

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 Panel's July 17, 2003, decision in the above-referenced case, the Department of Commerce (the Department) provides a remand determination with regard to five general issues and seven company-specific issues challenged in the underlying investigation.¹ Specifically, in addressing the five general issues, the Department has: 1) further explained the application of its constructed value (CV) profit methodology; 2) re-allocated joint production costs using a value-based cost allocation methodology taking into consideration dimensional differences in the subject merchandise; 3) made price adjustments for dimensional differences in merchandise; 4) further explained its determination that finger-jointed flangestock (FJF) is within the class or kind of merchandise covered by the order; and, 5) further explained its determination that square-ended bed-frame components (SEBF) are within the same class or kind of merchandise covered by the order.

The Department has also addressed the seven company-specific issues as follows: 1) excluded Abitibi-Consolidated, Inc.'s (Abitibi's) affiliate, Scieries Saguenay Ltee., from the findings pertaining to Abitibi; 2) excluded stock option redemption costs from Abitibi's cost of production (COP) and CV; 3) treated Abitibi's trim blocks as subject merchandise; 4) further explained its decision that Tembec,

¹ On September 2, 2003, the Department issued a draft remand determination (Draft Remand) to the parties and allowed comments until September 15, 2003.

Inc.'s (Tembec's) divisional by-product wood chip prices reflect a reasonable surrogate for the actual cost of the wood chips; 5) further explained its use of Tembec's company-wide income statement to determine Tembec's general and administrative (G&A) expense rate; 6) further explained its rejection of Tembec's ministerial error allegation; and, 7) further considered West Fraser Mills Ltd.'s (West Fraser's) de minimis argument. Each of these issues is discussed in detail below. After addressing each of the Panel's concerns, the Department has recalculated all company-specific antidumping duty margins for certain softwood lumber products from Canada, as well as the "All Others" rate.²

ANALYSIS AND REDETERMINATION

I. General and Scope Issues

A. Calculation of CV Profit

1. Background

In its decision, the Panel made two key findings regarding the Department's calculation of CV profit. First, the Panel concluded that the Department provided a reasonable explanation as to why differing definitions of foreign like product (FLP) were warranted.³ Specifically, the Panel stated that the

² In its comments to the Department's draft remand redetermination, Tembec raised a new ministerial error allegation. The Department agrees that an error existed and has recalculated Tembec's credit value on all U.S.-dollar denominated sales.

³ In making price-based comparisons, the Department identified a number of FLPs. When CV was used, the Department calculated profit by using the respondents' aggregate home market sales as the FLP.

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explanation appearing at Comment 6 of the {Issues and Decision Memorandum} IDM in this case is sufficient . . . to rebut the presumption that the term {FLP} must be given an identical definition wherever it appears in the antidumping statute.⁴

Second, the Panel found that, while the rebuttable presumption was sufficiently rebutted, the Department needed to explain why its decision in this case to define “foreign like product” for the purposes of calculating CV profit as each respondent’s aggregate sales of subject merchandise was appropriate and not arbitrary.⁵ The Panel concluded that unlike the Department’s explanation in the case of RHP Bearings Ltd. v. United States, Slip Op. 03-10, p. 11, in which the explanation included a factual description of the Department’s calculations, the Panel noted that the present case was without this type of explanation.⁶ The Panel further stated that

{w}hile the courts have held that Alike product@ can be defined differently in the {normal value} and “CV profit” contexts, the courts have not upheld a blanket rule that the use of a Respondent’s aggregate home market sales for calculating CV profit will be an acceptable method in all cases. While the Final Determination asserts that the use of a model-match comparison in determining CV profit Awould add an additional layer of complexity and uncertainty to antidumping proceedings without generating more accurate results@, Commerce furnishes no explanation for this assertion. Had Congress intended that Commerce exclusively

⁴ Decision of the Panel, Secretariat File No. USA-CDA-2002-1904-02 (Panel Decision) at 41.

⁵ See Panel Decision at 44.

⁶ Id. at 43-44.

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determine CV profit on the basis of a Respondent's total aggregate sales, it would have so provided in the statute.⁷

Thus, the issue remanded to the Department was to explain why, in its CV profit calculation, its definition of FLP as the aggregate of each respondent's home market sales in the ordinary course of trade was reasonable.

In the case before the Panel, the Department calculated company-specific costs on a product-specific basis and compared these to product-specific home market sales prices.⁸ For those products where there were no sales at or above cost to calculate the normal value (NV) and where the Department could not identify sales of similar merchandise to calculate NV, the Department resorted to CV. Ultimately, only [] percent of the respondents' sales were subject to CV comparison, where the application of CV profit is relevant.⁹ To determine CV profit, the Department did three things. First, it calculated, on a company-specific basis, the total revenue and expenses for all home market sales of the FLP made within the ordinary course of trade (i.e., those sales which passed the cost test due to the existence of sales at or above the COP).¹⁰ Second, it calculated the profit percentage based

⁷ Id. at 44.

⁸ See Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 FR 15539 (April 2, 2002) (Public Record No. 1350) (Final Determination) and accompanying Issues and Decision Memorandum (Public Record No. 1304) (Issues and Decision Memo) at Comment 6.

