

Preliminary Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada

SUMMARY: Consistent with section 129 of the Uruguay Round Agreements Act (URAA), which governs the Department of Commerce's (the Department's) actions following World Trade Organization (WTO) reports, the Department has calculated new rates with respect to the antidumping duty investigation on certain softwood lumber products (softwood lumber) from Canada in order to implement the recommendations of the Appellate Body. If the U.S. Trade Representative, after consulting with the Department and Congress, directs the Department to implement, in whole or in part, this determination, these new rates will apply to unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date on which the U.S. Trade Representative so directs.

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SUPPLEMENTARY INFORMATION:

Background

On April 2, 2002, the Department published a final determination of sales at less than fair value in the antidumping duty investigation on certain softwood lumber from Canada. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 FR 15539 (April 2, 2002) (*Final Determination*), and accompanying Issues and Decision Memorandum. Following an affirmative injury determination issued by the United States International Trade Commission, the Department published an antidumping duty order on this product on May 22, 2002.

*See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products From Canada*, 67 FR 3606 (May 22, 2002).

Subsequently, the Canadian government requested the establishment of a WTO dispute resolution panel (the Panel) to consider various aspects of the Department's final determination in this case. The Panel circulated its report on April 13, 2004. *United States-Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (April 13, 2004).

On May 13, 2004, the United States and Canada appealed certain findings and conclusions in the Panel report. The WTO Appellate Body (the Appellate Body) issued its report on August 11, 2004. *See United States-Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (August 11, 2004). The Appellate Body report and the Panel report, as modified by the Appellate Body report, were adopted by the WTO Dispute Settlement Body (DSB) on August 31, 2004. *See Minutes of the Meeting, Dispute Settlement Body*, August 31, 2004, WT/DSB/M/175 (Sept. 24, 2004).

On September 27, 2004, the United States indicated to the DSB that the United States intended to implement a decision consistent with the recommendations and rulings of the DSB. *See WTO News*, <[http://www.wto.org/english/news\\_e/news04\\_e/dsb\\_27sep04\\_e.htm](http://www.wto.org/english/news_e/news04_e/dsb_27sep04_e.htm)>. On November 5, 2004, pursuant to section 129(b)(2) of the URAA, the U.S. Trade Representative requested that the Department issue a determination that would render the Department's actions in the investigation not inconsistent with the findings of the DSB.

Section 129 of the URAA<sup>1</sup> is the applicable provision governing the nature and effect of

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<sup>1</sup> Citation to "section 129" refers to section 129 of the URAA, codified at 19 U.S.C. § 3538.

determinations issued by the Department to implement findings by WTO panels and the Appellate Body. Specifically, section 129(b)(2) provides that “notwithstanding any provision of the Tariff Act of 1930 . . . ,” (the Act), within 180 days of a written request from the U.S. Trade Representative, the Department shall issue a determination that would render its actions not inconsistent with an adverse finding of a WTO panel or the Appellate Body. 19 U.S.C. § 3538(b)(2). The *Statement of Administrative Action*, U.R.A.A., H. Doc. 316, Vol. 1, 103d Cong. (1994) (SAA) variously refers to such a determination by the Department as a “new,” “second,” and “different” determination. *See* SAA at 1025, 1027. This determination is subject to judicial review separate and apart from judicial review of the Department's original determination. 19 U.S.C. § 1516a(a)(2)(B)(vii).

In addition, section 129(c)(1)(B) of the URAA expressly provides that a determination under section 129 applies only with respect to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the U.S. Trade Representative directs the Department to implement that determination. In other words, as the SAA clearly provides, “such determinations have prospective effect only.” SAA at 1026. Thus, “relief available under subsection 129(c)(1) is distinguishable from relief in an action brought before a court or a NAFTA binational panel, where . . . retroactive relief may be available.” *Id.*

### **Appellate Body Findings and Conclusions**

Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Antidumping Agreement) provides that there are three means of calculating a dumping margin “during the investigation phase.” The agreement states that “normally” a margin “will be established on the basis of a comparison of a weighted average normal value with a weighted average of

prices of all comparable export transactions” or that it will be established “by a comparison of normal value and export prices on a transaction-to-transaction basis.” The third means of comparison, a comparison of “a normal value on a weighted average basis with individual export transactions,” is provided for when certain criteria exist.

