UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
OFFICE OF THE CHIEF COUNSEL FOR IMPORT ADMINISTRATION
Washington, D.C. 20230

July 7, 2005

PUBLIC DOCUMENT

Ms. Caratina Alston
Secretary, United States Section
NAFTA Secretariat
Room 2061, Department of Commerce
14th Street and Constitution Ave., N.W.
Washington, D.C. 20230

RE: In the Matter of Certain Softwood Lumber Products From Canada: Final Affirmative Countervailing Duty Determination; Secretariat File No. USA-CDA-2002-1904-03
Fourth Remand Determination

Dear Ms. Alston:

On behalf of the investigating authority, in accordance with Rule 73(1) of the Article 1904 Rules of Procedure for Binational Panel Review and the Panel's May 23, 2005 decision and June 23, 2005 order, enclosed for filing please find the original plus eight copies of the Fourth Remand Determination. The Fourth Remand Determination is a public document.

The index and administrative record of this fourth remand proceeding will be filed in accordance with Rule 73(2)(a).

Please contact me if you have any questions concerning the enclosures at (202) 482-2879.

Respectfully submitted,

Michele D. Lynch

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Office of the Chief Counsel
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cc: Parties to the proceeding

COPY OF ORIGINAL

FOURTH REMAND DETERMINATION

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

SUMMARY

In accordance with the Panel's May 23, 2005, decision and the Panel's June 23, 2005, order,[1] the Department of Commerce (the Department) provides this fourth remand determination with regard to the following issues: (1) Quebec syndicates' missing pricing information; (2) profit earned by private log sellers in Quebec; (3) profit earned by private log sellers in Ontario; (4) exclusion of sales by Ontario companies for which the "input source" was unsubsidized; (5) matching the numerators to the denominators of the countervailing duty rate calculations; and (6) revision of the surrogate benchmarks for Manitoba and Saskatchewan to reflect the results of the recalculation of the benchmarks for Quebec and Ontario. These issues are discussed in detail below. After addressing each issue, the Department has recalculated the aggregate subsidy rate applicable to all producers and exporters of certain softwood lumber products from Canada, except for those companies excluded from the order. For the reasons set forth below, the Department requests that the Panel affirm this remand.

As we stated in our Original Remand Determination, the Second Remand Determination,

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[1] Decision of the Panel on Third Remand, In the Matter of Certain Softwood Lumber from Canada: Final Affirmative Countervailing Duty Determination, Secretariat File No. USA-CDA-2002-1904-03 NAFTA Binational Panel Review, May 23, 2005 (Panel Decision on Third Remand) and Order of the Panel: In the Matter of Certain Softwood Lumber from Canada: Final Affirmative Countervailing Duty Determination, Secretariat File No. USA-CDA-2002-1904-03 NAFTA Binational Panel Review, June 23, 2005 (Order of the Panel).

and Third Remand Determination,[2] we continue to disagree with the Panel's conclusion that there was not substantial evidence to support the Department's original benefit calculation in the final determination. Additionally, we disagree with the Panel's May 23, 2005 decision with respect to the remanded issues and continue to find that those calculations were supported by record evidence and were otherwise in accordance with law. Our reconsideration of our Third Remand Determination is set forth below.

We received comments from various parties with proposed methodologies for implementing the Panel's remand.[3] Where appropriate, we have attempted to address concerns

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[2] Remand Determination In the Matter of Certain Softwood Lumber from Canada: Final Affirmative Countervailing Duty Determination, Secretariat File No. USA-CDA-2002-1904-03 NAFTA Binational Panel Review, January 12, 2004 (Original Remand Determination); Second Remand Determination In the Matter of Certain Softwood Lumber from Canada: Final Affirmative Countervailing Duty Determination, Secretariat File No. USA-CDA-2002-1904-03 NAFTA Binational Panel Review, July 30, 2004 (Second Remand Determination); Third Remand Determination In the Matter of Certain Softwood Lumber from Canada: Final Affirmative Countervailing Duty Determination, Secretariat File No. USA-CDA-2002-1904-03 NAFTA Binational Panel Review, January 24, 2005 (Third Remand Determination).

[3] In the Matter of Certain Softwood Lumber Products from Canada Final Affirmative Countervailing Duty Determination: *Decision of the Panel on Third Remand* (May 23, 2005)(FILE USA-CDA-2002-1904-03), June 2, 2005, Arent Fox on behalf of the Gouvernement du Quebec (GOQ); *Certain Softwool Lumber Products from Canada*: Comments Regarding Ontario Company-Specific Exclusions in the Forth Remand Determination, June 6, 2005, Baker & Hostetler LLP on behalf of the Ontario Forest Industries Association (OFIA) and the Ontario Lumber Manufacturers Association (OLMA); Certain Softwood Lumber Products from Canada (Fourth Remand): Comments on Ontario Industry Associations' June 6 Submission, June 10, 2005, Dewey Ballantine LLP on behalf of the Coalition for Fair Lumber Imports Executive Committee (the Coalition); *Certain Softwood Lumber Products from Canada*: Comments Regarding Ontario Company-Specific Exclusions in the Fourth Remand Determination, June 20, 2005, Baker Hostetler LLP on behalf of the OFIA and OLMA; *Certain Softwood Lumber Products from Canada*: Comments Regarding Ontario Company-Specific Exclusions in the Fourth Remand Determination, June 23, 2005, Hogan & Hartson LLP on behalf of the Government of Ontario (GOO); Certain Softwood Lumber Products from Canada; Comments for Fourth Remand Determination, June 27, 2005, Kaye Scholer LLP on behalf of Terminal Forest Products Ltd. (Terminal), Carrier Lumber Ltd. (Carrier) and West Chilcotin Forest Products Ltd. (West Chilcotin); Certain Softwood Lumber Products from Canada (First B.C. company request); Comments for Fourth Remand Determination, June 27, 2005, Kaye Scholer LLP on behalf of Allmac Lumber Sales Ltd., Aquila Cedar Products Ltd., Arbutus Manufacturing Ltd, B&L Forest Products Ltd., Bakerview Forest Products Inc., Bridgeside Higa Forest Industries Ltd., Canadian Engineered Wood Products, Canadian Overseas Log & Lumber Ltd., Canyon Lumber Company Ltd., Central Cedar Ltd., Centurion Lumber Manufacturing (1983) Ltd., Chasyn Wood Technologies Inc., City Lumber Sales & Services Limited, Clearwood Industries Ltd., Coast Clear Wood Ltd., Deep Cove Forest Products Inc., Errington Cedar Products, Faulkener Wood Specialties Ltd., Forwest Wood Specialties, Inc., Fraser Pacific Forest Products Inc., Fraser Pacific Lumber Company, Fraser Pulp Chips Ltd., Fraserview Cedar Products Ltd., Frontier Mills Inc., Goldwood Industries Ltd., Greenwood Forest Products (1983) Ltd., Haida Forest

raised by the parties.

ANALYSIS AND DETERMINATION

I. Syndicate Pricing Data

The Panel instructed the Department to reopen the record for the limited purpose of accepting from Quebec certain missing price information for sales reported by syndicates, to verify such information to the extent appropriate, and to recalculate the Quebec benchmarks including this price information. Specifically, in its Panel Decision on Third Remand the Panel stated that the Department is ordered to reopen the record for the limited purpose of developing the missing pricing information from the two Quebec syndicates that, to date, had only provided volume data. Respondents were given 10 days to notify the Department whether they wished to pursue this matter, and, if so, whether the syndicates can, and are willing to, supply the missing prices. The Panel stated that if not, the record will not be reopened and the Department's remand determination (i.e., not to rely on the reported volumes) on this point is upheld. See Panel Decision on Third Remand at 10.

