

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 SECOND REMAND**

December 1, 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.

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.

**Panel Decision on Second Remand, Dec. 1, 2004**

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.

Jamie M. Wilks, McMillan Binch on behalf of the Canadian Lumber Remanufacturers' Alliance.

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.

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

**Panel Decision on Second Remand, Dec. 1, 2004**

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.

## 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. The Department calculated the subsidy to be 19.34 % *ad valorem*.

On August 13, 2003 the Panel issued its first decision which ruled 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 had not properly calculated 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 (“First Remand Determination”). In that document the Investigating Authority recalculated a revised countervailing duty rate of 13.23 percent *ad valorem*. In so doing, the Department, pursuant to the August 13, 2003 Decision of the Panel, revised its benefit methodology.

Both the Petitioner and the Canadian parties raised numerous objections to the Department’s First Remand Determination. After briefing by the parties, a second oral hearing was held on April 1, 2004 in Washington, D.C. On June 7, 2004 this Panel rendered a second decision, remanding the matter to the Investigating Authority to address certain issues and redetermine the benefit, if any. This the Department did in its Second Remand Determination of July 30, 2004 finding a revised rate of 7.82%, *ad valorem*. The Canadian parties have raised a number of issues in opposition to the Second Remand Determination, and so the matter is, once again, before this Panel for review. While the Petitioner continues to contest the overall methodology used by the Department in both of the Remand Determinations, it has also filed briefs in support of the Department’s decision.

While familiarity with the history of this matter and with the two prior decisions of this panel will generally be assumed throughout this decision, a brief summary of the posture of this case will be helpful to the reader. In the Final Determination, the Investigating Authority found that stumpage systems administered by the Canadian

**Panel Decision on Second Remand, Dec. 1, 2004**

provincial governments conferred a benefit upon producers of softwood lumber within the meaning of 19 U.S.C. 771(5)(E).<sup>1</sup> Paragraph (iv) of subsection (E) further provides that a benefit is conferred when the government provides a good (standing timber, in this case) for less than adequate remuneration. The adequacy of remuneration:

...shall be determined in relation to prevailing market conditions for the good or service being provided...in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of...sale.

19 U.S.C. 771(5)(iv).

In order to determine whether the prices the Provinces charged for stumpage conferred a benefit, the Investigating Authority created benchmark prices for comparison purposes. Commerce sought to apply its regulations which call for, in the first instance, “market prices for the good or service from actual transactions within the country under investigation (including imports).”<sup>2</sup> However, it rejected the use of prices for Canadian timber. Although the Panel expressed some scepticism regarding the justification for Commerce’s refusal to use transactions in Canada, under the deferential standard of review applicable to panel reviews, we upheld Commerce’s decision.

Commerce, in the Final Review, then went to the second tier in the hierarchy set forth in the regulation, which provides, in pertinent part:

... if actual market-determined prices are unavailable in the country under investigation, world market prices that would be available to purchasers in the country under investigation. 19 U.S.C. 351.511(a)(2)(ii).

In applying this standard, the Department created benchmark prices based upon prices for U.S. stumpage, adjusted for various factors intended to reflect market conditions in Canada. This Panel ruled that the use of benchmark prices so derived was not supported by substantial evidence and was therefore contrary to law. Accordingly, the matter was remanded to the Department for further consideration.

---

<sup>1</sup> The Department also found other necessary elements for the imposition of countervailing duties under section 771(5), namely that the government provided a financial contribution, and that the benefit was specific. This Panel’s previous opinions did not disturb these findings, and accordingly only the benefit part of the formula is at issue at this time.

<sup>2</sup> 19 U.S.C. 351.511(a)(2).

**Panel Decision on Second Remand, Dec. 1, 2004**

In its First Remand Determination, the Investigating Authority created a new methodology for establishing benchmark prices, this time under the third tier of the cited regulation, which provides:

(iii) if there is no world market price available to purchasers in the country in question, an assessment of whether the government price is consistent with market principles.

This methodology was based upon the premise that a benchmark could be developed if there were sales of logs which were traded without the intervention of government programs. The Department stated its rationale as follows:

... in considering what prices to use as benchmarks to measure the adequacy of remuneration for standing timber, we started with the fact that log markets and standing timber markets are both 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.<sup>3</sup> (*footnote omitted*)

Both the Petitioner and the Canadian parties raised objections to the use of benchmarks derived from sales of logs from private forests. However, the Panel found that the approach taken by Commerce was not unreasonable. It did find, however, that the calculations were not wholly supported by substantial evidence. Therefore, the matter was, once again, remanded to the Department to address these issues. In addition, the Investigating Authority requested that the Panel remand for further consideration of several items.

**II. THE REMAND ORDERS AND PANEL DIRECTIONS**

The Department, in its briefs before the Panel requested that the Panel remand the case to consider:

- (1) The issue of adjustment for harvesting costs for Manitoba and Saskatchewan.
- (2) The calculation of the numerator in British Columbia.

---

<sup>3</sup> Remand Determination, p.12.

**Panel Decision on Second Remand, Dec. 1, 2004**

(3) The Department's omission of Douglas-fir from the Vancouver Log Market prices used as domestic log prices in the British Columbia Coast species matching.

(4) The exclusion of 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) The exclusion from the benchmark calculation for British Columbia, of the Revelstoke Community Forest Corp Log Sale Prices.

(6) The making of adjustments, both downward and upward with respect to certain harvesting costs in Québec.

(7) The re-evaluation of whether Québec mills use pulpwood imports to produce softwood lumber.

(8) The correction of the conversion factor used to value non-standard cords.

(9) The exclusion, in the calculation of the Ontario benchmark, of price listings for "pine" logs that were actually White Pine logs.

