

REMAND REDETERMINATION

In the Matter of Sales at Less Than Fair Value of Certain Softwood Lumber from Canada,
Secretariat File No. USA-CDA-2002-1904-02
NAFTA Binational Panel Review

SUMMARY

In accordance with the March 5, 2004, Decision of the Panel Respecting Remand Determination (“Decision on Remand”) in the above-referenced case, the Department of Commerce (the Department) provides a remand determination with regard to three company-specific issues challenged in the underlying investigation.¹

The Department has addressed the issues as follows:

1) recalculated the general and administrative (G&A) expense ratio for Tembec, Inc. (Tembec) based on the G&A expenses reported for the Forest Products Group; 2) recalculated the by-product offset for West Fraser Mills Ltd.’s (West Fraser) using the prices recorded in West Fraser’s books and; 3) offset Slocan Forest Products Ltd.’s (Slocan) indirect selling expenses with profits earned on lumber futures trading. Each of these issues is discussed in detail below. After addressing each of the Panel’s concerns, the Department has recalculated the relevant company-specific antidumping duty margins for certain softwood lumber products from Canada, as well as the “All Others” rate.

ANALYSIS AND REDETERMINATION

A. *Tembec’s G&A Expense*

The Panel remanded this issue to the Department with instructions that it recalculate the G&A ratio for Tembec based on the G&A expenses reported for the Forest Products Group, rather than using Tembec’s company-wide G&A expenses in the calculation of the G&A

¹On April 13, 2004, the Department issued a draft remand determination (Draft Remand) to the parties and allowed comments until April 16, 2004.

expense ratio. Decision on Remand at 27. We have done so.

In its remand redetermination, the Panel concluded that the Department did not provide a satisfactory explanation for using company-wide G&A expenses in its G&A ratio calculation. Id. However, the Department disagrees with the Panel's findings that its use of company-wide G&A expenses from Tembec's audited financial statements was not supported by substantial evidence. First, we continue to believe that the company-wide G&A expenses from the financial statements provide "actual data pertaining to the production and sales of the foreign like product," in accordance with 19 U.S.C. §1677b(b)(3)(B). Second, we believe that the Panel erred when it stated that "[w]hether or not Canadian GAAP permitted allocation otherwise than in accordance with GAAP is not relevant. The relevant question under the applicable law is whether the producer's records are unreliable." Id. We disagree; 19 U.S.C. §1677b(f)(1)(A) specifically states that "[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise." Thus the Panel has ignored the first prong of a two-prong standard. We believe that it is relevant that Canadian Generally Accepted Accounting Principles (GAAP) permits a supplemental presentation of expenses (i.e., the Forest Products Group G&A expense) that is "otherwise than in accordance with [Canadian] GAAP." Of the two G&A expense calculations presented, only the company-wide amount was audited and clearly in accordance with Canadian GAAP, which is what the Department would normally rely upon.

B. West Fraser's Sales of Wood Chips

In its remand redetermination, the Panel concluded that West Fraser's own sales of wood chips to unaffiliated purchasers were not reasonable to use as market prices and that West Fraser provided other evidence substantial enough to support its assertion that the prices recorded in its books for sales to affiliates did in fact reflect market prices. Decision on Remand at 29. The Panel directed the Department to use the prices recorded in West Fraser's books in calculating the by-product offset for wood chips. Id. In accordance with the Panel's March 5, 2004 remand, the Department has recalculated the by-product offset for West Fraser using those prices.

However, the Department continues to disagree with the Panel's finding that West Fraser's own sales of wood chips to unaffiliated purchasers were not reasonable to use as market prices. First, contrary to the Panel's assertion, in determining whether such prices are appropriate market values to use, it is not the Department's position that the volume of those transactions in relation to total sales of wood chips is the determining factor. To the contrary, the Department's analysis is qualitative in nature, in that it seeks to find the market value that best represents the company's own experience in the specific markets in which it operates based on transactions between two unaffiliated parties.