Products Ltd., Hillmoe Forest Products Ltd., Howe Sound Forest Products Ltd., Hudson Mitchell & Sons Lumber Inc., Imageworks Design Studio Ind., Interior Joinery Ltd., Jasco Forest Products Ltd., Kenwood Lumber Ltd., Lakeside Timber Ltd., Landmark Truss & Lumber Inc., Leslie Forest Products Ltd., North Shore Timber Ltd., North Star Wholesale Lumber Ltd., Oregon-Canadian Holdings Inc. (dba Oregon-Canadian Forest Products), Pacific Lumber Remanufacturing Inc., Pacific Western Wood Works, Pallan Timber Products Ltd., 582912 BC Ltd. (dba Paragon Wood Products), Paragon Ventures Ltd., Pat Power Forest Products Corp., Power Wood Corp., Quadra Wood Products Ltd., Raintree Lumber Specialties Ltd., Rielly Industrial Lumber Inc., Sauder Industries Ltd., Sawarne Lumber Co. Ltd., Shawood Lumber Inc., Skana Forest Products, Spruceland Forest Products Inc., Sylvanex Lumber Products Ltd., Twin Rivers Cedar Products Ltd., Tyee Timber Products Ltd., 391605 B.C. Ltd. (dba Vanderhoof Specialty Wood Products), Vancouver Specialty Cedar Products Ltd., Vernon Kiln and Millwork Ltd., Visscher Lumber Inc., Welco Lumber Corp., and West Bay Forest Products & Manufacturing Ltd. (Second B.C. company request); Certain Softwood Lumber Products from Canada; Comments for Fourth Remand Determination, June 28, 2005, White & Case LLP on behalf of the Buchanan affiliated mills, exporter and importers, and other affiliates (collectively, Buchanan); Certain Softwood Lumber Products from Canada (Fourth Remand): Comments on Remand Methodology on Log Seller Profit Issues, June 29, 2005, Dewey Ballantine LLP on behalf of the Coalition; and Comments and Calculations of the Gouvernment du Quebec concerning the *Decision of the Panel on Thrid Remand* (May 23, 2005)(Case No. C-122-839). July 5, 2005, Arent Fox on behalf of the GOQ.

On June 2, 2005, within the specified 10 days, the Government of Quebec advised the Department that it could not pursue the matter. It claimed that the relevant information is not available to, or in the possession of, the Government of Quebec or any other Canadian government. Therefore, no additional pricing data was presented and consistent with the Panel's Decision on Third Remand, the Department's determination not to include in its calculations volume data for which no corresponding price data was provided is unmodified.

II. Profit

In the Panel Decision on Third Remand, the Panel instructed the Department "to recalculate the profit earned by the log sellers in Quebec starting with a blended price combining both private logs and imported logs," and "to include in its calculations for Ontario, the profit earned by private log sellers." See Panel Decision on Third Remand at 26. The Panel also instructed the Department to recalculate the profit figures for Manitoba and Saskatchewan.[4]

For the reasons outlined below, these new profit calculations are unnecessary. With regard to Quebec, we strongly disagree with the Panel's conclusion that using the blended log price as a starting point for deriving the benchmark stumpage price requires that the amount of profit to be subtracted from that price also be calculated using the blended log price as the starting point. The derivation of the benchmark stumpage price and the derivation of the Quebec profit are separate undertakings. As we explain below, simply starting the Quebec profit calculation with the blended log price results in an excessive profit adjustment and, in turn, a grossly understated benefit amount for the Quebec stumpage program.

Notwithstanding these objections, however, consistent with the Panel's instructions, we

[4] June 23, 2005 Order of the Panel, at 1.

have recalculated the profit for Quebec starting with the blended log price and have recalculated the profit adjustments for Ontario, Manitoba, and Saskatchewan. As explained below, for reasons of ensuring consistency with our practice of using a benchmark that reflects market principles, we used as our profit adjustment in the benefit calculation only the portion of the (albeit high) estimated profit figure that is attributable to private wood lot owners log selling expenses.

The Panel is Incorrect in Concluding That the Department Did Not Follow Its Stated Methodology

Contrary to the Panel's statement, this is not an issue of "applying our stated methodology" but is, in fact, an issue for which deference is owed to the Department. While we agree with the Panel that our stated methodology for developing a benchmark based on market principles is to start with a benchmark log price and make deductions to "get back to the stump," nowhere in the Original Remand Determination did the Department state that it would measure profit based on the benchmark price. To the contrary, the Department stated that it would make a deduction for profit, where available. See Original Remand Determination at 17. The absence of profit data from the respondents makes the question of the amount of profit to be deducted an issue requiring the application of facts available. We draw the Panel's attention to the fact that in the calculation of profit for Alberta for the Original Remand Determination, the Department did not start with the Alberta "blended" benchmark log price, which was ultimately rejected by the Panel because of the inclusion of limited imports. Rather, the Department started with domestic Alberta log prices.[5] This demonstrates that the Department's "stated" methodology was to rely

[5] The Department used the TDA log price as the starting point for its Alberta benefit calculation and the TDA harvesting costs as public harvesting costs. Alberta Remand Calculation Memorandum, at 15 (P.R. Third Rem. 12).

solely on domestic log prices to measure profit.

It is Appropriate That There are Two Different Calculations - One for Benchmark, One for Profit

The derivation of the benchmark stumpage price and the profit calculation are distinct inquiries. The benchmark stumpage price, defined broadly as adequate remuneration, encompasses the market conditions in the country. This, by its nature, can encompass a broad range of factors and data sets. By contrast, profit, by its very definition, requires a reasonably detailed matching of selling prices and underlying costs. For example, taking the total sales revenue for one company and comparing it with the production costs from another company would not yield a reliable profit figure. For each of these inquiries, the Department examined the record evidence and determined which data are suitable for use in the Department's calculations. Consistent with the statute and its regulations, the Department properly included import prices in its derivations of benchmark stumpage prices because those prices reflect prevailing market conditions in those provinces. Also consistent with our practice, we separately estimated the amount of profit to be deducted along with certain costs incurred by tenure holders.

Throughout this case, our methodology has been to calculate the stumpage program benefit by first deriving the benchmark stumpage price and then comparing that price to the Crown stumpage price. In deriving this benchmark stumpage price, it is necessary to use as the starting point the weighted-average of the prices of both domestic and imported logs because those were the prices available to the sawmills who produced subject merchandise during the

period of investigation (POI).[6] The next step in the benchmark stumpage price derivation is to subtract from the weighted-average log price harvesting costs and a reasonable amount of log sellers' profit.

Normally, we would look to use a profit figure already on the record for use in our benchmark derivation. Because there are no Quebec profit figures on the record, consistent with our practice, we used information on the record to derive a reasonable estimate of the amount of profit that would be earned on log sales in Quebec absent the provincial stumpage program.[7] Under the methodology, we would then subtract this profit estimate from the weighted-average log price. In both the Second Remand Determination and the Third Remand Determination, to determine log seller profit in Quebec, we deducted the average private timber sale price and the private landowner harvesting and haul costs in Quebec from the weighted-average Syndicate log price for SPF, i.e., from the domestic log price. This calculation, which we based entirely on Quebec domestic data, resulted in a log seller profit figure that was negative.[8] Therefore, we reasonably did not make a profit deduction for Quebec.