It appears to the Panel that with respect to the first six items and item nine, Commerce has made the adjustments, and no objections thereto have been taken by the parties. Item eight appears to the Panel to be moot, as no conversion factor is necessary in view of our Second Remand Decision which prescribed the use of Sawlog Journal quotations.

Item seven, the question of pulpwood imports into Québec is the subject of briefing before this Panel, and this question will be discussed in the Québec section of this opinion.

This Panel, in turn, directed the Administering Authority to consider eleven items:

- (1) 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) 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) 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.

**Panel Decision on Second Remand, Dec. 1, 2004**

- (4) 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) To recalculate the benchmark log price for Manitoba without use of the import data.
- (6) To recalculate the benchmark log price for Saskatchewan without use of the import data.
- (7) To recalculate the benchmark log price for Alberta without use of the import data.
- (8) 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) 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) 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) 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.

Notwithstanding that the Department addressed each of these questions in its Second remand Determination, there is considerable controversy regarding the results of its consideration. We will not discuss them in the order in which they were listed, but rather with respect to each of the provincial calculations.

### **III. STANDARD OF REVIEW**

In each of the previous opinions of this Panel, we have, by way of introduction, discussed the standard of review required to be applied by a binational panel created pursuant to Chapter 19 of the North American Free Trade agreement. While the Panel is mindful of the standard of review to be applied, it sees no reason to once again recite the case law interpreting this standard. Reference is made, in this connection, to the previous decisions of this Panel. Suffice it to say at this time, that the Panel is required by Section 516A(b)(1)(B) of the Tariff Act of 1930, as amended, to “hold unlawful any determination, finding, or conclusion found...to be unsupported by substantial evidence on the record, or otherwise not in accordance with law...”

### **IV. DISCUSSION**

The Second Remand Determination of the Investigating Authority first discussed the issue arising from the Panel’s order concerning the necessity of examining whether the profit earned by owners of private forests should be accounted for in the development of log-based benchmarks. The Determination then separately discussed the benchmark calculations for each province. As the issues concerning the profit calculations are not the same for each province, the Panel will proceed to an examination of the revised benchmarks on a province-specific basis.

#### **A. ALBERTA**

##### **(i) BENCHMARK PRICES**

The Panel directed the Department to recalculate the benchmark prices for Alberta without the use of import data as there was no substantial evidence that the two small import shipments reflected market conditions in Alberta. This the Department did. No objection has been raised against the implementation of this order by any party.

##### **(ii) PROFIT**

The Panel also ordered the reconsideration of the profit allowance for Alberta.

In the first Remand Determination, the Investigating Authority calculated the benchmark by deducting from the weighted average private log price an amount of C\$3.46. Its explanation for this deduction was as follows:

From the KPMG weighted average price of C\$50.94, we deducted C\$3.46 to account for imputed profit, as reported in the November 19, 2003 Government of Alberta Supplemental Questionnaire Response at Exhibit AB-S-73.<sup>4</sup>

---

<sup>4</sup> Alberta Calculations memo, p. 23.

#### Panel Decision on Second Remand, Dec. 1, 2004

In the brief filed by Commerce before this Panel at the time of the first remand, the Department requested that the Panel remand for further consideration of this profit adjustment. The Panel understood that the Department intended to eliminate this adjustment.

The question of profit arises in this context. The Department's methodology on remand was based upon an analysis of market conditions in Canada. In describing the basis for using private log prices as reflective of market principles, the Department stated:

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.<sup>5</sup>

In the Second Remand Determination the Department also identified the three parties in the log transaction as the landowner, the log seller, and the sawmill. However, in the Panel's remand determination, we said:

The Panel is not persuaded that the Department made a reasonable effort to estimate log seller's 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.<sup>6</sup>

The Panel does not question the idea that the profits of the independent harvester are included in the amount it charges for harvesting. However, in its Second Remand Determination Commerce<sup>7</sup> states:

The profit we need to adjust for is that of an independent harvester *who paid stumpage for standing timber, incurred harvesting costs, and made a profit on the log sales.*<sup>8</sup> (emphasis added)

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

---

<sup>5</sup> First Remand Determination, pp. 11-12, January 12, 2004.

<sup>6</sup> Remand opinion, p. 27.

<sup>7</sup> Second Remand Determination, p. 4.

<sup>8</sup> Second Remand Determination, p. 4, July 30, 2004.

**Panel Decision on Second Remand, Dec. 1, 2004**

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.

If the theory behind the log-derived benchmark is to get “back to the stump” in order to compare it to the tenure-holder’s stumpage, as the Panel understands, it is necessary to account for any elements beyond the private forest owners’ stumpage in the context of prevailing market conditions in Canada.

In our second Remand Decision the Panel understood that the prevailing market conditions were represented by the last of the three scenarios posited above.<sup>9</sup> Indeed, at page 4 of the Second Remand Determination, Commerce stated: “Alberta and Ontario reported harvest costs from integrated lumber producers who pay independent contractors to harvest for them. These independent contractors harvest timber for a fee.” We don’t find anything in the Department’s determination to suggest that the harvesting of private timber is done in a different manner, and accordingly, it seems that this arrangement represents prevailing market conditions in Canada.

The Panel understood that this is exactly how the Investigating Authority viewed the prevailing market conditions in Alberta, and that, accordingly, that is the reason the Department deducted the wood lot owner’s profit in the first instance, in order to arrive at a benchmark price for private stumpage. And that is why the Panel directed the Department to apply a better rate of profit for the benchmark only if it could, but not to eliminate the profit component entirely.