Accordingly, our established preference is to use the price which the respondent itself received in transactions with unaffiliated purchasers, as this price best represents the respondent's own experience in the market under consideration. We therefore continue to believe that West Fraser's own sales of wood chips in British Columbia to unaffiliated parties are the proper market price to use in our calculations. Moreover, we continue to believe that those sales represent commercially viable quantities that cannot be dismissed simply because much greater quantities were sold to affiliates. Since

our established preference is to use a company's own sales to unaffiliated parties, there was no need in this case to resort to West Fraser's reported alternative data.

C. Treatment of Slocan's Futures Trading Profits

The Panel has determined that Slocan's futures trading profits should be considered an offset to Slocan's indirect selling expenses. Decision on Remand at 42 (noting that it would not ordinarily have determined that Slocan had made the requisite showing, but concluding that the Department had acknowledged that this type of income could be an offset to indirect selling expenses). Because these profits were related to economic activity in the United States, we have used them as an offset to Slocan's indirect selling expenses incurred in the United States and have recalculated Slocan's margin accordingly.

Comments From Interested Parties

On April 6, 2004, the Coalition for Fair Lumber Imports (the Coalition) a domestic interested party, Tembec and West Fraser submitted comments on our Draft Remand.

A. Comment 1 - West Fraser's Sales of Wood Chips

West Fraser requests that the Department add language to its remand determination to make clear "that its amended final determination in this case will have retroactive, as well as prospective, effect."² West Fraser claims that an instruction to U.S. Customs and Border Patrol to refund all antidumping duty deposits on unliquidated entries made by West Fraser would be consistent with the Department's actions in similar circumstances.³

²See West Fraser's April 16, 2004 letter at 2.

³ Id. at 2-3.

Department's Position:

West Fraser is mistaken. Neither the Tariff Act of 1930, as amended, (the Act) nor the NAFTA rules provide for the retroactive effect of a Panel decision, and the decisions cited by West Fraser are inapposite. Under 19 U.S.C. §1516a(g)(5)(B), entries of subject merchandise are to be liquidated in accordance with the determination subject to NAFTA Panel review, if they are entered on or before the date of publication of the notice of the panel's decision. This statutory provision contrasts with the next subparagraph, at section §1516a(g)(5)(C), which provides for a special administrative suspension of liquidation during the pendency of a NAFTA Panel review of an administrative review proceeding (or class or kind determination), as opposed to the review of an original investigation, at issue here. Congress' specific intent not to provide for the suspension of liquidation, either by the agency or the Panel, during a NAFTA Panel review of an investigation, is further apparent in light of subparagraphs §1516A(c)(1) and (2). Under these provisions, Congress provided for the liquidation of entries in accordance with an agency determination even though that determination is being challenged in a federal court proceeding, unless those entries are enjoined by a court order. In addition, neither the NAFTA rules, nor the NAFTA itself provide a mechanism for the suspension of liquidation of entries during the pendency of a panel review of an investigation.⁴

Since there is no provision for the suspension of liquidation in a NAFTA proceeding concerning an investigation, the liquidation of entries made prior to the notice of the amended decision will occur pursuant to the challenged administrative determination. It is clear that the final NAFTA panel decision

⁴ See also NAFTA Binational Panel Rule 78, Extraordinary Challenge Committee ("ECC") Rule 65 (indicating effective date of Panel and ECC decision as post publication of final decisions).

does not affect those entries. That some of West Fraser's entries at issue may be suspended pursuant to the first administrative review is of no consequence. The non-liquidation of entries subject to an administrative review is a statutory suspension, not made pursuant to the binational panel review process under §1516A(g)(5)(C). Consequently, the Panel's final decision, and the Department's final amended determination based thereon can apply prospectively only, as the statute permits applicability only to future entries.