Our Calculation of a Negative Profit for Quebec is Reasonable

In the Third Remand Determination, to determine the amount of "log seller profit," the Department subtracted from the domestic log price both the timber price, and harvesting and hauling costs for the same timber species paid by private landowners and independent harvesters

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[6] With respect to the Panel's invitation that the Department to remove import prices from its calculations, we remind the Panel that it previously affirmed our use of import prices in our derivation of the benchmark stumpage price.

[7] Just as we relied on facts available for the amount of profit to be deducted in our Alberta benefit calculations, we derived the amount of profit in Quebec using the data available on the record.

[8] As set forth in the Third Remand Determination, the full data set for the private SPF sales formed the basis of the methodology proposed by the GOC for Quebec.

in Quebec. The approach is reasonable because all of these prices and costs are linked. They all reflect not only the prices and costs incurred in Quebec to produce the domestic logs but they are the only costs that are available to Quebec landowners. As such, they reflect the conditions of the Quebec market and can reasonably be used together as facts available. As detailed below in the table, the Department started with the weighted average Syndicate log price for SPF [9] and deducted private harvesting costs and private stumpage. This resulted in a "negative" profit figure of C$2.54. Having properly determined the amount of Quebec's log seller profit, consistent with its methodology and the Panel's instruction, the Department applied the resulting zero to the weighted-average benchmark price.

	Quebec Syndicate Log Price	56.86
-	Quebec Private Harvesting Costs	39.66
-	Quebec Private Stumpage	19.74
=	Profit	(-2.54)

A negative log seller profit does not imply that log sellers lost money during the POI. As the Panel has noted, Quebec wood lot owners are both timber sellers and log sellers. Sawmills, likewise, purchase both standing timber and delivered logs from wood lot owners. The Department's determination that log seller profit in Quebec was negative during the POI simply means that wood lot owners who chose to sell logs made less money, on average, than wood lot owners who sold timber. It does not necessarily mean that all wood lot owners who sold logs

[9] Although the calculation memorandum for the Third Remand Determination contains the correct domestic log price for SPF (corrected to account for the conversion factor), average harvest and haul costs and resulting profit figure, the figures in the Third Remand Determination inadvertently were not corrected. See Quebec Calculation Memorandum (P.R. Third Rem. 16); Third Remand Determination, at 24. (P.R. Third Rem. 18).

lost money.

According to the Panel, the purpose behind the exercise was to determine whether Quebec landowners made any additional profit selling logs compared to what they made selling timber. June 7, 2000 Order of the Panel, at 26. The record indicates that wood fiber prices generally were declining during the POI.[10] Thus, a reasonable conclusion to be drawn from the record, apart from the conclusion reached applying the profit formula, is that holding onto the fiber longer and selling it as logs rather than timber during the POI was not beneficial to Quebec landowners.

Further, because both wood lot owners and sawmills can sell and buy wood fiber either as timber or as logs, over time, timber and log prices in a region should tend to equilibrate. Although one might expect that wood lot owners will, over time, earn a small profit to cover inventory carrying costs when they sell the fiber as logs rather than when they sell timber, this is not necessarily so over shorter time periods. In fact, the Department's use of a domestic log price benchmark – which the Panel has sustained as supported by substantial evidence – is based on the proposition that wood lot owners and sawmills may not be able to switch readily from dealing in logs to dealing in timber (or vice versa) to take advantage of short-term market fluctuations. Specifically, in explaining its revised benefit methodology, the Department stated that although "the wood lot owner can switch from selling timber to selling logs in response to market price fluctuations and the mill owner can also acquire its wood input in the form of

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[10] Specifically, with respect to Quebec, the Sawlog Bulletin prices published by individual mills generally fell during the POI. Quebec Remand Calculation Memorandum, Att. 2-A (P.R. Rem. 66). On the B.C. Coast, log prices for all major species declined from the first half of the POI to the second. GBC December 17, 2001 Questionnaire Response BC-S-124 (P.R. 602) (first half of POI); GBC June 28, 2001 Questionnaire Response BC-S-79 (P.R. 255) (second half of POI).

timber or logs, we also believe that these are significantly different types of transactions and that the substitution of one product with the other may not be as easily performed in the short run."[11] Thus, even if *over time* log sellers earn more profit than timber sellers, that does not mean that log seller profit is constant. Rather, when log prices are rising, it is reasonable to expect that log sellers will earn higher profits from the delay in transferring title to the wood fiber, while in periods of falling prices, they will earn less than they would have otherwise received.

In contrast to the record evidence supporting the Department's log seller profit calculation for Quebec, there is no record evidence that log sellers must always earn higher profits than timber sellers. The record data relied upon by the Department demonstrate that private SPF log prices in Quebec during the POI were higher than private SPF harvesting and hauling costs and private SPF stumpage prices in Quebec. That data – submitted by Quebec and included in Quebec's proposed log seller profit calculation – constitutes substantial evidence supporting the Department's Quebec profit calculation.

The Panel is Incorrect in Concluding That the Benchmark and Profit Calculations Must be Based on the Same Data Sources

Referring to the First Remand Determination at 14, in its Panel Decision on Third Remand, the Panel concluded that, given that the Department stated that it would determine a species-specific log price (based on import prices and domestic prices), from which it would deduct harvesting costs, forest planning costs, and, where available, profits, the Department is required to account for log seller profit. We agree with the Panel that our stated methodology for developing a benchmark based on market principles is to start with a benchmark log price and

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[11] Original Remand Determination, at 13 (P.R. Rem. 71).

make such deductions to "get back to the stump." For reasons previously articulated by the Department and restated below, we do not agree with the Panel's assessment that the Department's determination to use import prices in its derivation of the benchmark stumpage price requires that those same import prices must also be used as the starting point for estimating the Quebec profit adjustment. Simply using the blended log price as the starting point to calculate the profit adjustment for Quebec overstates the amount to be deducted and, in turn, results in an understated benefit amount.

Use of Imported Log Prices in Profit Calculation Requires Use of Maine Costs

In contrast to the linkage of the Quebec prices and costs that we used in our calculations, the record does not contain Maine harvesting cost data associated with the prices for the imports of Maine's logs. Accordingly, we are not able to calculate a profit for Maine logs imported into Quebec without the private harvesting and stumpage costs available in Maine to producers of logs. Therefore, we did not use these import prices in calculating a reasonable estimate of Quebec's log seller profit. Instead, the Department properly calculated Quebec's log seller profit relying upon the only log sales for which the full data existed on the record – private SPF sales in Quebec. The result of the Department's calculation is a proxy for log-seller profit that relates to Quebec's market conditions.

Use of Surrogate Maine Costs Supports Our Original Negative Profit Calculation

As stated above, it is illogical and incorrect to integrate prices for imported Maine logs into the Quebec profit because such calculation reflects neither Quebec nor Maine log seller profit. Integrating Maine logs into the Quebec profit calculation without the use of Maine costs would involve mixing price data for logs and cost data for different underlying timber to derive

an artificial "profit" figure that does not represent the profit earned either by Quebec log sellers or Maine log sellers. Although the Panel does not agree, our reliance upon import prices for benchmark purposes, but not for the log seller profit calculation, is entirely appropriate. The Panel's implication that import prices may be too high and therefore the Department should consider removing them from its calculations lacks record support. As the domestic industry has noted, it is not necessarily that the import prices are too high; it may be that the domestic log prices are suppressed by the provincial stumpage subsidies.[12] Indeed, the Department noted in both the Original Remand Determination and the Second Remand Determination that the Coalition raised some legitimate concerns about possible suppression of domestic log prices in Canada. Even the Panel has found that there appears to be substantial evidence on both sides of the issue of log suppression. See Panel Decision on First Remand at 11. What this highlights for purposes of this determination is that in calculating a reasonable amount of profit to be deducted it is important to use costs associated with that price, i.e., Maine costs with import prices and Quebec costs with domestic prices, because disparities between domestic and imported log prices may in part be due to domestic log price distortions.