In fact, what the Department did in the Second Remand Determination was to conflate the forest owner with the harvester, i.e. rely upon the second of the above scenarios, and conclude that the harvester’s profit was already accounted for in the figure

---

<sup>9</sup> At oral argument counsel for the Québec Lumber Manufacturer’s Association stated, in response to the Department’s assertion that the harvester is the log seller,

To the contrary. The prevailing market condition, not in all circumstances, but in most, is one where the log seller is either the land owner or the tenure holder, and the harvester is an independent, unrelated contractor, a logging contractor, and as Commerce described them at some point in its brief, the independent harvester. Emphasis on the word independent.

In Québec, for example, the record evidence indicates that most private logs are sold by private wood lot owners through marketing syndicates, and most of these wood lot owners contract out the harvesting function. As evidence, I cite a report put on the record on October 31<sup>st</sup>, 2003 by the Coalition, by Messrs. Cox and Lutz, remand public record document 24 at page 84. It identifies the fact that in the private markets in Québec, the tendency is to contract out logging services. Transcript, pp. 210, 211.

**Panel Decision on Second Remand, Dec. 1, 2004**

for harvesting costs. However, Commerce indicated that since it was constrained by the Panel's decision, not to eliminate the profit entirely, it reduced the C\$ 3.46 by one half, to C\$1.73. It reasoned that:

...in light of the Panel's decision and despite our disagreement with the Panel's remand, we have used Alberta's calculation as the basis for a profit calculation. However Alberta has acknowledged that the entire C\$3.46 is not profit for the harvester, but rather the C\$3.46 includes "some amount of profit." In light of Alberta's statement, and to mitigate the impact of the flaw in Alberta's methodology, we concluded that there was a better option than simply using C\$3.46 as the profit amount.

As noted above, our market principle analysis is modeled on two separate transactions by independent economic actors: the independent harvester (log seller) and owner of the trees (standing timber seller). The C\$3.46 figure is available to cover the profit of both of those independent economic actors. Lacking information on the separate transactions, it is reasonable to divide the profit evenly between the two. This approach is consistent with past Department practice where we lacked record information to determine whether and to what extent certain costs or benefits accrued to various parties in the transaction. See, e.g., LTV Steel Co. v. United States, 985 F. Supp. 95, 117 (CIT 1997).<sup>10</sup>

The Petitioner agrees with the Department that there should be no deduction for profit. It points out that the harvesting costs are largely attributable to tenure holding sawmills, and the stumpage price is the Crown stumpage price. Thus, the gap between log and stumpage prices (C\$3.46) would be made up of any logger profit and the subsidy benefit, if any. Thus, there is no substantial evidence, even if you consider the harvester to be an independent contractor, as to how much, if any, of this gap could be attributed to the private log seller.

Alberta, for its part, argues that there is no record evidence of any amount of profit included in the harvesting and hauling data, as those costs are derived from figures provided by integrated tenure holders, and there is no information as to, or to what extent, they involve independent contractors, or just the mill owners' costs. More importantly:

...even if evidence on the record showed that the harvest and haul cost data include profits for the services being provided (which it does not), this, as the Panel has recognized, would not in any way eliminate the need for a profit adjustment on the log sale itself. Log sellers are not charities; they want to sell their products at a profit. The fact that the harvester and hauling contractor will receive profits for whatever services they provide does not change the seller's desire for a profit on the product it is selling.<sup>11</sup>

---

<sup>10</sup> Remand Determination, pp. 5,6.

<sup>11</sup> Canadian Parties' Rule 73(2) brief, p. B-2.

## **Panel Decision on Second Remand, Dec. 1, 2004**

The Panel cannot understand how the Department could have mistaken our intent, as it does not appear that it made a serious effort to ascertain the profit earned by sellers of private logs in Alberta. Commerce says that since the harvester's profit is included in the fee for service, it would be double-counting by further deducting for profit. Canada is, however, arguing for deduction of the log seller's profit independent of any profit earned by the harvester. It is conceivable that our opinion left room for confusion on the part of the Department (although we are of the view that it was clear enough), but that is exactly what the Panel had in mind.

In any event, what Commerce did do with respect to our directions, is not supported by substantial evidence. The Department reasoned that since it was not clear how much of the profit might be attributable to the harvester and how much might be allocated to the owner of the trees, it would be appropriate to divide the profit in half. Whether this action is, as claimed, consistent with past Department practice, we do not read the case cited, *LTV*, as supporting this action. In that case the Court held that there was substantial evidence to support the Department's action since it was based upon a reasonable inference. Specifically, Commerce had reasoned that in the absence of any contrary information, two parties in a negotiation would have equal bargaining power. Accordingly, it was fair to assume that such negotiations would give a result midway between the starting points of the two parties. There is not a credible analogy to the situation at hand.

There is no credible evidence of which the Panel is aware, that any of the C\$3.46 is attributable to independent harvester profit, and in sum, the Department has not come up with a better estimate of log-seller profit in Alberta than the C\$3.46 figure used in the First Remand Determination. The Investigating Authority is therefore directed to reinstate the C\$3.46 as a deduction for profit in Alberta.

### **B. QUÉBEC**

In addition to the issue of profit, the Panel remanded three issues specific to this province. First, the Investigating Authority requested two remands: one, to adjust for harvesting costs and another, to consider the inclusion of pulpwood imports in calculating the benchmarks. In addition, the Panel directed that the Sawlog Journal prices be removed from the benchmark calculation and to weight-average the import and Syndicate prices. Québec also raised the question of quality as requiring an adjustment of prices for imported logs that can produce more lumber than domestic logs.

#### **(i) HARVESTING COSTS**

In the Second Remand Determination calculations, the Department adjusted the harvesting costs both upward and downward to reflect silviculture costs of tenureholders. No objection has been raised by any party to those adjustments.