⁹ See memorandum from Salim Bhabhrawala to Constance Handley, regarding NAFTA Panel Remand Results Analysis Memorandum for the All Others Rate at Attachment 2, dated October 14, 2003.

¹⁰ See Issue and Decision Memo at Comment 6.

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on the ratio of total revenue less total expenses divided by total expenses for the FLP. Third, it calculated CV profit by multiplying the company-specific profit percentage by the company's product-specific per-unit COP.¹¹ The Department concluded that by following this methodology, it reasonably reflected the actual experience of each respondent for home market sales of the FLP.

The issue argued by the parties was whether the Department had to apply a uniform definition of the statutorily defined term "foreign like product" consistently throughout the statute, in light of the U.S. Court of Appeals for the Federal Circuit's (CAFC) decision in SKF USA Inc. v. United States, 263 F.3d 1369 (CAFC 2001) (SKF USA Inc.). In SKF USA Inc., the CAFC held that the Department must apply a uniform definition of a statutorily defined term consistently throughout the Act, unless the Department could provide a reasonable explanation as to why inconsistent definitions were warranted.¹² Specifically, the CAFC found that a rebuttable presumption existed that

Congress intended that {FLP} have the same meaning in each of the pertinent sections . . . of the statute, and . . . that Congress intended Commerce, in defining the term, would define it consistently {, and} {w}ithout an explanation sufficient to rebut this presumption, Commerce cannot give {FLP} a different definition.

¹¹ Id.

¹² See 263 F.3d 1369, 1382 (CAFC 2001).

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See SKF USA Inc., 263 F.3d at 1382. Thus, for the Department to apply a differing definition of FLP in its NV price calculation from the definition applied in its CV calculation, the Department must provide a reasonable explanation.

In the Softwood Lumber investigation, in defining the term FLP, for purposes of product comparison, the Department explained that “{p}ursuant to section 771(16) {provision defining FLP} of the Act, all products produced by the respondents that meet the definition of the scope of the investigation . . . fall within the definition of {FLP}.”¹³ In the Final Determination, the Department provided a detailed explanation of its CV profit calculation, including a statement that it continued to define FLP as it had in the Preliminary Determination.¹⁴ In its explanation, the Department stated that it continued to exclude from the calculation those sales made below the COP.¹⁵ Thus, the Department continued to calculate CV and CV profit in the same manner as in the Preliminary Determination by using the aggregate of each respondent’s home market sales made in the ordinary course of trade.¹⁶

On September 3, 2003, pursuant to the Panel’s decision, the Department issued its Draft Remand Results and provided a further explanation of its CV profit calculation. The following analysis summarizes the Department’s rationale in response to the Panel’s decision.

¹³ See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Softwood Lumber Products from Canada, 66 Fed. Reg. 56,062, 56,064 (November 6, 2001) (Preliminary Determination).

¹⁴ See Issues and Decision Memo at Comment 6.

¹⁵ Id.

¹⁶ Id.

2. Analysis

- a. The Department's Use of the Preferred CV Profit Calculation Required Defining the FLP as the Merchandise in the Same General Class or Kind (i.e., the Aggregate of Each Respondent's Home Market Sales)

To calculate CV profit, the Department is required by the Tariff Act of 1930, as amended (the Act), to apply the preferred methodology under 19 U.S.C. § 1677b(e)(2)(A) based upon the actual amounts incurred or realized by a specific exporter or producer for selling, general and administrative (SG&A) expenses and profit related to sales of the FLP made in the ordinary course of trade, where such data are available.¹⁷ While Congress and the Administration envisioned that there might be a situation in which the actual amounts incurred and realized were unavailable, Congress specifically mandated that the Department would use the preferred method first, and only when this was unavailable, resort to the alternative methods.¹⁸

¹⁷ See 19 U.S.C. § 1677b(e)(2)(A) (2002); see also §1677b(e)(2)(B).

¹⁸ The alternative methods in the Act are:

(B) if actual data are not available with respect to the amounts described in subparagraph (A), then

(i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,

(ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in

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The Statement of Administrative Action (SAA) states that the Department will use CV to construct the NV where “home market sales of the {subject} merchandise . . . are either nonexistent, in inadequate numbers, or inappropriate to serve as a benchmark for a fair price, such as where sales are disregarded because they are sold at below-cost prices.”¹⁹ The SAA further states that because CV serves as a “proxy for a sales price, and because a fair sales price would . . . include an element of profit, {CV} must include an amount . . . for profit.”²⁰ Under the preferred methodology, the Department is to use those sales of the FLP that are made in the ordinary course of trade (*i.e.*, sales that pass the cost test).²¹ Therefore, applying the preferred methodology, the Department will attempt to use those FLP sales that are made in the ordinary course of trade, which consists of sales at prices at

clause (i) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or

(iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise;

See 19 U.S.C. § 1677b(e)(B)(i)-(iii) (2002).

¹⁹ See SAA URAA, H. Doc. 316, Vol. I, 103d Cong. (1994) (SAA) at 839.