Maine log prices reflect market conditions in Quebec because these import prices are available to sawmills in Quebec. These prices, however, also reflect the costs associated with harvesting conditions where the wood fiber originates. Therefore, it is only appropriate that in calculating the specific profit adjustment which is different from the benefit calculation, that we use the cost associated with that price.

We continue to determine that log seller profit for logs imported into Quebec should be

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[12] Petitioners' June 29, 2005 submission at 5-6.

based on the harvesting costs and stumpage prices for those logs, i.e., Maine harvesting costs and stumpage prices. Although the record does not contain Maine harvesting data, it does contain a reference by the GOQ's consultant Del Degan[13] and Associates that Maine harvesting costs are similar to those in Quebec. Del Degan's report, which compared Quebec and Maine harvesting conditions, reached the following conclusion about harvesting costs:

> This factor has been quantified as between Quebec's public and private forests, but is difficult to quantify in relation to the private forests of Maine because of a lack of information. To the extent that the private forest in both Quebec and Maine exhibit similar biophysical characteristics (which they do to a significant degree) the information previously provided to compare Quebec's public and private forests is instructive.

If we were to perform the same calculation we did using only Quebec data, we would use the $39.66 figure as a proxy for Maine harvesting costs. The record does contain Maine stumpage data. From that record data, we discern that timber prices in Maine are more than double the Quebec SPF private timber price used in the Quebec profit calculation.[14]

	Imported Log Price	72.55
-	Maine Harvesting Costs	39.66
-	Maine Private Stumpage	40.23
=	Profit	(-7.34)

Although the panel has indicated that our profit calculation should use the Quebec harvesting costs,[15] the fact that this calculation also shows a negative profit supports the

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[13] Del Degan, Masse et Associes Inc., "Quebec / Maine: Analysis of Comparative Factors Between the Public Forests of Quebec and the Private Forests of Maine" (December 2001) pages 11-12. Attachment to January 4, 2002, Letter from Arent Fox Kintner Plotkin & Kahn, PLLC.

[14] March 21, 2002 Calculation Memorandum at II-E6 (P.R. 866) (average Maine SPF timber price of C$40.23/cubic meter).

[15] See Third Remand Determination at 12.

reasonableness of the negative profit figure we calculated for Quebec. Moreover, the fact that logs imported into Quebec have a higher price than logs sold through the Syndicates does not, therefore, establish that log seller profit on imported logs was greater than log seller profit earned by Quebec's private wood lot owners. Indeed, because the Maine stumpage associated with the imported logs was so much higher than Quebec private stumpage, the profit earned on those imported logs could not have been greater than the profit earned on Quebec's private logs.

Use of Import Prices in the Profit Calculation Negates the Use of Import Prices in the Benchmark Calculation

The petitioners, in their comments on the Third Remand Determination [16] provided charts that detail how inclusion of the import prices in the profit calculation negates the Department's inclusion of the import prices in its benefit calculation. Those charts demonstrate that if the same log price is used in both the profit and benefit calculations, the benefit calculation is **exactly the same**. For the Panel's convenience, the original charts are set forth below:[17]

Profit:	Benchmark Log Price	61.92 (1)
	Private Log Harvesting Costs	36.65 (2)
	Private Stumpage Cost	19.74 (3)
	Profit Adjustment (1 – (2+3))	5.53 (4)
Benefit:	Benchmark Log Price	61.92 (5)
	Public Log Harvesting Costs	44.26 (6)

[16] Petitioners' January 18, 2005 Comments on Respondents' Submission Regarding Remand Methodology, at 21-22. (P. R. Third Remand 8); see also GOC February 22, 2005 Rule 73(2) Brief, at Appendix 2; See also, Appendix to Petitioners' June 29, 2005 Comments on Remand Methodology on Log Seller Profit Issues which demonstrates the circularity of the GOC's proposed methodology because no matter what log price is used each calculation results in the same subsidy benefit.

[17] Petitioners' January 18, 2005 Comments on Respondents' Submission Regarding Remand Methodology at Appendix 2. (P. R. Third Remand 8); see also GOC February 22, 2005 Rule 73(2) Brief, at Appendix 2.

Profit Adjustment	5.53	(7)
Imputed Benchmark (5 – (6+7))	12.13	(8)
Crown Stumpage and Tenure	13.74	(9)
Per-Unit Benefit (8 – 9)	(1.61)	(10)

The same result would occur if only the Syndicates' log prices are used to calculate profit and the subsidy benchmark – the GOC proposal that has been rejected by the Panel.

Profit:	Benchmark Log Price	56.86	(1)
	Private Log Harvesting Costs	36.65	(2)
	Private Stumpage Cost	19.74	(3)
	Profit Adjustment (1 – (2+3))	0.47	(4)
Benefit:	Benchmark Log Price	56.86	(5)
	Public Log Harvesting Costs	44.26	(6)
	Profit Adjustment	0.47	(7)
	Imputed Benchmark (5 – (6+7))	12.13	(8)
	Crown Stumpage and Tenure	13.74	(9)
	Per-Unit Benefit (8 – 9)	(1.61)	(10)

Adding import prices to the subsidy benchmark is completely offset when those same import prices are added to the profit calculation as well. If the log price in the profit calculation is selected to match the benchmark rather than selected as it should be – to match the log cost and timber price data used for the profit calculation – the resulting figure is not log seller profit. Rather, it is merely a means to negate the Panel's decision allowing the Department to include import data in its benchmark calculations.

The Panel has held that imported log prices reflect prevailing market conditions for logs in Quebec just as prices for domestic logs represent prevailing market conditions -- both data sets reflect prices that Quebec sawmills do pay for logs used to make softwood lumber.

For these reasons, the Department strongly disagrees that use of different log price starting points in the subsidy and log seller profit calculations – a log price that includes all known log transactions in Quebec for the benefit calculation, and a log price that matches the harvesting cost and timber price data for the profit calculation – is not reasonable.

Thus, as the Department has explained previously, a calculation whereby the Department would deduct Quebec stumpage prices from imported Maine log prices quite simply does not reflect log seller profit. Given that the record demonstrates that if the Department uses the blended domestic and import log price as its starting point the resulting figure cannot be representative of log seller profit in Quebec (or Maine), there is no reasonable explanation for requiring such a calculation.

The Department has not, however, adopted a methodology using Maine costs because it is mindful of the Panel's determination that "Commerce's methodology makes sense only if it calculates the profit which would have been earned on the sale of the imported logs had they been harvested in Canada, just as the harvesting costs represent what it would have cost to harvest the logs had they been grown in Canada."[18]

Consistent With the Law, The Department Requires A Market Benchmark to Measure Adequacy of Remuneration

The statute and the Department's regulations require that the Department determine the adequacy of remuneration in relation to prevailing market conditions in Canada.[19] This is true whether the Department applies the first, second or third tier of its regulatory hierarchy. Indeed,

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[18] Panel Decision on Third Remand, at 12.

[19] 19 USC 1677(5)(E)(iv); 19 CFR 351.511.

the third tier of the hierarchy pursuant to which the derived stumpage benefit methodology was developed provides that the Department "will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles." 19 CFR 351.511(a)(2)(iii).