**(ii) PULPWOOD**

The second remand issue arises from the contention of the Canadian parties that certain imports classified as pulpwood are, in fact, used to make softwood lumber. In the first Remand Determination benchmark calculation the Department did not include these imports in the overall quantity of sawlogs imported into Québec. As the logs identified as pulpwood are of a lower value, the effect is to raise the overall price of imported logs. As indicated in the Second Remand Determination, the remand request arose from the Canadian argument that in considering exclusion requests for Québec mills, it became apparent that the volume of logs used by those mills exceeded the volume of sawlog imports relied upon by the Department in the first Remand. Thus, argues Canada, there must have been some other logs (namely pulpwood), that were actually used in making softwood lumber.

The Department, in the Determination at issue rejects this contention. First, it argues, the import statistics come from entries for which the importers have represented the intended use of the imports. In other words, it is the importer who has indicated whether the logs are intended for making lumber or pulp, and Commerce contends that there is no evidence to support the idea that the importers misrepresented this intended use.

Secondly, the Department asserts, the information collected during the consideration of exclusion requests relates to the volume of logs consumed by the mills, rather than the amount imported during the period of investigation (“POI”). Thus, there need be no correlation between the import statistics and exclusion findings.

The Petitioner supports the Department. It contends that much of the apparent discrepancy in the volume of imports vs. the volume used to make lumber can be explained away since the logs could have been sourced from other Canadian provinces, could have been either sourced from a time outside of the POI, or used during such time. In addition, the Coalition argues that the exclusion applications cannot be relied upon for a variety of reasons. Petitioner also states that there is no reason to question the accuracy of the import statistics.

Canada’s argument based upon the discrepancy between the figures derived from the company exclusion process and the import statistics cites the figure of over 2.4 million cubic meters of imported logs shown (and verified) to have been used to make lumber, while only 1.47 million cubic meters of sawlogs were shown to have been imported. Thus there are over 900,000 cubic meters of sawmill input that is not accounted for. The only possible reason for this is that much of the 1.47 million cubic meters of imported wood which was denominated in the import statistics as other than “wood in the rough,” i.e. pulpwood, was, in fact, used to make lumber. Further, Canada claims that the record contains evidence that in eastern Canada, smaller logs are frequently used to make lumber.

In its case brief before this Panel, The Department does not address the discrepancy discussed above, but relies principally upon the assertion that the import

## **Panel Decision on Second Remand, Dec. 1, 2004**

statistics represent credible evidence of the intended use of the imports. As noted by the Petitioner, the import statistical category in issue is “logs for pulping,” a specific end use.

The Panel also notes that if it is true that smaller logs which might have been entered as pulpwood are, in fact, used in Québec for making lumber, we have not seen any evidence that Commerce could have determined with any degree of certainty the volume of logs so used.

Therefore, the Panel is of the view that the approach taken by the Investigating Authority is not unreasonable. While Canada points to evidence which suggests that there is an anomaly in the information developed in the exclusion process, it has not explained away the inference to be drawn from the import statistics. The Panel cannot understand why sawmills importing logs to be used to make lumber would have identified them as “logs for pulping”. Therefore, we find that there is credible evidence to support the Department’s conclusion.

### **(iii) SAWLOG JOURNAL DATA & WEIGHT-AVERAGING**

The Panel directed the Department, in our Remand Decision, to recalculate the benchmark prices in Québec without the use of the Sawlog Journal data, and to weight-average the import and Syndicate prices. The Department did both.

However, the Government of Québec (“GOQ”) vigorously asserts that the methodology used by Commerce in its weight-average calculations is flawed, and grossly overstates the (higher) value of the imports vs. the (lower) value of private forest logs.

The intention of the Panel was to have the Department weight-average the imports giving rise to one figure for imports, and to weight-average the private forest log prices to give a separate value for domestic logs, the two figures to be weight averaged together. Mechanically, this appears to have been done.<sup>12</sup> The GOQ, however, contends that the weight assigned to the domestic figure is faulty in that it should include all of the volume of logs that were used to make lumber, from both private *and Crown* forests. As a consequence, since the vast majority of logs used to make lumber are sourced from Crown lands, the benchmark prices should be weighted to reflect those logs.

Both the Investigating Authority and the Coalition contend that the Department followed the Panel’s instructions in all respects, and that its methodology is consistent with the Department’s regulations and long-standing practice.

In the Panel’s view, the establishment of a benchmark price for domestic (private plus imports) logs has nothing to do with the total volume of logs (including Crown logs) that were made into lumber, or even harvested, during the POI. The purpose of the benchmark is to be able to compare private stumpage with Crown stumpage in order to

---

<sup>12</sup> Remand calculation for Québec, July 30, 2004.

#### **Panel Decision on Second Remand, Dec. 1, 2004**

determine the benefit attributable to Crown tenure-holders. Accordingly, we do not agree with the GOQ on this point.

There is one other respect in which the Investigating Authority's calculation has been called into question. In determining the weight-averaged price of the privately sourced logs in Québec, the Department used reports from Syndicates of private woodlot owners. In some cases, the information reported by the Syndicates was not used by the Department with the explanation that "(d)ata submitted by the Syndicates [was] excluded from the Weighted-Average Price because there was no price reported with the volume, [the] sale was to a non-sawmill or [the] sale was not in Québec."<sup>13</sup> Commerce, in its Second Remand Determination does not discuss this point.

Canada contends that even if the weight-averaging excludes the volume of Crown harvest (with which the Panel agrees), it was improper to exclude what it claims to be over one million cubic meters of logs which fall into the above categories.

The Panel recognized that both the import statistics and the Syndicate reports were incomplete and did not in every respect reflect prevailing market conditions in Canada, but nonetheless could be used to approximate them. While it seems entirely reasonable to have rejected sales that were not to sawmills (even though the logs might well end up being made into softwood lumber), and to reject sales "not in Québec," whatever that may mean, the Panel questions the rejection of sales for which no price was reported. We agree with the GOQ that in order to reflect actual market conditions in Québec, the actual volume of privately sold logs should have been accounted for. The consequence of not doing so is to exaggerate the volume of imported logs in the overall benchmark prices.