B. Comment 2 - Treatment of Slocan's Futures Trading Profits

The Coalition argues that in offsetting Slocan's indirect selling expenses by the amount of the futures trading profit, the Department created a negative expense. According to the Coalition, there is no such thing as a negative expense under the law. Section 1677a states that the United States price is to be reduced by the amount of expenses generally incurred by or for the account of the exporter in the United States. The Coalition cites to Thyssen Stahl AG et al. v. AK Steel Corp., 1998 U.S. App. LEXIS 17064 (Fed. Cir.1998) in which the Court of Appeals for the Federal Circuit (CAFC) noted that "The statute clearly contemplates only reductions in U.S. price to account for expenses, and not increases to account for gains, associated with selling the merchandise."

The Coalition argues that by treating Slocan's futures profits as a negative expense, the Department has impermissibly increased Slocan's U.S. price. Therefore, the Coalition requests that the Department eliminate this negative expense.

The Department's Position:

We agree with the Coalition. The Panel has directed the Department to use the futures profits as an offset to indirect selling expenses. Because the statute allows only for reductions in U.S. price

when adjusting for expenses, we have capped the amount of the offset by the amount of indirect selling expenses.

C. Comment 3 - WTO Panel Decision

Tembec argues that the Department should follow a recent WTO majority panel decision issued in United States – Final Dumping Determination on Softwood Lumber From Canada, WT/DS264/R (April 13, 2004) (U.S. - Softwood Lumber) with respect to a certain aspect of its antidumping duty calculation.⁵ Specifically, Tembec argues that, in light of this decision, the Department should “issue margins that are not inflated by the Department’s unlawful zeroing practice.” Id. at 3. Tembec claims that the WTO panel report, should the United States appeal the decision, “would be sustained” because of the Appellate Body decision in European Communities – Antidumping Duties on Imports of Cotton Type Bed Linen From India, WT/DS141/AB/R (March 1, 2001) (“Bed Linen”). Id. at 3. Tembec argues that “there can be no dispute that the WTO ruling on zeroing in US: Softwood Lumber applies in this case.” Id. Tembec further argues that “[t]he Department should respect the WTO ruling on zeroing, as it is implicitly respecting the ruling on export restraints (and explicitly respected the ruling on the ‘arm’s length’ sales test), by refraining from employing the practice of zeroing in its remand results.” Id. at 5.

Department’s Position:

The Department disagrees with Tembec’s comments. The U.S. Court of Appeals for the Federal Circuit and the U.S. Court of International Trade have upheld the Department’s methodology as a reasonable interpretation of the statute. Timken Co. v. United States, 354 F.2d 1334 (Fed. Cir.

⁵ See Tembec’s April 16, 2004 letter at 2-3.

2004) (“Timken”); Bowe Passat Reinigungs-und Waschereitcecnik GmbH v. United States, 926 F. Supp. 1138, 1150 (CIT 1996). The Panel has similarly upheld the Department’s practice in this case and did not instruct the Department to revisit this issue.

FINAL REDETERMINATION

In accordance with the remand order, we have recalculated the antidumping duty margins for three respondent companies. We have also recalculated the “All Others” rate. We note that as a result of the revised calculations the margin for West Fraser is de minimis. Therefore, if this remand redetermination becomes final, subject merchandise produced and exported by West Fraser and entered after the publication of the notice of the Panel’s final decision will be excluded from any amended order published thereafter. Pursuant to 19 U.S.C. §1673d (c)(5)(A), we have excluded West Fraser’s rate from the calculation of the “All Others” rate. The weighted-average percentage dumping margins for the period April 1, 2000, through March 31, 2001, for certain softwood lumber products from Canada are as follows:

<u>Company</u>	<u>Original Remand Margin (percent)</u>	<u>Revised Remand Margin (percent)</u>
Abitibi-Consolidated, Inc.	11.85	N/A
Canfor Corporation	5.74	N/A
Slocan Forest Products, Inc.	8.77	8.56
Tembec, Inc.	6.66	6.28
West Fraser Mills Ltd.	2.22	1.79
Weyerhaeuser Company	12.36	N/A
All Others	8.07	8.85

James J. Jochum
Assistant Secretary
for Import Administration

Date