As discussed above and in previous remand determinations on this case, the Department is attempting to measure the adequacy of remuneration by comparing the price of the government provided timber to a market-determined benchmark price. Such an exercise is consistent with the statute, the Department's regulations and Department practice. Were we to remove profit from the market-determined benchmark price, the resulting value would not be an appropriate benchmark because, by its very nature, it would not be a "market-determined" price. As we have stated previously, although the regulations do not specify how the Department is to conduct a market principles analysis, there can be no doubt that profit is a key element in such an analysis. Because the very motivation for producing a good and then selling it is the prospect of obtaining a profit, profit is a critical element of any meaningful price in a commercial setting. Accordingly, profit is an essential component of measuring whether adequate remuneration was received by the government. As the Panel has recognized, the Department's goal in its derivation of the benchmark price has been to get "back to the stump." For this derivation to be meaningful and comport with our statute and regulations, however, the result must be representative of the profit-inclusive price of stumpage for private standing timber in Canada. Private sellers in a market strive to earn profits, and consequently, the benchmark must include any relevant component of profit. Therefore, the benchmark stumpage price used for comparison with the stumpage price charged by the provinces for standing timber must include the profit that the private landowner

would build into the stumpage price, were he to sell his timber "ex-stump" as standing timber and not in the form of harvested logs. The profit component, which must remain in the benchmark price, is not the log seller's profit; it is the stumpage seller's profit.

The Calculated Profit is Attributable to Both Timber and Logs

Leaving aside the above arguments, the Panel has directed the Department to make a deduction for profit by first calculating profit starting with the blended import and domestic benchmark price. Therefore, for the purpose of this remand determination, we have done so. However, the entire amount of profit, which we derived by deducting the reported private harvest and haul and private stumpage figure[20] from the blended benchmark log price, cannot solely be attributable to the landowner profit on the sale of logs. A landowner has the option of selling standing timber or hiring a harvesting contractor and selling logs. If the landowner sells standing timber, there are land owning and forest management costs for which he would want to earn a profit. If the landowner sells logs, there are the additional costs for hiring harvesters for which he would also want to earn a profit. Thus, the landowner has two different options upon which he could seek to earn a profit.

As we understand the Panel, a landowner who chooses to sell logs as opposed to timber, does so in part to earn an additional amount of profit over and above what he could earn on the sale of timber. Therefore, we have measured, and deducted, only that incremental amount of profit associated with the sale of the log. Absent specific information on the record as to the amount of profit associated with each option, we have reasonably allocated the entire amount of "profit" derived from the methodology the Panel directed we use. Because the overall amount of

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[20] This is the only available measure of landowning and forest management costs incurred by sellers of timber.

profit we are able to calculate stems from both the landowner's land ownership and forest management costs[21] and the additional costs of hiring harvesters and haulers, we have apportioned the overall "profit" in proportion to the costs associated with the sale of timber and the sale of logs. We allocated, as a percentage of the log price, the costs associated with the timber sale phase and costs associated with the log sale phase.

Results

Our above objections notwithstanding, we have followed the Panel's direction and recalculated the stumpage program benefits for Quebec, Ontario, Manitoba, and Saskatchewan. We accounted for the log seller profit by calculating the incremental profit attributable to the landowner that decides to sell logs as opposed to selling standing timber. First, to estimate the overall amount of profit that a private landowner would obtain absent the provincial stumpage program, we subtracted the reported private landowner's costs and the reported private stumpage price from the blended domestic and import price. As explained above, we reasonably concluded that a portion of this overall profit amount is attributable to the "value-added" of the process of harvesting the timber and selling it to a mill (that is, paying to have the tree harvested and de-limbed and then hauled as a log to the purchasing mill). To calculate this portion, we multiplied the overall profit figure by the ratio of the reported private harvesting and haul costs and (as directed by the Panel) the blended log price. We note that consistent application of this methodology also would dictate apportioning the Alberta profit figure of $3.46 in a similar fashion to reflect the Panel's ruling that market conditions in Alberta are such that private landowners sell there own timber as logs.

Quebec

For Quebec, we have calculated C$2.72 as the amount to be deducted from the Quebec blended log price. This methodology takes into account the Panel's preference that the Department base its calculations on the scenario in which a forest owner hires independent harvesting and hauling contractors and sells the logs itself to a sawmill. This methodology also reflects the statutory and regulatory requirements that are also reflected in the Department's practice of ensuring that the derived *market-determined* benchmark stumpage price be inclusive of profit.

Quebec Blended Price	$63.74	a
Private Harvest and Haul	$39.66	b
Private Stumpage	$19.74	c
Overall Profit	$ 4.38	d = a-b-c
Profit on Log Sale	$ 2.72	e = (b/a)*d

In the investigation, we determined that the administratively-set Crown stumpage prices suppress the timber market and the private timber prices in Quebec are artificially low. Thus, the use of this price overstates the amount of profit that would be obtained under actual market conditions, not understates it. Because we determined that the private price in Quebec is effectively determined by the stumpage program, our use of that price in the profit calculation is a conservative means of calculating the amount of profit to be deducted from the blended log price.

Just as our Quebec profit calculation is flawed in that the private timber price we used to calculate profit is the same private timber price we found to be unuseable for benchmark purposes, the Alberta profit adjustment is overstated because it is based on the artificially low

Crown stumpage fee.[22]

Ontario

In the Third Panel Decision, the Panel identified the three possible scenarios under which logs sales occur in Canada:

> As the Panel sees the matter, there are several possibilities. First the forest owner could harvest its own logs and sell them to a sawmill. The forest owner could also sell to an independent harvester who sells to a mill. Lastly, the forest owner could hire an independent harvesting contractor and sell the logs itself to a sawmill.

The record is replete with information indicating that independent loggers in Ontario pay stumpage to private forest owners for their timber, incur the harvest and haul costs, and then sell the timber as logs to sawmills.[23] Therefore, we based our profit calculations for Ontario on the second of these scenarios. To derive the benchmark stumpage price, we simply subtracted the reported harvesting and hauling figures from the average log price. This methodology reasonably accounted for log seller profit because the harvest and haul figures are amounts paid to contractors, not costs incurred by the contractors themselves. By subtracting these "fee for service" figures, we accounted for both the harvesting and hauling costs that would be incurred by the independent logger and a reasonable amount of profit he could obtain those costs. Consistent our long-standing practice, the remainder of the calculation is a benchmark stumpage price that reasonably reflects adequate remuneration for standing timber, that is, the fully loaded

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[22] As detailed in prior submissions filed with the Panel, the C$3.46/cubic meter adjustment that the Panel required the Department to apply to Alberta is based on the TDA log price, the TDA harvesting costs, and *Crown stumpage*. Because the purpose of the benefit calculation, including the profit adjustment, is to determine whether Crown stumpage is provided for adequate remuneration, Crown stumpage should not be one of the elements in the calculation. Because the Crown stumpage price is artificially low, using the Crown stumpage price to calculate profit results in an overstatement of the profit amount that a log seller would obtain absent the Alberta.

[23] GBC June 28, 2001 Log Export Restraint Questionnaire Response at BC-LER-55

price of standing timber absent the government stumpage program.

The Panel however stated that it "understood that the prevailing market conditions were represented by the last of the three scenarios" and ruled that the Department must make a "deduction of the log seller's profit independent of the any profit earned by the harvester." While this third scenario identified by the Panel may occur in Ontario, that fact does not diminish the reasonableness of our calculation based upon the second of the three scenarios.

