPMG study price of C\$47.48, to arrive at an average Alberta SPF benchmark of C\$69.57. The Coalition argues that the private log prices were depressed by the availability of subsidized crown timber, but it strains credulity to suggest that a

⁹ We do not mean to suggest that it would not be possible for a sawmill to purchase logs from a distance greater than 100 miles. There is considerable dispute among the parties as to how long a log haul would be to be economical. What we do mean to say is that the further away the mill is from the forest, the less likely it would be that saw logs would be bought by that mill.

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sawmill would pay almost twice as much for imported logs as the presumably available price of in-country logs. Thus, regardless of any effects of the presumed subsidy, it is hard to reconcile the discrepancy.

The KPMG study is not an analysis of actual log sales. Rather, it is based upon Timber Damage Assessment prices. In Alberta, when a mining or drilling operator damages trees in its operations, it is required to compensate the owner or tenure holder for the damage done. This leads to a price for the damaged timber in what is, in effect, an arms length negotiation. While the Department had refused to use these prices under tier one of the regulations, it accepted them as informative of market conditions in Alberta under tier three. It does not appear from the briefs of the parties that there is a serious challenge to the KPMG data, and there is no substantial evidence for the Department to have rejected the use of this data.

The import data for Alberta suffers from the same infirmity as in the case of Manitoba and Saskatchewan. Accordingly, the Department is directed to recalculate the benchmark log price for Alberta without use of the import data.

BRITISH COLUMBIA

British Columbia has two distinctly different forest areas and, consequently, different species and markets. Accordingly, benchmark prices were created both for the B.C. coastal area and for the interior. For the British Columbia coast area, Commerce used, as for the other provinces, import statistics, and, in addition, prices from the Vancouver Log Market. For the interior, it used import statistics, the Vernon Log Yard Sort prices, and data from the Revelstoke Community Forest Corp.¹⁰

The Investigating Authority weight-averaged the imports by species, and likewise, it weight-averaged the domestic prices, however, it simple-averaged the two together, so that the imports represent 50% of the benchmark prices.

Canada's brief points out that only 38,580 cubic metres of imports were simple-averaged with 4,700,000 cubic metres of domestic log sales resulting in what is claimed to be a serious distortion, as the import prices are materially higher than the domestic prices.

The Remand Determination does not discuss why Commerce simple averaged the two data sets. At the oral hearing, it was suggested that weight-averaging was not

¹⁰ The Revelstoke data was, according to the B.C. Calculations Memo, obtained from the company's website.

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possible because there were two B.C. benchmarks, and the Department did not have information as to how many of the imported logs were shipped to the interior and how many were destined for the coastal area. Without this information, there were no volumes to create a weight average for either of the two B.C. regions.

Since there was no information concerning the destination of log imports to B.C., the Department chose to simple-average the volume-weighted import average with the volume-weighted domestic log sales average for each of the two B.C. regions. Considering the relatively low volume of total imports to B.C., however, it might not be unreasonable to double-count the imports and then weight-average the results. This could be accomplished by, first, applying the total volume of imports to the coast, and, second, applying the same total import volume to the interior, and then weight-averaging the results with the data for domestic log sales in the two regions. Although this procedure would inflate the resulting benchmarks, it would achieve a more appropriate benchmark for each region than results from the simple-average of the domestic with the import averages for each region.

The Department is directed to recalculate the benchmark for British Columbia and to explain the basis for its action. If the Department is able to calculate a benchmark with weight-averaging of the domestic and import data, it is directed to calculate a benchmark with weight-averaging of the domestic and import prices. In this connection, we note that it does not appear that the Department asked for volume information during the investigation.

The Government of British Columbia raises another issue with respect to the use of the import data. In terms of both volume and value the second largest species of wood imported in B.C. during the POI was Douglas fir. Canada argues that the three largest importers of Douglas fir during this time period were not sawmills, and that they did not use these logs for lumber. The Department, in its brief claims that the first it learned of this contention was in Canada's brief, and that even if the importers are not sawmills, that does not necessarily mean that the logs were not used to make lumber.

The Panel does not regard as unreasonable the proposition that the existence of more valuable and less valuable logs will balance out where the database is substantial, and that the use of such import data is therefore reasonable. However, the B.C. Government indeed indicated in its October 14, 2003 response to Commerce's questionnaire that the largest importers of Douglas fir were the Bell Pole Company, Fraserwood Industries, and Heatwave Technologies, and that none were lumber producers. If this is so, there is not substantial evidence to support the Douglas fir benchmark used by the Department, and this has to be taken into account in recalculating the B.C. benchmarks.