In the investigation of softwood lumber from Canada, the Department calculated dumping margins for the investigated respondents using weighted-average-to-weighted-average comparisons. Specifically, the Department compared weighted-average export prices (EPs) or constructed export prices (CEPs) to weighted-average normal values. When the EP or CEP was greater than the normal value, the comparison showed no dumping. In these circumstances, the Department did not offset or reduce the amount of dumping found on other comparisons based on the amount by which the EP or CEP exceeded the normal value for distinct comparisons. When the EP or CEP was less than the normal value, the comparison was considered to have revealed dumping. In order to calculate the weighted-average dumping margin, the Department aggregated the amount of dumping found through these comparisons and divided it by the aggregate value of all U.S. sales (regardless of whether they were dumped) to ensure that the results took account of all comparisons and thus all U.S. sales, dumped and non-dumped.

In its report, the Appellate Body rejected the United States’ arguments 1) that the text of Article 2.4.2 of the Antidumping Agreement did not address the methodology at issue in this investigation, 2) that certain WTO Members, including the United States, did not offset their calculations for non-dumped comparisons in their investigation calculations before, during, and following the implementation of the Antidumping Agreement, and that absent language addressing this methodology in the Agreement, Members did not negotiate and agree that this methodology should be considered impermissible, and 3)

that under Article 17.6 (ii) of the Antidumping Agreement, the Appellate Body was required to find that WTO Members which applied this methodology acted in conformity with Article 2.4.2 of the Agreement. *See* paragraphs 107-108 of the Appellate Body's decision.

The Appellate Body concluded, at paragraph 108 of its decision, that "based on the ordinary meaning of Article 2.4.2 read in its context" the Department's comparison methodology was "prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology." The Appellate Body did not address the other methodologies provided for in Article 2.4.2, namely .... "the transaction-to-transaction methodology" or .... "the weighted-average-to-individual methodology." *See id.* at paragraph 63 and 104-105.

## **Implementation**

In light of the Appellate Body's findings and recommendations, we have preliminarily determined to apply the transaction-to-transaction methodology in this Section 129 Determination. Therefore, the Department is implementing the recommendations and rulings of the DSB as follows:

To determine the dumping margin for each respondent, we matched each individual transaction in the U.S. sales database with an individual transaction in the home market database. In seeking to determine which specific home-market transaction would be the most suitable match for a given U.S. transaction, we began our analysis with the model-match characteristics used in our *Final Determination*. Consistent with our *Final Determination*, we did not match across product type, species, or grade group. Because lumber prices were extremely volatile and the market in a constant state of flux during the period of investigation (POI), we first attempted to find an identical match at the same level of trade on the same day. If no identical match was found, we looked for an identical home-market sale the day before the U.S.

sale, then the day after the U.S. sale, and so forth, up to seven days before or after the U.S. sale. If no identical sale was found at the same level or trade, we looked for an identical match at a different level of trade. We then began to look for the most similar sale, based on product characteristics and level of trade, in the same manner. Consistent with our standard methodology, when sales were equally similar based on product characteristics, we identified sales with the smallest difference in the variable cost of manufacturing as being the most similar. We did not match sales whose difference in variable cost exceeded twenty percent of the total cost of manufacturing of the U.S. sale. We limited the window to sales within a two-week time frame because we are looking for a specific sale that represents the best possible match. Given the high level of price volatility, we felt that a longer window period would result in U.S. sales being matched to home market sales made under different market conditions. We note in cases where price volatility is not as important a consideration, it may be more appropriate to use another period, such as the 90/60- day window period used in administrative reviews.

Within these parameters, we found a significant number of instances in which more than one home market sale qualified as an equally appropriate match. In order to identify the most appropriate match within such groups, we looked for the sale that was the most similar in quantity. Section 773(a)(6)(C)(i) of the Act contemplates that the sale quantity may have an effect on price. While the parties did not claim a quantity adjustment in this case, to the extent that the quantity of merchandise sold may affect the price of an individual transaction, we have taken that factor into account by using it as our first “tie-breaker.”