For Ontario, we again did not have a profit figure on the record. Therefore, we subtracted from the Ontario log price the $2.72 figure we calculated for Quebec. Although we strongly disagree with the use of the blended Quebec price as a starting point for deriving log seller profit, this figure is, at a minimum, based on private harvest, haul and land owning data. Unlike the Alberta profit figure, this $2.72 figure was not calculated using the Crown stumpage fees and Crown tenure costs.

III. Ontario Exclusions

In the Panel Decision on Third Remand, the Panel instructed the Department to grant exclusions from the countervailing duty order to sales by Ontario companies for which the "input source" was unsubsidized, and to exclude those sales from the denominator of its benefit/countervailing duty rate calculations. See Panel Decision on Third Remand at 26. According to the Panel, the OFIA and OLMA, and Tembec (the Ontario parties) argued in their briefs on the Third Remand Determination that the Department must either (1) apply one properly-calculated country-wide rate, weight-averaging the B.C. and Quebec results with the other four provinces or (2) exclude British Columbia and Ontario because they, like the Maritime Provinces, have received no stumpage benefit. See Panel Decision on Third Remand at 19.

Alternatively, the Ontario parties argued that exclusions should be granted with respect to sales by Ontario companies for which the "input source" was unsubsidized.

Although the Department did not have an opportunity administratively to address these issues in the Third Remand Determination because they were not part of the Decision of the Panel on Second Remand,[24] the Panel addressed the arguments in its Panel Decision on Third Remand. The Panel properly concluded that "if a province's producers have not received a benefit because the prices they paid for Crown stumpage were above market prices, then this province's 'zero' benefit is added to the other provinces' benefits" to calculate a country-wide rate to which all producers are subject. See Panel Decision on Third Remand at 18. Additionally, the Panel properly concluded that it could not exclude Ontario or British Columbia from the country-wide calculations, because softwood lumber production in Ontario and British Columbia does not fall within the same fact pattern as softwood lumber production in the Maritimes. The Panel went on, however, to determine that because the Department's calculation of Ontario's de minimis benefit reveals that Ontario-sourced lumber received no countervailable subsidy, the Department must grant exclusions from the order to companies whose Ontario "input source" was unsubsidized. The Panel Decision on Third Remand reveals that the Panel believes that such Ontario companies are somehow eligible for exclusion under the company-exclusion methodology affirmed by the Panel. The Department respectfully disagrees.

As an initial matter, we agree with the Panel that individual companies may be excluded

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[24] The Panel earlier in the proceeding admonished the Department that: "on remand, . . .[it] may only address issues specified in the remand order. . . ." See Decision of the Panel, In the Matter of Certain Softwood Lumber from Canada; Final Affirmative Countervailing Duty Determination, Secretariat File No. USA-CDA-2002-1904-03 NAFTA Binational Panel Review, June 7, 2004 at 31 (citation omitted) (Panel Decision on Original Remand).

from the CVD order if their company exclusion requests are granted. For this to take place, however, the companies must have been individually investigated and determined to have received zero or de minimis subsidies.[25] This has not occurred for the Ontario companies now seeking exclusion.[26] Rather, the Panel's decision would extend an aggregate determination – that Ontario Crown timber is unsubsidized – to granting exclusions from the CVD order to companies whose input sourcing is from Ontario. Effectively, the Panel is concluding that because Ontario's provincial stumpage subsidy, on an aggregate basis, is de minimis, all of the companies that source Ontario Crown timber for their production of lumber must also be de minimis. There is no record evidence that would support such a conclusion. Although some of the companies if individually investigated may receive a zero or de minimis rate, this is not necessarily the case for all of the companies. Rather, some companies that source Ontario Crown timber may also receive subsidies that are above de minimis. There is simply no basis upon which the Department can conclude that the individual subsidy rates for these companies are in fact de minimis without conducting company-specific investigations, including verifications of

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[25] One need look no further than the Department's remand determinations for examples of the Department's proper application of the original company-exclusion methodology. See Original Remand Determination at 45-46, and Second Remand Determination at 25-26. Specifically, with each successive remand determination, the Department has applied the re-calculated provincial subsidy rate to the remaining six companies originally considered for exclusion to determine whether any of those companies should be excluded. For each of those companies, the Department not only had the data that it needed but it also verified that data.

[26] One of the 28 companies considered by the Department was an Ontario-based company, Sault Forest Products, that claimed zero or de minimis subsidies on the basis that it obtained its timber from unsubsidized sources. This company was excluded from the order. See Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination; Certain Softwood Lumber Products From Canada, 67 FR 15545 (April 2, 2002) (Final Determination) and accompanying Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada (March 21, 2002) (Issues and Decision Memo). The Final Determination was subsequently amended. See Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products From Canada, 67 FR 36070 (May 22, 2002).

each of the companies, as it did for 28 of the 30 companies considered for exclusion in the original investigation.[27] Because the Department did not conduct any such company-specific investigations for the Ontario companies now seeking exclusion, there is no record evidence supporting the Panel's instruction that these companies are eligible for exclusion from the CVD order.

The Panel's order also fundamentally contravenes its previous decision affirming that the Department's determination to conduct this investigation on an aggregate basis was consistent with the statute. See Decision of the Panel at 65 - 70. In support of its determination to conduct the investigation on an aggregate basis, the Department informed the Panel that the law, by permitting the calculation of an aggregate subsidy rate to be applied on a country-wide basis, required some companies that received zero or de minimis subsidies to pay a higher rate, i.e., the country-wide rate, while others that received larger subsidies would pay less than the amount received when they paid the country-wide rate. See November 15, 2002 Response Brief of the Investigating Authority, at G-21-22 ("Thus, when country-wide aggregated rates are applied, the failure to exclude companies, even those alleging de minimis or zero subsidies, does not violate the law, rather, it is in accordance with the statute. A country-wide rate, calculated on an aggregate basis, by definition, may subject some producers and exporters to duties in excess of the subsidies that the producer or exporter actually receives, while others are subjected to duties

[27] Two of the 30 companies considered for company exclusion, did not respond to the questionnaire response and were not verified. See Memorandum to the File from the Team concerning Final Calculations for Companies Requesting Exclusion, dated March 21, 2002.

below the actual level of subsidies received.")[28]; and April 17, 2003 Hearing Transcript, Certain Softwood Lumber Products from Canada – Countervailing Duty Investigation, at 64 (Counsel for the Department, "The entire nature of the aggregate investigation results in the fact that companies who may not receive subsidies are, in fact, assessed the subsidy rate.").

Even so, consistent with the statute, the Panel upheld the Department's determination to limit the number of company-specific reviews it conducted during the course of this aggregate investigation. Specifically, in its August 13, 2003, decision, the Panel stated that the statute[29] and the regulatory grant of discretion[30] are sufficiently broad so as to permit the Department to reasonably conclude that consideration of the more than 350 applications for company exclusion would be impracticable. Thus, the Panel concluded that the Department's decision to limit the number of individual company-specific investigations for the purpose of exclusion from the CVD order was supported by substantial evidence and was otherwise in accordance with the law.

Ontario recently attempted to submit new factual information on the record of this remand which, according to the domestic industry's June 10, 2005, submission, related to

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[28] The Lumber III panel correctly understood that when country-wide aggregate rates are assessed, "a countervailing duty is imposed on the merchandise equal to the amount of the country's net subsidy, *not the amount of the subsidy in fact received by the company.*" Lumber III at 129 (emphasis added).

[29] Section 777A(e)(2)(b) of the Act vests the Department with discretion, as the "administering authority," to "determine a single country-wide subsidy rate" when "it is *not practicable* to determine individual countervailable subsidy rates . . . because of the large number of exporters or producers involved."