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PROFIT ADJUSTMENTS

With the exception of the Province of Alberta, Commerce did not deduct from the benchmark log prices an amount for the profit of the log seller. Intuitively, it would seem that the price at which a log seller is willing to sell would include a profit over and above the seller's cost. In its Remand Determination the Department seems to agree, but states that the information was not available to make the adjustment in every province.¹¹ Indeed, it now seeks a remand to "revise" (presumably to eliminate) the profit component in Alberta's calculation on the grounds that the evidence used to support this data was only an estimate, and was therefore inadequate.

In its brief, however, the Department posits a different reason for not making an allowance.

The Department recognizes that if independent harvester's profit is not included within the various provincial costs, that profit should be deducted to arrive at the "derived market stumpage price" used in the Department's calculations. However, all of the cost studies used for the Department's provincial benefit calculations cover the entire operations of integrated producers that manufactured lumber, harvested logs, and performed forest management functions required by their tenures, including costs paid to contractors. Thus, because the independent harvester's profit was included within the total cost data for all of the provinces, the Department believes it unnecessary to make the additional adjustment ... [Department's Response Brief, P.R. Rem. 360, p. 79.]

This explanation is puzzling to the Panel. The fact that the Department relied upon studies of integrated producers does not establish that the harvester is always the log seller. At the hearing in this case, it was understood that the Department was saying that there are no independent log sellers in Canada who are not also harvesters. If this were the case, it would be obvious that any profit over and above the harvesting costs would be built into the sale price. However, Canada sharply argues that independent log sellers do exist in the relevant Canadian markets and there seems no record evidence to establish otherwise.

The Petitioner's argument against the allowance for profit is equally opaque. In part, it seems to suggest that since in a competitive market, a seller will continue to sell up to the point it no longer has a profit, it is improper to assign a fixed profit figure in the calculations. The use of a fixed profit figure does not take into account the ability of the producer to increase profit by increasing volume.

¹¹ In its brief, Canada states that for the Province of Québec, profit data was available.

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The Canadian parties further argue that if the Department had no figures upon which to base a profit component, it is because it did not ask for this information, and the refusal to make a profit adjustment amounts to an impermissible adverse factual inference. Under 19 U.S. Code § 1677e(b), the Administering Authority may “use an inference that is adverse to the interests of [a] party” which has “failed to cooperate by not acting to the best of its ability to comply with a request for information”.

The Panel is not persuaded that the Department made a reasonable effort to estimate log sellers’ profits. Nor has it pointed to any substantial evidence that supports its post-decision rationale that all independent log sellers are also harvesters. At the oral argument, it was suggested by the Canadian parties that the opposite is true, namely that in most cases the harvester is an independent contractor and the log seller is the owner of the woodlot. This is consistent with the language quoted from the Remand Determination at page 9 of this opinion. The entire premise of the log benchmark methodology is that the log seller is independent. In this context, the word independent can only be taken to mean *independent from the sawmill*.

The Coalition has not convinced us that *no* profit should be deducted. The Department is not authorized to base its determinations on a theoretical model of enterprise behaviour. The Department’s effort here is to establish actual market conditions in Canada, not some theoretical profit.

Therefore, the question of the proper adjustment for profit is remanded to the Department for further consideration with respect to the benchmarks for all provinces. The Panel recognizes that it may not be unreasonable for the Department to reconsider the method used to estimate profit in Alberta, and accordingly, grants the remand request on this point. However, if the Investigating Authority cannot determine a better estimate of the amount of profit for Alberta, it is not authorized to change it.

V. NUMERATOR AND DENOMINATOR ISSUES

ALBERTA’S NUMERATOR

The GOC contends that the Department’s calculation of the numerator for Alberta fails to comply with the requirement that the numerator match the denominator in subsidy calculations. *See* Canada’s Brief at D-10, *citing* this Panel’s Decision at 82 and WTO Appellate Body Report, *United States–Lumber Final Determination* at para. 164 n.196. The GOC states that the Department’s Alberta numerator calculation includes “not only log volumes that went to sawmills, but also volumes that went to pulp, paper and other wood products industries” while its denominator calculation was not proportionally increased “to take into account the pulp, paper and other wood produced from the extra volumes” included in the Alberta numerator. Canada’s Brief at D-10 (*citing* Remand

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Determination at 37-38). Thus, according to Canada, the Department has not “netted down” or limited the numerator to logs that “hit the saw blade in the saw mill” as it did in the case of the other provinces.