It is reasonable to assume that Commerce has the ability to assign this additional volume the same benchmark prices developed for transactions which show both volume and price, or in some other manner to take these sales into account in developing the Québec benchmark. Therefore, Commerce is directed either to include these volumes in the benchmarks, or to advise the Panel why it should not, or alternatively, why it cannot.

#### **(iv) QUALITY**

Québec raises the question of whether, in developing benchmark prices for imported logs, it is necessary to adjust the prices for the fact that imported logs are in many cases superior to private forest logs, and can, therefore, produce more softwood lumber.

This question proceeds from the observation in the calculation of the SPF benchmark for Québec, that the import prices are 27.8% higher than the Syndicate prices, and this differential can only be accounted for by the fact that the imported logs are larger

---

<sup>13</sup> Remand calculation memo for Québec, attachment 2H, July 30, 2004.

**Panel Decision on Second Remand, Dec. 1, 2004**

and of better quality. Québec argues that there is no other reason why Canadian sawmills would pay more for imported logs than they do for allegedly price-suppressed wood that is produced in Canada. Further, it points to statistics drawn from the company exclusion process that demonstrate that lumber produced from imported logs is vastly more valuable than that produced from domestic logs.

The Petitioner sharply contests the GOQ argument on a number of grounds which need not be discussed in view of the Panel's conclusions.

Both the Department and the Petitioner contend that Canada cannot raise this argument at this time<sup>14</sup> on the grounds that Canada, by not raising this contention before the agency, is estopped from raising it now citing *Kokusai Electric Co. vs. E.F. Johnson Co.* 632 F. Supp. 23 (C.I.T. 1986) and *United States vs. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952) for the well established principle of exhaustion of administrative remedies.

However, the Panel does not feel that this issue need be addressed. At the time of the first remand, we considered the question of log based benchmarks. We recognized that the prices for imported logs were, on balance, higher than those for private forest logs in Canada. Nonetheless, we stated:

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.<sup>15</sup>

In other words, regardless of whether the prices are high or low, imports are part of the mix of privately traded logs in Canada. As such, the Panel sees no reason why their prices should be adjusted as suggested by the GOQ to reflect market conditions.

**(v) PROFIT**

As was the case with all of the other provinces, the Panel, in its Remand Decision, directed the Department to consider whether the Québec benchmark log prices should be adjusted to account for log-seller profit. In considering the issue with respect to Québec, Commerce did not base its calculations upon the theory that the independent harvester and the log seller were one in the same, although there is nothing in its Determination that

---

<sup>14</sup> Indeed, the Administering Authority, in its brief before the Panel does not address the merits of this argument at all.

<sup>15</sup> Decision of the Panel, p. 14.

**Panel Decision on Second Remand, Dec. 1, 2004**

would suggest that its thinking was otherwise. Rather, its stated methodology was to adopt the calculation used in the First Remand Determination for Alberta. Specifically, Commerce said that it was adopting the methodology urged by Canada in the first Remand, namely, to subtract from the weight-averaged domestic log price the costs for harvest and haul, and then subtract from that the price for private stumpage.<sup>16</sup>

The Investigating Authority's calculation yielded a negative figure, so that no allowance was made for profit in Québec. While it would seem counterintuitive that log sellers would sell for a loss, the explanation is that instead of starting with a benchmark price of C\$39.66 (the number used in the calculation referred to in the footnote 16), the Department started with a private log price of C\$17.10, a figure lower than the figure used for private stumpage.<sup>17</sup>

If we correctly understand Canada's complaint, the Department's methodology is flawed in that it adjusts only the private prices for profit, and not the blended benchmark prices, including both the Syndicate and Import prices.

The Coalition argues that it was improper for the Department to ignore the negative profit figure arrived at in its calculation. If the deduction of profit results in a negative, it logically follows that one of the input figures must be incorrect. Thus the Petitioner urges that the (negative) C\$2.64 be added to the Syndicate price, resulting in a higher benchmark (and presumably still not showing a profit). Indeed, the Coalition asks that the negative profit figure be added to the surrogate benchmark prices for the other provinces where Commerce applied the Québec result.

This Panel does not know what profit figure would have resulted if the Department had not failed to apply its own methodology. In order to determine market conditions in Canada, the Department started with two data bases, import statistics and private market prices, in order to arrive at benchmark domestic prices. Therefore, it was necessary, in order to arrive at an adjusted log-seller stumpage cost to compare with the Crown stumpage, to deduct harvesting costs and log-seller profit. But, to compare apples with apples, it was necessary to take the (blended) benchmark domestic log prices and deduct from that point, not to adjust only the Syndicate prices for profit. This was urged by Canada before the Department and also before this Panel, and the Department offers no explanation for its failure to properly implement its own methodology. The Investigating Authority is directed to do so.

---

<sup>16</sup> A footnote in page C-56 of Canada's case brief before this Panel, reads, in part:

...by deducting average hauling and harvesting costs for Québec's private forest (C\$39.66) and average private stumpage costs for the private forest (C\$18.57), a log seller profit of C\$11.23 could have been calculated.

<sup>17</sup> Remand Calculation for Québec, attachment 4B, July 30, 2004.

## **Panel Decision on Second Remand, Dec. 1, 2004**

Lastly, the Petitioner raises the question of the proper conversion factor to be used to convert Syndicate prices to cubic meters where the data is reported in other forms. The Department has asked for a remand to address this question, and the Panel remands for that purpose.