[30] The regulation provides that:

> Where the Secretary conducts a countervailing duty investigation on an aggregate basis under section 777A(e)(2)(B) . . . the Secretary will consider and investigate requests for exclusion *to the extent practicable.*" 19 C.F.R. 351.204(e)(4).

approximately 176 mills which operate pursuant to Crown timber licenses.[31] Had Ontario timely submitted such applications, the Department would have received in excess of 520 requests for company exclusion rather than the original 350 requests. As noted above, the Panel affirmed that the Department properly exercised its discretion in determining that it was administratively impracticable for it to consider 350 requests. There is no reason to conclude that the addition of 176 requests for exclusion would change the outcome of either the Department's exercise of its discretion or the Panel's decision affirming that decision.

As noted in our Exclusion Memorandum of February 20, 2002, the Department's goal in the investigation was to examine the maximum number of requests that did not impose an extraordinary administrative burden.[32] The Department determined that the criteria used by the Government of Canada (GOC) to define most of the exclusion groups were not criteria that could be investigated and evaluated without imposing an extraordinary burden on the Department's already scarce resources. See Exclusion Memorandum. Nevertheless, to achieve our goal of considering as many requests as practicable, we established a criterion that would be administratively feasible, i.e., input source, and examined companies that met that criterion. Specifically, the Department selected the original 30 companies for individual review on the basis of their acquisition of logs and/or lumber from unsubsidized sources - those sources that, *at the time of the original investigation*, were not *alleged* to have provided subsidies: the Maritime

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[31] Certain Softwood Lumber Products from Canada (Fourth Remand): Comments on Ontario Industry Associations' June 6 Submission, June 10, 2005, Dewey Ballantine LLP on behalf of the Coalition for Fair Lumber Imports Executive Committee (the Coalition) at 9.

[32] See Memorandum from Bernard T. Carreau, Deputy Assistant Secretary Group II to Faryar Shirzad, Assistant Secretary For Import Administration concerning Countervailing duty (CVD) investigation on softwood lumber products from Canada, February 20, 2002 (Exclusion Memorandum). (Pub. R. 750).

Provinces, private lands in Canada, and the United States. That criterion provided a simple, factual, and easily verifiable basis to consider exclusion. Although the Panel may ultimately affirm a remand determination which contains a de minimis provincial rate for Ontario that is factored into the aggregate rate, the Ontario stumpage program, unlike the sources that formed the basis of the Department's original exclusion criteria, was alleged to be subsidized and was investigated. Consequently, the Ontario companies do not satisfy the original eligibility criteria because they did not claim to have zero or de minimis subsidies on the basis of their acquisition of logs and/or lumber from unsubsidized sources.[33]

The Panel appears to be suggesting that now, some three years after the Department established the eligibility criterion for company exclusion and conducted company-specific investigations and verifications for those companies that satisfied that criterion, the Department should entertain new requests for exclusion based on different criteria arising as a consequence of the three remands. However, the results of these remands, specifically the nature of the aggregate stumpage subsidy in individual Canadian provinces, simply could not have been a consideration before the Department at the time it considered company exclusion requests and when it determined on what basis to limit company-specific investigations. Where the Department determines after concluding an aggregate investigation that certain subsidies are zero or de minimis, it does not revisit its original company exclusion decision to take this determination into account. Rather, as the Panel itself has recognized, these subsidies are factored into the aggregate subsidy rate that is applicable to all companies, except those

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[33] As previously noted, one of the 28 companies considered by the Department was an Ontario based company that claimed zero or de minimis subsidies on the basis that it obtained its timber from unsubsidized sources.

specifically determined to be excluded from the CVD order.

Another significant difference between those companies eligible for exclusion from the order and the Ontario companies is the failure of the Ontario companies to timely request exclusion on the basis that they sourced from unsubsidized Crown timber. Although the opportunity to apply for exclusion was available to any company, there were no requests for exclusion from Ontario companies now seeking exclusion by the October 29, 2001 deadline claiming that they sourced from unsubsidized Ontario Crown timber. Rather, with the exception of the Ontario company already considered for exclusion, the remainder of the claims made during the original investigation were not based on unsubsidized sources. They were made by primary mills, remanufacturers and wholesalers based on the nature of the transactions pursuant to which the logs or lumber were obtained. See Exclusion Memorandum, at 3 - 4. Deadlines are important because they ensure administrative finality. Applications for company-exclusion including the basis of the claimed exclusion were due by no later than October 29, 2001.

The Ontario parties have attempted to confuse the issue here by claiming this is an issue of "input source" similar to the Panel's determination related to used railroad ties, barnboard or other "old wood." As noted above, the Panel determined that it was within the Department's discretion to limit the number of company-specific requests considered. However, the Panel found that the Department failed to properly apply its own "input source" criterion by failing to grant applications submitted by all companies that relied on the source of their lumber as the basis for exclusion. See Decision of the Panel at 69. As a result, the Panel instructed the Department to consider additional companies that claimed to have salvaged used railroad ties, barnboard or other "old wood" from demolished buildings, riverbeds, etc., because these

applicants *could not have benefitted* from the alleged subsidy. Without agreeing that the additional companies met the Department's selection criteria, the Department reasoned that because used railroad ties, barnboard or other "old wood" from demolished buildings, riverbeds, etc., *could not have benefitted from the alleged subsidies during the period of investigation*, imports of such products are not within the scope of the order. The Department did not conduct any additional individual company-specific reviews nor did the Department exclude any additional companies. The "old wood" situation clearly differs from the situation presented by the Ontario companies. As we explained in the First Remand Determination, the companies that export merchandise that is considered "old wood" could not have benefitted from the alleged subsidy and do not export merchandise subject to the order. See First Remand Determination at 30. Significantly, as we explained above, absent company-specific investigations there is no basis in the record to conclude that any of the Ontario companies are entitled to a finding that they received de minimis subsidies. Because these companies could have benefitted from subsidies during the period of investigation and they do export merchandise subject to the order this is not akin to the used railroad tie scenario. Additionally, exclusion from the scope of the order is substantively different from a determination that a company may have received de minimis subsidies.

In sum, because the Department has not conducted individual company-specific investigations of the Ontario companies and has not verified any company-specific data, there is no record evidence supporting the Panel's decision that such companies are entitled to be excluded from the order simply because the aggregate rate for Ontario is de minimis. Thus, although the Panel may believe that its request would simply require applying the

Department's exclusion methodology to these Ontario companies, as discussed above, it cannot be implemented in this manner. Rather, it would require the Department to develop a new exclusion methodology applying different exclusion criteria, and to conduct company-specific investigations including verifications of all of the Ontario companies involved.

The Panel's current request contravenes the company exclusion methodology that it has already upheld. It is nothing more than a pretense for the Ontario parties to suggest that these companies are somehow similarly situated to those companies determined to be eligible for exclusion. As already noted, the companies that ultimately were determined to be eligible for exclusion sourced timber from sources for which no allegations of subsidization were received. By contrast, the Ontario Crown stumpage system was alleged to be subsidized and was investigated. Thus, the Ontario companies were not eligible for exclusion at the time the Department developed its company exclusion methodology. In any event, unlike the companies that were eligible to be considered for exclusion, the Ontario companies failed to request exclusion in a timely manner on the basis of sourcing from Crown timber.