For all companies, if there was still more than one equally appropriate match, we took customer categories, as reported by the individual respondents, into account. In order to do so, we had to give the customer categories a numerical ranking, to reflect which categories would be considered the most similar.

Wherever possible, we attempted to be consistent between companies. For example, we considered wholesalers more comparable to distributors than to retailers. Where there were still multiple equally comparable transactions, we looked for the transaction with the most comparable channel of distribution.

When there remained multiple equally comparable transactions, we attempted to distinguish the single most appropriate match based on total movement expenses. Movement is the most significant expense related to the sale of softwood lumber and the amount of movement expenses can be considered indicative of the distance between the customer and the mill, and of the logistical coordination necessary to comply with the delivery terms of the sale. One company, Slocan, reported commissions. Accordingly, for this company, as a “tie-breaker,” we also looked at whether or not a commission was paid. We did not consider the total amount of the commission because the commission was price dependent: considering the amount of the commission would result in a match to the sale with the most similar price, rather than one made under the most similar conditions.

The final criterion we used to distinguish among equally comparable transactions was the number of days between payment and shipment. We used the number of days that payment was outstanding rather than the code for terms of sale, because it more accurately reflects exactly when the customer paid. We did not use indirect selling expenses as a tie-breaker because such expenses are strictly price-dependent and, just as in the case of commissions, relying on these expenses to define the most similar sale would result in selecting as the match, the sale with the closest price, rather than the sale made under the most similar conditions. After considering these criteria, a small number of U.S. sales still had more than one equally comparable home market match. In these cases, we programmed the computer to select the first observation on the short list of equally comparable sales.

We believe that there are particular benefits from this analysis which do not exist in the context of the weighted-average-to-weighted-average comparisons. It is beyond question that the prices for lumber during the POI in both the United States and Canadian markets were volatile. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber from Canada*, 67 FR15539 (April 2, 2002), and accompanying Issues and Decision Memorandum at Comment 4; *see also* Memorandum from Constance Handley, Program Manger to the File, re: Price Volatility, dated January 28, 2004. To the extent that the sales volume of a particular product varies over time and between the markets, the weighed-average price of any particular product could be skewed toward a period of low prices in one market and toward a period of high prices in the other market. In such a case, the weighed-average margin calculated for that product would not reflect the dumping, or lack of dumping, that may have occurred on the individual sales incorporated into the average. In the transaction-to-transaction analysis, however, the matching of identical or similar merchandise within a narrow time frame allows us to judge more accurately whether dumping was occurring when sales were made under the same market conditions.

With respect to United States law on this issue, section 777A(d)(1)(A)(i) and (ii) of the Act provides that in antidumping investigations, the Department may calculate a dumping margin using either weighted-average-to-weighted-average comparisons or transaction-to-transaction comparisons, with no stated preference.

Congress, in the SAA, stated that “normally” the Department will measure dumping margins on the basis of weighted-average-to-weighted-average comparisons. *See* SAA at 842. The SAA states that a transaction-to-transaction analysis “would be appropriate in situations where there



are very few sales and the merchandise sold in each market is identical or very similar or is custom made. However, given past experience with this methodology and the difficulty in selecting appropriate comparison transactions, the Administration expects that the Department will use this methodology far less frequently than the average-to-average methodology.” *Id.* at 842-43.

Section 19 CFR 351.414(c) of the Department’s regulations, adopted shortly after the URAA came into force, adopted the SAA’s preference for weighted-average-to-weighted-average comparisons in investigations, explaining that the Department will only use the transaction-to-transaction means of comparison “in unusual situations.” The language of the regulation directly tracks the language of the SAA, and the Department explained in the Preamble to its Final Regulations that this provision was implemented to reflect the language of the SAA. *See Preamble, Antidumping and Countervailing Duty Final Rule*, 62 Fed. Reg. 27295, 27373 - 7374 (May 19, 1997) (the Preamble). The Department further explained in the Preamble that the reason for this preference was directly tied to difficulties the agency had in the past with regard to the transaction-to-transaction methodology and concerns about the difficulty of guaranteeing that “merchandise in both markets” would be “identical or very similar” in order for such a comparison to work appropriately. *Id.* at 27374.