### **C. ONTARIO**

Commerce requested a remand to exclude from the Ontario benchmark listings for “pine” logs which were actually White Pine. As the source of these listings was the Sawlog Journal, they have been eliminated from the benchmark. The elimination of the Sawlog Journal was directed by the Panel, and Commerce complied with the Panel’s directions.

The Panel also ordered the Department, after elimination of the Sawlog Journal quotations, to weight-average the import and KPMG domestic log sales information. This has also been done by the Department.

Also mandated by the Panel was the recalculation of the Ontario benchmark prices taking into account actual market conditions in Ontario. In the initial remand, the Investigating Authority had calculated separate benchmark prices for Spruce, Red and White Pine, and Other Conifer logs. However Ontario’s stumpage programs group Pine, Fir, Spruce and Larch together (SPF), Red and White Pine together, and Hemlock and Cedar together. Inasmuch as almost 95% of Ontario’s Crown harvest is SPF, the Panel found that the Department’s breakdown did not reflect prevailing market conditions.

The Department followed our instructions and recalculated benchmarks for those groupings. Ontario complains, however, that Commerce did not correctly include Balsam Fir and Larch in the SPF benchmark, but rather included them in the Other Conifer category. Commerce agrees, and requests a remand to correct this error.

A second error, for which Commerce also request a remand, was the inclusion in the import statistics of an obvious clerical error in respect to an entry from China which grossly inflated the import benchmark.

The Panel had also directed the Department to examine the profit issue with respect to Ontario. But the Department refused to make such allowance.

The Department’s reasoning in the Second Remand Determination on this issue is baffling. Commerce recognizes that prevailing market conditions in Ontario reflect that independent harvesters perform a service for a fee. The inescapable inference of this is that the log seller is not the harvester, but rather the owner of the timber. Again, the Panel agrees that any profit of the harvester is included in its fee, but that does not account for any profits earned by the seller.

**Panel Decision on Second Remand, Dec. 1, 2004**

The Remand Determination states:

...assuming *arguendo* that an additional adjustment should be considered, the Government of Ontario (“GOO”) fails to provide any reason why Québec’s profit figure of \$0.00 would not be an appropriate surrogate.<sup>18</sup>

Likewise the Investigating Authority provides no reason why Québec *is* an appropriate surrogate. On remand, if the Department still considers Québec to be an appropriate surrogate, and if, for some reason, the Investigating Authority cannot measure log-seller’s profit in Ontario, it is directed to explain this preference.

Another issue is raised by several Ontario parties. In its remand calculations, the Department found no benefit for the SPF category of logs. The benefit which was calculated was, therefore, attributable to the other two groupings. In fact, what the Department calculated was a negative benefit, i.e., it found private stumpage to be higher than Crown stumpage, but “zeroed” the difference.

The Ontario parties argue that prevailing market conditions call for the harvesting of all of the trees in a particular stand, so that the adequacy of remuneration must be determined with respect to the entire harvest. They point out that the issue of “zeroing” has been addressed by the World Trade Organization Appellate Body, and found impermissible.<sup>19</sup> The Department, for its part, contends that what is being asked for is an offset. The Statute, 19 U.S.C. Sec. 1677(6), in defining the “net countervailable subsidy” allows offsets only for (1) the deduction of application fees, deposits, or similar payments to qualify for a subsidy, (2) accounting for losses due to deferred receipt of a subsidy, or (3) the subtraction of export taxes, duties or other charges intended to offset the subsidy.

The Panel has already addressed the offset argument in its First Remand Decision in connection with the calculation of benchmark prices in British Columbia. In that decision the Panel concluded that addressing the prevailing market conditions in Canada, as requested by the Ontario parties and as ordered by this Panel, does not entail the application of an offset. When the Department considers the benchmarks for all species in Ontario, it must consider the *net* benefit, if any, accruing to all of the species.

Both the Ontario parties and the Petitioner urge the Panel to reject the use of log benchmarks entirely, Ontario asking that the Panel order to use the cost/revenue standard, and the Petitioner to order the use of cross-border benchmarks. The Panel has previously addressed these contentions, and, for reasons previously stated, will not accede to these petitions.

---

<sup>18</sup> Second Remand Determination, p. 67.

<sup>19</sup> *Final Dumping Determination on Softwood Lumber from Canada*, Report of the Appellate Body, WT/DS264/AB/R, 11 August, 2004.

## D. BRITISH COLUMBIA

### (i) ACTUAL MARKET CONDITIONS

Consistent with the governing statute, 19 U.S.C. § 1677(5)(E), in its Remand Decision of June 7, 2004, the Panel directed the Department 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.” (Panel Remand Decision, pp. 17-19, emphasis supplied.) The Panel observed that:

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 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. (*Id.*, pp. 18-19.)

The Panel’s decision thus leaves the choice of methodology to the Department’s discretion, provided that the methodology selected reflects the *actual market conditions* that govern the sale of timber harvesting authority in B.C. However, on the ground that only limited record evidence is available as a basis for recalculating the benchmark price for stumpage that would reflect actual market conditions in B.C., the Department chose to combine Coastal and Interior benchmark prices to develop a single log price benchmark for the entire province. The Panel does not accept this choice of methodology.

In its Remand Decision, the Panel found that “British Columbia has two distinctly different forest areas and, consequently, different species and markets.” (Panel Remand Decision, p. 24.) Furthermore, the Panel, the Department, and the Petitioner have repeatedly acknowledged in this and in all prior lumber proceedings that prevailing market conditions are substantially different on the Coast and in the Interior. Thus in prior phases of this case, the Department consistently performed separate benefit calculations for the Coast and Interior because it recognized significant differences in market conditions as between the two regions.

In constructing its “single weight-averaged benchmark price” for B.C., the Department sought to achieve a benchmark price “for the entire Crown harvest that reflected the relative species mix in B.C., *i.e.*, a single B.C. stand value.” (DOC Second Remand Determination, p. 11.)

