

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

IN THE MATTER OF
CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA.
FINAL AFFIRMATIVE COUNTERVAILING DUTY DETERMINATION

FILE USA-CDA-2002-1904-03

DECISION OF THE PANEL ON THE FIFTH REMAND DETERMINATION

March 17, 2006

Mr. Daniel A. Pinkus, Chair

Mr. William E. Code

Mr. Germain Denis

Judge Milton Milkes

Professor Daniel G. Partan

Appearances:

M. Jean Anderson, Gregory Husician, John M. Ryan, Melanie A. Frank, Timothy J. Hruby, JahnaM. 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.

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 the Province of Alberta.

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

Michele Sherman Davenport, Dennis James, Jr., Cameron & Hornbostel LLP, on behalf of the Governments of the Province of Manitoba and the Province of 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 the Province 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 and its Constituent Associations: The Cariboo Lumber Manufacturers' Association, the Coast Forest & Lumber Association, the Interior Lumber Manufacturers' Association, and the Northern Forest Products Association.

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 and Bowater Incorporated.

Michael A. Hertzberg, Howrey Simon Arnold & White LLP, on behalf of the Maritime Lumber Bureau, the Governments of the Canadian Provinces of New Brunswick, Nova Scotia, Newfoundland and Labrador, and Prince Edward Island.

John E. Corette, III, William D. Kramer, Piper Rudnick LLP, on behalf of The Maritime Lumber Bureau, The Governments of the Canadian Provinces of New Brunswick, Nova Scotia, Newfoundland and Prince Edward Island, and J.D. Irving, Ltd.

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

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.

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

Mark R. Sandstrom, Law Office of Mark R. Sandstrom, on behalf of Goodfellow Inc.

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

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 Thomas on behalf of Shuqualak Lumber Company.

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

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

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

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

INTRODUCTION

On November 22, 2005 the Investigating Authority (The United States Department of Commerce) issued its Fifth Remand Determination in this matter, the Final Affirmative Countervailing Duty Determination in the Matter of Certain Softwood Lumber from Canada, 67 Fed Reg. 15545 (Apr. 2, 2002). The Department, as directed by this Panel in our Fourth Remand Determination (October 5, 2005), recalculated the subsidy rate and determined it to be 0.80 percent *ad valorem*. This rate is *de minimis*.

This Panel had ordered Commerce to use the figure of C\$4.34 in determining the profit earned by sellers of logs in the Province of Québec for the purpose of developing a log-based benchmark price. Under the Department's methodology, the benchmark price is compared with Crown stumpage to determine the amount, if any, by which Crown stumpage is subsidized. While the Department complied with our order, it continues to object to the Panel's decision. In particular, Commerce disagrees with the Panel's rejection of its "apportionment" theory under which only part of the C\$4.34 profit figure is attributable to the log seller, and the balance is allocated to the timber owner. The Investigating Authority also continues to object to the Panel's previous order that the profit be calculated with a blended import and private log price as the starting point.

Additionally, the Department raises an issue which was not previously discussed by the Panel. In calculating the log based benchmark price, the Department started with a blended import and private log price, from which it subtracted harvest and haul costs and private stumpage. The Department objects to the use of the figure it used to represent private stumpage on the ground, *inter alia*, that it was derived from transactions which took place prior to the period of investigation.

Petitioner supports Commerce in this regard. It argues that if private stumpage is to be used in constructing a log benchmark at all, it was improper to use stumpage from a prior time period. Additionally, Petitioner observes that the Department found, in the original determination that private timber market prices in Québec were distorted by virtue of the subsidization of Crown timber, and that accordingly, they could not be used to determine market prices for purposes of measuring the adequacy of remuneration. The Panel found that there was record evidence to support the finding of distortion. Therefore, Petitioner argues, it would be contrary to the doctrine of "law of the case" to permit the use of these same private timber prices to determine the adequacy of remuneration in the context of a log-based benchmark.

Lastly, Petitioner argues that the Department's failure to account for the effect of log export restrictions renders its Determination unsupported by substantial evidence or contrary to law.

The Department's Fifth Remand Determination has also been challenged by the British Columbia parties in that Commerce has failed to revoke the CVD order, and has, indeed, indicated that it does not intend to revoke the order *ab initio*. The Panel is asked either to order revocation of the order, or to explicitly state that it lacks jurisdiction to do so.

LOG SELLER PROFIT

The issues of the apportionment of profit, and the use of a blend of import and private prices in development of benchmarks were dealt with at length in previous decisions of this Panel, and were not the subject of remand orders. The record with respect to these issues has not been supplemented. Accordingly, the Panel will not further consider them.

As noted, both the Department and Petitioner object to the use, in calculating the log-based benchmark, of a stumpage price derived from a time period prior to the POI because pre-POI stumpage would be matched with Crown stumpage during the POI. But both the Department and Petitioner recognize that it was not unreasonable for Commerce to have used timber sale data prior to the time of the harvest, and subsequent log sale data if the exercise is to derive a log price benchmark. This issue has likewise been considered. The record in this regard has not changed, and the Panel will not further consider this issue at this time.