Alberta allegedly informed the Department about its administrative inability to separate sawlogs from other wood, thereby isolating logs destined for sawmills as other provinces had done and provided the Department with two “accurate methodologies to calculate the volume of provincial wood that did go to sawmills”. The first of these methodologies simply calls for subtracting “sawlog” volumes harvested by Alberta tenure holders who do not own sawmills that produce softwood lumber from total Alberta “sawlog” volumes. The second methodology uses what Alberta claims to be standard conversion factors to convert the actual volume of lumber produced in Alberta mills back into the equivalent volume of whole logs that would have been used to make such lumber. *Id.* at D-12. This second method might be called a “logs to lumber recovery rate”. The Department refused to accept either proposed “net-down” methodology.

With respect to tenure holders who do not own sawmills, the Department contends that there is no record evidence demonstrating that non-integrated tenure holders do not harvest timber to produce lumber. Further, it states that Alberta has reported that tenure holders sell logs and that “there is a significant amount of ‘swapping’ of logs in Alberta”, but Alberta does not maintain statistics on the amount of swapping that takes place between non-related buyers and sellers. Therefore, volumes of logs that Alberta sawmills obtain from third parties for processing into lumber may not have been included in the sawlog volume reported by Alberta. Consequently, simply deducting the volume of logs reported by tenure holders that do not own sawmills would not result in a more accurate number.

The Panel agrees that the mere fact that Crown logs are harvested by tenure holders who do not own sawmills will not establish that such logs are not used to produce softwood lumber. Accordingly the Panel finds that the Department properly rejected the first of Alberta’s proposed methodologies.

With respect to “netting-down” of logs through application of a “logs to lumber recovery rate”, the Department argues that this methodology was rejected by the Department in *Lumber III* on the grounds that there was insufficient evidence to support the conversion factors proposed by Alberta. *See Lumber III*, 57 Fed. Reg. at 22603. In *Lumber III* the Department stated that Alberta’s methodology was based on two variables:

a nominal volume to actual volume conversion factor, and a logs to lumber recovery rate. The methodology assumes that the nominal to actual recovery factor calculated for 2x6 is applicable across all the dimensions of lumber. However, Respondents did not justify why the 2x6 nominal to actual recovery factor value should be considered as representative. Because Alberta did not provide an adequate explanation for its use of the 2x6 value, and because the

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Department has no other information on the record regarding this issue, we did not make their proposed adjustment.” [*Ibid.*]

In the present proceeding the Department states that:

The recovery rate proposed by the GOC is based on a ratio for for (*sic*) logs measured according to the Smalean formula, Alberta’s current cubic measurements system, and the Alberta MBF log measuring rule. Therefore, it suggests that it is representative of a log-rule conversion factor rather than a logs-to-lumber recovery rate. In summary, the alternative methods proposed by the GOC produced arbitrary and erroneous results and lack any compelling evidence on the record which would justify their application to Alberta’s numerator. [Department’s Brief, at pp. 96-97].

While we can accept Alberta’s log to lumber conversion rate concept, Alberta’s response at the Panel hearing fails to give an adequate explanation for its proposed methodology. *See* Hearing transcript at 222-23. Therefore, we reject Alberta’s second methodology as well. In sum, while Alberta contends that the Department’s numerator volume does not represent the actual volume of logs entering Alberta sawmills, Alberta has offered no viable means to the Department by which to separate the volume that it contends did not “hit the blade” to produce lumber in Alberta’s sawmills.

DENOMINATOR ISSUES

In its Remand Determination the Department allegedly improperly excluded from the denominator the value of certain “residual products” produced by smaller sawmills in all provinces. The Department explained that “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.” Thus the Department did not include in the denominator products that were not the result of the softwood lumber manufacturing process, such as particle board, and products derived from “Crown logs that never entered or were not processed by a sawmill.” Final Determination, P.R. 336, p. 38-39. However, the Department reported that:

Citing 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. [*Id.* at 40.]

Canada argues that its failure to provide the Department with non-scope product values that are confidential is inconsequential to this conclusion. As accepted by the Department, the smaller mills’ production mirrors the production of large sawmills. According to the Remand Determination, “[a]s the GOC itself has pointed out, the 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

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accounted for the majority of the long-form questionnaire responses.” Remand Determination, P.R. 336, at 44-45.

The “long-form questionnaires” report production data and commodity-specific product sales figures submitted by large sawmills for each product category, whereas the “short-form questionnaires” are summary reports of total sales by smaller sawmills. Both sets of data are drawn from questionnaire responses reported in the GOC 1997 Annual Survey of Manufacturers (ASM). The GOC explains that “residual products” reported in the 1997 ASM questionnaires consisted of:

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 p. 41.]