The Department weight-averaged the prices obtained from three data sets – log prices and sales volumes from the Vancouver Log Market (“VLM”) on the Coast, the Vernon Log Yard (“Vernon”) in the Interior, and imports of “wood in the rough.” Of the

## Panel Decision on Second Remand, Dec. 1, 2004

three sources, the volume of log sales reported in the Coastal VLM dwarfs both the volume reported in Vernon and volume reported in the import price data. The Coastal VLM volume accounted for over ninety-eight percent (98%) of the total volume reported in the three data sets, whereas the Interior Vernon and import volumes each accounted for less than one percent (<1%) of the total. (See Second Remand B.C. Calculations Memo at B.C.-5, P.R. 18.) Thus, through this new alternative approach, the Department in effect used the higher Coastal VLM prices as the basis for the benchmark which was then used for the dramatically cheaper Interior stumpage.<sup>20</sup>

In addition, the Department in effect created an artificial value for Coastal and Interior species which reflects the weight average of sales prices and volumes reported for the Coast and for the Interior. For example, the Coast (VLM) Douglas-fir log price is \$105.31/m<sup>3</sup>, while the Interior (Vernon) price is \$47.88/m<sup>3</sup> for the same species. Similarly, the Coastal hemlock log price is \$68.46/m<sup>3</sup>, whereas the Interior price is \$33.09/m<sup>3</sup>. When weight averaged according to volumes, the result is an artificial value for these species: VLM (Coast) volumes were 1,476,200/m<sup>3</sup> and 1,932,713/m<sup>3</sup>, for Douglas Fir and Hemlock respectively, whereas Vernon (Interior) volumes were 6,431/m<sup>3</sup> and 1,044 m<sup>3</sup>, for Douglas Fir and Hemlock respectively.

In its Remand Decision the Panel upheld the Department's decision to use import data as well as Vernon data for constructing the Interior benchmark even though there was no information concerning the destination of log imports to B.C. We stated that "it might not be unreasonable to double-count the imports and then weight-average the results." This would permit the Department to double-count the import data and to use this data in constructing separate benchmarks for both the Coast and Interior. However, we view as arbitrary and not supported by substantial evidence the Department's decision to construct "single weight-averaged benchmark price" for B.C.

The Panel reaffirms its earlier decision directing the Department to recalculate the benchmark price for B.C. stumpage taking into account the *actual market conditions* that govern the sale of timber harvesting authority in British Columbia, including the fact that stumpage fees are charged for stands rather than for the individual species. When doing so, it must perform separate benefit calculations for the Coast and for the Interior using the data available for each.

### (ii) ADDITIONAL ISSUES CONCERNING B.C. BENCHMARKS

Canada raises two issues that would become relevant should the Panel accept the Department's "single weight-averaged benchmark price" for B.C. These issues are (a) to require the Department to calculate a separate benchmark for Coastal Sitka Spruce, and

---

<sup>20</sup> For example, Canada observes that spruce on the Coast is largely Sitka spruce, whose high value is reflected in its average VLM price: \$122.76/m<sup>3</sup>, whereas spruce in the Interior is largely Engelmann spruce, a much lower value species, as reflected in its Vernon price of \$51.34/m<sup>3</sup>. (See Second Remand B.C. Calculations Memo at B.C.-7, P.R. 18.)

**Panel Decision on Second Remand, Dec. 1, 2004**

(b) to weight-average species prices by the volume of logs in the benchmark rather than by the harvest volume of each species when it calculates single benchmark prices for SPF and Douglas Fir, which the Department has based on harvest volume. It is not necessary for the Panel to address these two issues since the Panel has already determined not to accept the Department's "single weight-averaged benchmark price" for B.C.

The Petitioners argue that the Department incorrectly weighted Coast and Interior logs-to-sawmills percentages when calculating a single province-wide logs-to-sawmills figure. It is similarly not necessary for the Panel to address this issue since the Panel has already determined not to accept the Department's "single weight-averaged benchmark price" for B.C.

**(iii) THE DEPARTMENT'S COMPARISON OF A BENCHMARK PRICE BASED ON SAWLOGS WITH B.C. STUMPAGE RATES FOR ALL LOGS**

Canada argues that the Department's comparison of a benchmark price based on sawlogs with B.C. stumpage rates for all logs, including lower value logs not used to produce lumber, inflated the alleged subsidy rate for B.C. and is inconsistent with the Department's first remand determination methodology.

We disagree.

The Department's decision to compare the market-determined benchmark price for sawlogs with stumpage prices actually charged for all Crown logs sent to sawmills is not unreasonable because the Department's calculation accounts for the actual stumpage fees charged on all logs that actually enter sawmills, that is, all logs that "hit the blade" in sawmills. The Crown does not charge different stumpage rates for the different grades of logs harvested. Therefore, it was not unreasonable for the Department to use the actual stumpage price paid by sawmills for all the Crown softwood logs that they received.

Therefore the Panel affirms the Department's decision to compare the market-determined benchmark price for sawlogs with the Crown stumpage actually charged for all Crown logs sent to sawmills.

**(iv) THE BENCHMARK FOR DOUGLAS FIR**

In its June 7, 2004 Remand Decision the Panel concluded that if the three largest B.C. importers of Douglas Fir during the period of investigation were proven not to be lumber producers, the Department would not have substantial evidence to support its use of the Douglas Fir benchmark. (Panel Remand Decision, p. 25.)

In its Second Remand Determination, the Department determined that two of the three largest B.C. importing companies at issue - Fraserwood Industries and Heatwave Technologies - are "in fact" lumber producers. DOC Second Remand Determination, p. 16.) This Panel does not find the Department's determination unreasonable.