Finally, the Panel must be aware that permitting the Ontario parties' to circumvent the Panel's prior decisions and, thus, require the Department to conduct company-specific reviews on every company that sourced timber from Ontario would be an extensive undertaking. At a minimum, we direct the Panel to 19 CFR 351.307(b) which *requires* that the Department conduct verification of factual information relied upon in a final countervailing duty investigation. We remind the Panel that the Department (1) determined to limit the number of companies investigated based, in part, upon this verification requirement and (2) despite the burden imposed, the Department did conduct a verification of the information submitted by each of the

companies investigated at the time of the original investigation.

That the OFIA and OLMA requests qualify as new, and untimely, requests for exclusion cannot be in doubt. On June 6, 2005, the OFIA and the OLMA notified the Department that they intended to submit *new factual information* for lumber companies in Ontario concerning applications for company exclusion, on a mill-by-mill basis.[34] On June 17, 2005, the Department notified the OFIA and OLMA that any new information would not be accepted. On June 17, 20, and 21, 2005, the OFIA and OLMA nonetheless, submitted new factual information which the Department subsequently removed from the record of the remand proceeding and returned to the proper parties. See June 22, 2005 letter from Barbara Tillman to Elliot Feldman Re: Softwood Lumber from Canada - Rejection of New Factual Information and June 23, 2005 letter from Barbara Tillman to Elliot Feldman Re: Softwood Lumber from Canada - Rejection of Submission Containing New Factual Information.[35]

On June 23, 2005, (some 30 days after the Panel's decision and a mere 14 days before the Department's remand determination was due to the Panel), the GOO requested that the Department promptly take two simultaneous actions: (1) act upon the exclusion requests already

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[34] The Ontario parties' assertion that, based on the Panel's June 7, 2004, decision with respect to Materiaux Blanchet, the Department would be required to conduct any exclusion analysis on a mill-specific basis, is incorrect. The Panel required the Department to conduct a mill-specific analysis for Materiaux Blanchet because the Department had erroneously done so in the underlying investigation. The remainder of the company-specific analyses performed by the Department were conducted on a company-specific basis consistent with established Department practice.

[35] Although the Ontario parties may complain that by removing their late submissions from the remand record the Department created the absence of record data, this quite simply is not the case. As noted above, any party believing that it was eligible for exclusion on the basis of zero or de minimis subsidies was provided sufficient opportunity at the beginning of the investigation to request exclusion and properly document its request. These new factual submissions are untimely.

on the record,[36] and (2) reopen the record to accept information provided by other companies that conduct lumber operations in Ontario. The GOO claims that the requests already on the record contain the information the Department needs to comply with the Panel's remand order.

Further complicating the issue, on June 27, 2005, the Department received comments from 67 companies claiming to be entitled to exclusion from the CVD order (assuming that an above de minimis subsidy rate exists on a country-wide basis after implementation of the Panel's instructions on remand) on the basis that (1) each submitted an exclusion request during the original investigation and (2) each source their timber from within the province of British Columbia which, like Ontario, constitutes an unsubsidized source.[37] On June 28, 2005, Buchanan claimed to have filed a timely exclusion request during the investigation supported by the certifications and documentation required by the regulations.[38]

We disagree with the parties' contentions that the information on the record is sufficient to enable the Department to determine whether these companies should be excluded from the CVD order. As noted above, in the underlying investigation, the Canadian parties submitted certain information related to requests for exclusion; however, the bases of those requests were not alleged unsubsidized sources. Thus, at a minimum, the Department would require additional

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[36] The GOO cites to an October 30, 2001, submission from Weil, Gotshal & Manges LLP on behalf of the Government of Canada, the Canadian Provinces and Territories, Canadian Industry Associations, and Individual Canadian softwood lumber producers. As previously noted, the exclusion requests received from Ontario companies were not requests made on the basis of the source of the input but rather were based upon the nature of certain transactions.

[37] See First B.C. company request and Second B.C. company request, June 27, 2005. These companies, however, do not even have the benefit of claiming that they are intended to be covered by the Panel Decision on Third Remand.

[38] See Comments for Fourth Remand Determination, June 28, 2005, White & Case LLP on behalf of the Buchanan affiliated mills, exporter and importers, and other affiliates (collectively, Buchanan). The Buchanan affiliated mills, exporters and importers, and other affiliates are identified as including 10 separate companies.

data from each company requesting a company exclusion and would then be required to conduct verifications of each company. For all of the reasons previously discussed, requiring the Department to develop an entirely new company exclusion methodology and conduct company-specific investigations of each of these companies within the context of this aggregate investigation is not warranted. Indeed, the statutory exception permitting the Department the discretion to conduct an aggregate investigation where there are large numbers of producers would be rendered meaningless by such a finding. See 19 U.S.C. § 1677f-1(e)(2).

IV. Manitoba and Saskatchewan

Although the Panel did not remand any issues specific to either Manitoba or Saskatchewan in its decision of May 23, 2005, on June 23, 2005, the Panel amended its Panel Decision on Third Remand to include a remand to the Department to revise the surrogate benchmarks for Manitoba and Saskatchewan to reflect the results of the recalculation of the benchmarks for the Provinces of Quebec and Ontario. See Order of the Panel at 1.

For purposes of this fourth remand determination, the Department has again constructed surrogate benchmarks for Manitoba and Saskatchewan using data from the other Boreal provinces. Our reliance upon the revised data from Alberta, Ontario, and Quebec, which include the profit values determined in this fourth remand determination, complies with the Order of the Panel.

V. Matching Numerators and Denominators

The Panel directed the Department to match the numerators to the denominators of its countervailing duty rate calculations. See Panel Decision on Third Remand at 26. In its discussion, the Panel referred to claims by the GOC that the Department (1) removed the sales of

excluded companies from the denominator and left the alleged benefit to those companies in the numerator and (2) used denominators that excluded sawmills' co-products and "residual" product shipments, even though uncontroverted record evidence confirms that the alleged benefit in the numerator applied to all production of recipient firms. See Panel Decision on Third Remand at 25 and 26. The second issue relates solely to non-stumpage programs.

For purposes of this fourth remand determination the Department has excluded from the numerator, the stumpage benefits received by the companies for which the Department has calculated a company-specific rate of zero or de minimis. See Calculation Memo for Fourth Remand, dated July 7, 2005.

In addition, pursuant to the Panel's remand, the Department has recalculated the benefit attributable to Forest Renewal BC using as its denominator sales inclusive of sawmills' co-products and "residual" product shipments. Because the other non-stumpage programs for which the GOC alleges the Department used an incorrect (lower) denominator were already determined to have no impact on the country-wide rate, we did not make any adjustments to those calculations. See Calculation Memo for Fourth Remand, dated July 7, 2005.

VI. Calculation of Benefit

To determine the benefit conferred by the provincial stumpage programs, we first calculated a weighted-average market-based price for logs. From the market-based price for logs, we subtracted harvest and haul costs, including an adjustment for the profit to derive a market-based stumpage price. We then compared the derived market stumpage price with fees charged for Crown stumpage. We concluded that where fees charged to acquire Crown stumpage were less than the derived market stumpage price, a benefit existed. Detailed calculations for

each province for which recalculations were done can be found in the appropriate section of the Calculation Memo.[39]

CONCLUSION

In accordance with the remand order, we have reconsidered certain calculation issues as described above. As a result, we have recalculated the ad valorem subsidy rate for certain softwood lumber products from Canada for the period April 1, 2000, through March 31, 2001. The revised rate is 1.21 percent ad valorem.

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

7-7-05
Date

[39] See Memorandum from the Team, through James Terpstra to the File, RE: Fourth NAFTA Panel Remand on the Countervailing Duty Order on Certain Softwood Lumber Products from Canada: Calculation of Country-wide rate and Individual Provincial Benefits (July 7, 2005).