The language of the SAA and the regulations does not prohibit the application of the transaction-to-transaction analysis in this case. First, there are no statutory or regulatory hierarchical criteria which govern the selection of comparison methodology. The preferences expressed in the SAA and regulations merely indicate that in “normal” cases, weighted-average comparisons will be applied. However, among other things, the volatility of prices of subject merchandise and of the product sold in Canada during the POI distinguishes this case from the norm.

Second, the SAA was drafted and implemented in 1994, and the regulations soon followed in 1997. Both of these sources explain that the preference for a weighted-average methodology was based upon past experiences and an expressed difficulty in selecting appropriate comparison transactions. The Department's computer resources have improved greatly in the last few years, and many resource and programming difficulties the Department faced in 1994, and even in 1997, for conducting transaction-to-transaction matching on large databases no longer exist.

Third, when the URAA was negotiated, the Department did not apply an offset for non-dumped sales in antidumping investigations. Consequently, when Congress expressed a preference for weighted-average comparisons and when the Department adopted its regulations, they did so in the context of the Department's long-standing practice of not applying such an offset when making such comparisons. Because the Department is precluded in this instance from applying its non-offset practice after making weighted-average-to-weighted-average comparisons, it is not clear that the stated preferences at the time of the SAA and regulations should continue to apply.

Accordingly, for all of these reasons, we have preliminarily calculated dumping margins using the transaction-to-transaction methodology. By applying the transaction-to-transaction analysis in this case, we are not intending to implement a practice that applies to all antidumping investigations. As discussed above, the use of this methodology is premised on the combination of facts and circumstances that have led to and support this determination. Moreover, because the Appellate Body's Report requires the offset for non-dumped sales only for a weighted-average-to-weighted-average comparison, we have not applied the offset for non-dumped sales in our transaction-to-transaction comparison.

Section 129 Determination Margins

As a result of the changes to the calculations, we have determined that the following antidumping margins exist:

<u>Manufacturer/Exporter</u>	<u>Weighted-Average Margin</u>
Abitibi-Consolidated Inc. (and its affiliates Produits Forestiers Petit Paris Inc., Produits Forestiers La Tuque Inc., Scieries Saguenay Ltee., Societe En Commandite Scierie Opticwan)	13.02
Canfor Corporation (and its affiliates Lakeland Mills Ltd., The Pas Lumber Company Ltd., Howe Sound Pulp and Paper Limited Partnership)	9.16
Slocan Forest Products Ltd.	12.75
Tembec Inc. (and its affiliates Marks Lumber Ltd., Excel Forest Products)	12.73
West Fraser Timber Co. Ltd. (and its affiliates West Fraser Forest Products Inc., Seehta Forest Products Ltd.)	3.98
Weyerhaeuser Company (and its affiliates Monterra Lumber Mills Ltd., Weyerhaeuser Saskatchewan Ltd.)	16.10
All Others	11.38

Interested Party Comments

Interested parties may submit case briefs and/or written comments no later than February 14, 2005.

Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may

be filed no later than February 22, 2005. Parties who submit arguments are requested to submit with the argument (1) a statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities.

Further, the parties submitting written comments should provide the Department with an additional copy of the public version of any such comments on diskette.

#### Continuation of the Suspension of Liquidation

In accordance with sections 129(b)(4) and 129(c)(1)(B) of the URAA, if the U.S. Trade Representative, after consulting with the Department and Congress, directs the Department to implement, in whole or in part, this determination, we will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all imports of softwood lumber from Canada that are entered, or withdrawn from warehouse, for consumption on or after the date on which the U.S. Trade Representative so directs us. CBP shall continue to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The suspension of liquidation instructions will remain in effect until further notice.

Because we completed an administrative review of all of the individual companies subsequent to the issuance of the order in this proceeding, we will not issue a new cash deposit rate for them, pursuant to this Section 129 Determination. The Section 129 Determination "all others" rate will be the new cash deposit rate for all exporters of subject merchandise which did not participate in the first administrative review, with respect to entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the U.S. Trade Representative directs the Department to implement this determination. These instructions will remain in effect until further notice.

This Section 129 Determination is issued and published in accordance with section 129(c)(2)(A) of the URAA.

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Barbara E. Tillman  
Acting Assistant Secretary  
for Import Administration

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(Date)