## **Panel Decision on Second Remand, Dec. 1, 2004**

The Department argues that even though the Government of B.C. presented evidence demonstrating that one of the three largest importing companies – Bell Pole Company – has no sawmill facility, it did not present similar evidence to prove that the other two importing companies do not have sawmill facilities. Their dry kiln operator status can reasonably point to their participation in the softwood lumber production process because that kiln-drying is an essential stage in the production of lumber. Furthermore, the absence of these two firms from the B.C. Mill List does not imply that they are not sawmill facilities or that they are not involved in the production of softwood lumber. The B.C. Mill List has a disclaimer stating that not all mills responded to the questionnaire and that the Mill List does not include remanufacturing plants.

Finally, the record does not contain company-specific import volumes or values. In the absence of such company specific information, the Department was not unreasonable in determining that Douglas Fir import prices are reflective of the market prices of logs used to produce softwood lumber, or in continuing to use those import prices in its benchmark calculations. The Panel affirms the Department's determination to include import prices for Douglas Fir in its benchmark calculations for B.C.

### **(v) WHETHER CROWN AND PRIVATE TIMBER ARE USED IN EQUAL PROPORTIONS TO PRODUCE LUMBER**

The Petitioners allege that the Department incorrectly assumed in its Second Remand Determination, as it had in prior determinations, that Crown and private timber are used in equal proportions to produce lumber.

The Panel does not address this issue owing to the failure of Petitioners to exhaust administrative remedies. *See Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998), *quoting, inter alia, United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). The Petitioner failed to raise this argument before the Department during the underlying investigation. Judicial relief for a supposed or threatened injury will not be granted unless available administrative remedies have been exhausted.

### **E. MANITOBA AND SASKATCHEWAN**

The Department, at the time of the First Remand Determination, asked for a remand to adjust harvesting costs in both Manitoba and Saskatchewan. There is no issue raised by the Canadian parties in this regard at this time.

The Panel remanded for consideration of two issues. First, Commerce was instructed to recalculate for both provinces without the inclusion of import prices, and second, as with all provinces, to consider the issue of log-seller profit. As there was no data available as to private log sales in either province, the Department constructed a surrogate benchmark from data in the other boreal provinces.

## **Panel Decision on Second Remand, Dec. 1, 2004**

Included in the surrogate benchmark was the very import data which the Panel had instructed Commerce not to use. The Department suggests in its determination that the Panel objected to the use of these few shipments on the grounds that they were very small, and that our opinion can be read to permit their inclusion in the benchmark. The Panel did not object on the grounds that the shipments were small. We concluded that there was no substantial evidence to support their use. There still is no substantial evidence, and our opinion cannot be read to permit their inclusion.

The Department did not separately consider the question of profit in either of these provinces, as there was no data concerning private log sales. Any revisions in the provinces forming the surrogate benchmarks will necessarily address this issue.

### **F. BOIS OMEGA**

#### **1. IF THERE IS NO INCREASE IN QUÉBEC'S OR ONTARIO'S BENCHMARK PRICES**

In its Second Remand Determination the Department determined that among other companies, Bois Omega received zero or *de minimis* benefits during the POI and is therefore eligible for exclusion from the order. (DOC Second Remand Determination, pp. 25-26.) There being no objection to this determination, the Panel need not make any determination and no remand is necessary.

#### **2. IF THE DEPARTMENT'S BENCHMARK CALCULATIONS RESULT IN A HIGHER BENEFIT FOR QUÉBEC OR ONTARIO**

In the event of a higher benefit calculation for Québec and/or Ontario both Bois Omega and the Department have requested a remand to exclude additional sales that might erroneously be attributed to Bois Omega. There being no objection to this remand request, the Panel affirms the Department's decision to exclude such additional sales and thereby confirms Bois Omega's status as a company potentially eligible for exclusion from the order.

### **V. REMAND ORDERS**

- (1) The Department is directed to reinstate the C\$3.46 profit figure in computing the log-seller profit in Alberta.
- (2) The Department is directed to include in the Québec benchmarks the volume of logs for which the Syndicate data does not indicate prices, or to explain why it should not do so, or why it cannot do so.
- (3) The Department is directed to adjust the Québec benchmarks by deducting log-seller profit from both the import and Syndicate prices.

**Panel Decision on Second Remand, Dec. 1, 2004**

- (4) The Department is directed to consider the conversion factor to be used to convert Syndicate prices in Québec to cubic meters where the data is reported in other forms.
- (5) The Department is directed to include Balsam Fir and Larch in the Ontario SPF benchmark.
- (6) The Department is directed to correct the clerical error in the import statistics for Ontario which grossly inflated the benchmark.
- (7) The Department is directed to examine the issue of log-seller profit in Ontario. If the Department determines that it is appropriate to use a surrogate profit figure from some other province, it is directed to explain its choice.
- (8) The Department is directed to redetermine the net benefit for Ontario.
- (9) The Department is directed to recalculate the British Columbia benchmark taking into account actual market conditions in that province. In so doing, the Department must perform separate benefit calculations for the Coast and for the Interior using data available for each region.
- (10) The Department is directed to apply recalculated profit figures for Alberta and Québec in calculating British Columbia stumpage benefits.
- (11) The Department is directed to eliminate the import data in the surrogate benchmarks for Saskatchewan and Manitoba.
- (12) If the Department's benchmark calculations result in a higher benefit for Québec or Ontario, the Department is directed to exclude additional sales that might erroneously be attributed to Bois Omega.

The Investigating Authority is directed to complete its remand determination by January 24, 2005.

Original signed by:

Daniel A. Pinkus  
Daniel A. Pinkus

William E. Code  
William E. Code

Germain Denis  
Germain Denis

Milton Milkes  
Milton Milkes

Daniel G. Partan  
Daniel G. Partan