Petitioner's "law of the case" argument is as follows. In the Final Determination, the Department found that private market prices for timber were distorted by virtue of the Provincial administered stumpage programs. Therefore, they were not usable for purposes of Section 351.511(a)(2)(i) of its regulations which requires that the adequacy of remuneration be based upon "a market-determined price". Therefore, the Investigating Authority made its Determination based upon subsection (a)(2)(ii) of the regulation which applies to the situation where a market-determined price is not available. The Panel upheld the Investigating Authority on this point. Therefore it is the "law of the case" that a benchmark based upon private timber prices is precluded by the Panel's previous finding.

Petitioner raised the substance of this argument in connection with a motion filed by the Investigating Authority for clarification of the Panel's remand order of October 5, 2005. Although Petitioner's argument is somewhat recast here as the "law of the case",

the Panel does agree that because private timber prices may not be considered to be “market-determined”, they cannot be used to determine the actual stumpage paid by Québec landowners for purposes of calculating a log-based benchmark. This issue was, in any event, not one on which the Panel remanded, as was, therefore, not before the Investigating Authority.

LOG EXPORT RESTRAINTS

Petitioner’s contention that the Department must account for the effect of log export restraints imposed by the Provincial government proceeds from the proposition that the Québec benchmark is a timber benchmark and not a log-based figure. Commerce had ruled in the Final Determination that the effect of such restraints was not a significant factor to investigate in its original cross-border methodology, but Petitioner argues that once the cross-border methodology was rejected, the depressing effects of export restraints becomes relevant.

The Coalition notes that in its First Remand Determination the Department indicated that:

We do not have sufficient evidence in the record of the potential effect of the log export restrictions, which we did not investigate as a potential subsidy. Therefore we do not have the means to assess the potential effect, if any, of the log export ban on the market prices of logs.¹

The Panel saw no error in Commerce’s view of the record.

Petitioner now argues that there is, indeed, ample evidence to support an examination of the effect of restraints on timber prices.

The Department observes that it previously found the record evidence insufficient to assess the impact of export restraints, and since the issue was not before the Department in its Fifth Remand Determination, the issue should not be addressed at this time. For these reasons, the Panel does not agree that the Department should now reexamine the record on this issue.

¹ At p.13.

REVOCAION

The Government of British Columbia and the British Columbia Lumber Trade Council have asked the Panel to order the revocation of the CVD order *ab initio*. The basis for this request is that under 19 U.S.C. §1671 there can be no assessment of duties if the Department finds that there is no subsidy, which is, effectively, what the Fifth Remand Determination has done. The Department has publicly taken the position that it is not required by statute to give effect to the Determination other than prospectively.²

It seems clear from its public statements and from its brief before this Panel that at present the Department does not intend to revoke the order *ab initio*, although it still will have the ability to do so when the Panel review has been completed.

The B.C. parties argue that while at this stage they may not be entitled such relief, they do not want to be put in the position in later litigation before the United States Court of International Trade of having waived their right to relief by not timely requesting the Panel to act. In this context, the B.C. parties ask the Panel to determine whether it has jurisdiction to order the requested relief, and if the Panel determines that it does not, then to so state explicitly.

The Department, for its part, contends that the question of revocation was not addressed in the Remand Determination, and that, in any event, the issue is not revocation *per se*, but the effective date thereof. It offers a lengthy and interesting argument as to why, in any event, revocation would be prospective only. At the same time, it does not offer much of a view as to whether or not the Panel has such authority.

Unlike the Department, the Petitioner urges that the Panel has no jurisdiction to order revocation, and that, in any event, the matter is not ripe for consideration.

It is the Panel's view that, as the question of revocation was not before the Department in the Remand Determination, we will not consider it.³ Importantly, whatever views the Panel may have of the Investigating Authority's position, the Panel is constrained to assume that the Department will correctly follow the law. In this connection, we also note the comment of the Department's General Counsel in the press conference referred to in footnote No.2 that:

² Attached to its brief is a transcript of a news conference of John Sullivan, General Counsel, U.S. Department of Commerce in which he states "On this issue, our position is clear, any relief provided by virtue of a NAFTA decision is perspective (prospective? sic.) only."

³ Likewise, the Panel does not address the legal basis for the countervailing duty order in the light of the Extraordinary Challenge Committee ruling (ECC-2004-1904-01) affirming the International Trade Commission's "no injury" determination.

And under NAFTA procedures, the case is not final. The parties will have time to comment...and the panel will review the remand determination...At that point we will have to assess what the Panel's decision is and proceed accordingly.

The Investigating Authority's Remand Determination is upheld.

Daniel A. Pinkus
Daniel A. Pinkus, Chair

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