The 1997 ASM data on product mix apparently covers the production of the large sawmills, but not that of the smaller sawmills. Canada apparently used the 1997 ASM data as the basis for calculating product mix in the POI using the aggregate value of all Canadian sawmills’ shipments reported for the POI in the Monthly Survey of Manufacturers (MSM). The MSM does not contain product-specific information. *See ibid.* Thus, the 1997 ASM data was used to establish the product-mix of Canadian sawmills, not the value of their shipments. Data on values was derived from the MSM.

The Department concluded that “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.” *Id.* at 45. By this logic, which is not contested, the product mix of lumber and co-products produced by smaller sawmills from crown logs included in the numerator should be the same as the product mix produced by large sawmills. Thus, the same ratio of softwood lumber/co-products to total production should be used for the smaller sawmills as for the large sawmills and included in the denominator. Applying this ratio to the total amount of small sawmill residual product, Canada calculates that about C\$1.1B has been wrongfully excluded from the denominator.

We find the Department’s determination to be correct in intent, but flawed in execution. The Department properly determined to include in the denominator all softwood lumber, co-products, and residual products produced from logs included in the numerator. The Department also accepts that the composition of small mills’ residual products production mirrors that of the larger mills for which an appropriate valuation has been included in the denominator. In these circumstances we believe the Department should include a corresponding proportion of smaller mill production in the denominator unless the Department has a reasoned basis to establish that the facts justify use of a different proportion. We therefore direct that the Department recalculate the denominator to include the appropriate proportion of the production of smaller sawmills in all

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provinces, and to provide a reasoned explanation of any deviation from the proportion included in respect of the production of the large sawmills.

VI. COMPANY EXCLUSIONS

ST. PAMPHILE MILL (BLANCHET)

In its Brief Complainant Québec Lumber Manufacturers Association (Québec Association) alleges that Commerce had no legal right to revisit on remand a legal issue that was decided in the original investigation and was not appealed. The Québec Association specifically argues that Commerce unlawfully revisited its exclusion calculation methodology, calculating a consolidated company rate for *Materiaux Blanchet, Inc.* after it had determined, in its original determination, that it would afford *Materiaux Blanchet's* St. Pamphile Border Mill (border mill) a mill-based subsidy rate. According to the Québec Association, this unlawful change has the effect of unlawfully exposing the border mill to a potential duty liability. We agree that the change was unlawful. Affording the border mill a mill-based subsidy rate was a methodological decision made by Commerce in its original investigation. As such, it is binding on the Department.

“[O]n remand, Commerce may only address issues specified in the remand order.”¹² Thus, it “cannot raise anew...an issue that it failed to pursue in the appeal.”¹³ Neither may it, “*sua sponte*, re-open an investigation for which it has made and publicized a final determination, disturbing the finality of its own decision.”¹⁴ If it “could amend determinations endlessly, it would [make it] difficult to answer the question as to when a *final* determination would ever be made.”¹⁵ Therefore, “[d]eviation from [a Panel’s] remand order in the subsequent administrative proceedings is itself legal error...”¹⁶

The only exception to this rule is the clerical errors exception set-out by the Supreme Court in *American Trucking Assns.*¹⁷ This exception allows administrative

¹² *Hussey Copper, Ltd. v. United States*, 960 F. Supp. 315, 318 (Ct. Int’l Trade 1997).

¹³ *Washington Post Co. v. U.S. Dept. of Health and Human Services*, 865 F.2d 320, 327 (D.C. Cir. 1989).

¹⁴ *Borden, Inc. v. United States*, 4 F. Supp.2d 1221, 1242 (Ct. Int’l Trade 1998) (citing *Badger-Powhatan v. United States*, 633 F. Supp. 1364, 1369 (Ct. Int’l Trade 1986)).

¹⁵ *Badger-Powhattan v. United States*, 633 F. Supp. 1364, 1369 (Ct. Int’l Trade 1986).

¹⁶ *Sullivan v. Hudson*, 490 U.S. 877, 886 (1990).

¹⁷ *American Trucking Assns v. Frisco Transp. Co.*, 358 U.S. 133, 145 (1958).

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officers to correct judgments which contain clerical errors.¹⁸ But it “may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies.”¹⁹

In the instant case, Commerce’s amendment of its mill-based subsidy rate for the border mill was unlawful. Commerce was not ordered to reconsider its calculation of a mill-based subsidy rate in the remand order. Thus, it did not have the power to retroactively change its methodological approach for the border mill.

The Department’s claim that the mill-based assessment was a clerical error does not persuade us. By merely claiming that the law gives it the power to retroactively amend judgments that contain clerical errors, the Department does not meet its burden of proof. The evidence on the record demonstrates that the Department chose to assess the border mill’s subsidy rate on a mill specific basis. Commerce specifically included the border mill as a unit in its exclusion analysis. It also used mill-specific as opposed to company-wide data for the border mill. Therefore, it may not now reassess the mill’s subsidy-rate on a company-wide basis. To do so is legal error.

The Department is directed to recalculate its exclusion analysis for Materiaux Blanchet’s St. Pamphile Border Mill on a mill-based subsidy rate as it had determined in the original investigation.

VII. THE DEPARTMENT’S REMAND REQUESTS

With the exception of its requests to correct a conversion factor, which is rendered moot by our decision, and to revise its profit adjustment with respect to Alberta, which is addressed in our discussion of profit adjustments, the Panel grants the remand sought by the Department to reconsider certain limited implementation issues. The issues for which this remand is granted are as follows:

- (1) to consider the issue of adjustment for harvesting costs for Manitoba and Saskatchewan;
- (2) to re-examine the calculation of the numerator in British Columbia;
- (3) to correct its omission of Douglas-fir from the Vancouver Log Market prices used as domestic log prices in the British Columbia Coast species matching;

¹⁸ *Id.* (citing *Gagnon v. United States*, 193 U.S. 451.)

¹⁹ *American Trucking Assns v. Frisco Transp. Co.*, 358 U.S. 133, 146 (1958).

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- (4) to exclude the following categories of building logs in the Vernon price list from the benchmark calculation in Interior British Columbia: “spruce bldg logs,” “spruce bldg logs (dry),” “white pine (dry) bldg logs,” pine bldg logs” and “cedar bldg logs;”
- (5) to exclude from the benchmark calculation for British Columbia the Revelstoke Community Forest Corp Log Sale Prices;
- (6) to make the adjustments both downward and upward with respect to certain harvesting costs in Québec;
- (7) to re-evaluate whether Québec mills use pulpwood imports to produce softwood lumber; and
- (8) to exclude price listings for “pine” logs that were actually listings for “White Pine” logs in calculating the benchmark in Ontario.

VIII. THE PANEL’S REMAND ORDERS

- (1) The Department is directed to recalculate the benchmark price for stumpage in British Columbia taking into account the actual market conditions that govern the sale of timber harvesting authority in that province, including the fact that Crown stumpage fees are charged for stands rather than for the individual species.
- (2) The Department is directed to recalculate the benchmark price in Ontario taking into account the actual market conditions that govern the sale of timber harvesting authority in that province.
- (3) The Department is directed to recalculate the benchmark log prices for Québec without use of the Sawlog Journal data. In the recalculation the Department must weight-average the import and Syndicates prices.
- (4) The Department is directed to recalculate the Ontario benchmarks, without use of the Sawlog Journal data, and weight-average the imports with the KPMG domestic log sales information.
- (5) The Department is directed to recalculate the benchmark log price for Manitoba without use of the import data.
- (6) The Department is directed to recalculate the benchmark log price for Saskatchewan without use of the import data.

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- (7) The Department is directed to recalculate the benchmark log price for Alberta without use of the import data.
- (8) The Department is directed to recalculate the benchmark for British Columbia and to explain the basis for its action. If the Department is able to calculate a benchmark with weight-averaging of the domestic and import data, it is directed to calculate a benchmark with weight-averaging of the domestic and import prices. In its recalculation the Department must determine whether there is substantial evidence to support the Douglas fir benchmark.
- (9) The Department is directed to reconsider the adjustment for profit with respect to the benchmarks for all provinces. The Panel recognizes that it may not be unreasonable for the Department to reconsider the method used to estimate profit in Alberta, and accordingly, grants the remand request on this point. However, if the Investigating Authority cannot determine a better estimate of the amount of profit for Alberta, it is not authorized to change it.
- (10) The Department is directed to recalculate the denominator to include the appropriate proportion of the production of smaller sawmills in all provinces, and to provide a reasoned explanation of any deviation from the proportion included in respect of the production of the large sawmills.
- (11) The Department is directed to recalculate its exclusion analysis for Matériaux Blanchet's St. Pamphile Border Mill on a mill-based subsidy rate as it had determined in the original investigation.

The Investigating Authority is ordered to complete its remand determination by the firm date of July 30, 2004.

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SIGNED IN THE ORIGINAL BY:

Daniel A. Pinkus

Daniel A. Pinkus, Chair

William E. Code

William E. Code

Germain Denis

Germain Denis

Milton Milkes

Milton Milkes

Daniel G. Partan

Daniel G. Partan