²⁰ See SAA at 839.

²¹ See 19 U.S.C. § 1677b(e)(2)(A) (2002), see also 19 U.S.C. § 1677(15), FAG et al. v. United States et al., 332 F.3d 1370, 74 (CAFC 2003), and SAA at 839-40 (“in most cases the Department would use profitable sales as the basis for calculating profits for purposes of {CV}”).

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or above cost, though it may include some below-cost sales. When the Department cannot use the preferred methodology, it will resort to one of the other alternative methods.²²

For the Department to determine the CV profit under the preferred methodology, it must first define the FLP. This term is defined as

merchandise in the first of the following categories in respect of which a determination for the purposes of subtitle B of this title can be satisfactorily made:

(A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

(B) Merchandise

(i) produced in the same country and by the same person as the merchandise which is the subject of the investigation

(ii) like that merchandise in component material or materials and in the purposes for which used, and

(iii) approximately equal in commercial value to that merchandise.

(C) Merchandise

(i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,

(ii) like that merchandise in the purposes for which used, and

(iii) which the administering authority determines may reasonably be compared with that merchandise.²³

²² With respect to the other methodologies, neither Congress, nor the SAA establish a hierarchy as to which alternative method to apply. See SAA at 840. While there is no preference for the other alternatives, any decision to use an alternative will be made on a case-by-case basis, and will depend, to an extent, on available data, and if the third methodology is used, (2)(B)(iii), the Department must explain its actions to the parties. See SAA at 840.

²³ See 19 U.S.C. § 1677(16) (2002).

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In our view, the question in the preferred CV profit context is whether the same general class or kind of merchandise (e.g., softwood lumber) sold in the comparison market by a producer or exporter is reasonably comparable to the subject merchandise sold by the same producer or exporter to the United States. Section 771(25) of the Act defines subject merchandise as “the class or kind of merchandise that is within the scope of an investigation, {or} a review” We interpret section 771(16)(C) of the definition of foreign like product, *i.e.*, the same “general class or kind of merchandise,” to be that category of merchandise that corresponds to the subject merchandise.

To conduct the CV calculation using the preferred methodology, the Department was required to make two inquiries: first, define what merchandise constituted the FLP and, second, identify those FLP sales that were made in the ordinary course of trade.²⁴ Accepting the Department’s explanation that it may apply different definitions of the FLP in the context of this case, combined with the Department’s requirement to use the preferred methodology, the Department looked first to see if its practice of defining the FLP as the aggregate home-market sales for the purposes of calculating CV profit was appropriate in this case. The Department determined that it was for the reasons discussed below.

2. Using The Aggregate Data Did Not Distort the CV Profit Calculation

In its decision, the Panel

expressed concern that the use of such an aggregate may frustrate the antidumping law’s goals of a fair “apples-to-apples” comparison in the

²⁴ See 19 U.S.C. § 1677b(e)(2)(A) (2002).

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case of softwood lumber products, since certain products are generally sold at low or no profit, and the application of an aggregate CV profit calculation might artificially create or inflate LTFV margins.

Panel Decision at 44 (footnote omitted). The Panel went on to state that

Indeed, by defining the “like product” for CV profit purposes as each Respondent’s total sales of subject merchandise, Commerce creates the possibility that two producers of identical products might have their CV profit calculated on the basis of vastly different transactions. Such Respondents might be engaged in sales of different “product mixes”, and their above-cost sales may be of products which have little relation to each other, or to the product for which an LTFV margin is being calculated.

Id. at n. 37.

The Department has reexamined the factual record of this proceeding and concludes that the use of aggregate home market data does not distort the CV profit calculation nor the overall antidumping analysis.

In the Final Determination, the Department calculated CV profit by using the profit rate calculated from each respondent’s aggregate home-market sales of subject merchandise (i.e., the same general class or kind of merchandise) sold in the ordinary course of trade. Unlike in the Preliminary Determination, where a strictly volume-based cost methodology was used, for the Final Determination the Department calculated a value-based cost across grades. As part of this remand redetermination, the Department has now extended the value-based cost methodology to include not only grade, but also dimension. The volume-based cost methodology used in the Preliminary Determination resulted in large profits for high-value products, and large losses for low-value products. By assigning costs based

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the revenues generated by each unique combination of species-grade-thickness-width and length, the Department has, in effect, redistributed the profit generated by the varying grades and dimensions of lumber. Because the cost for each product is allocated based on its market value, the lower-grade and lower-priced products are assigned lower costs, and therefore potentially have profit rates comparable to the higher-grade and higher-priced products. We note that the CV profit rate is applied to each product's cost and that low-value, low-cost products are, therefore, assigned a lower profit in absolute terms.

A similar argument was offered by the Canadian complainants. They suggest that the lumber industry may require special treatment since certain products are generally sold at low or no profit and by excluding these product sales from the calculation, and assigning these “profitless” sales an artificial profit, the dumping margin would be distorted. This claim is not warranted.

Following its normal methodology, the Department included all of the sales for which the net revenue exceeded the COP in the calculation of CV profit, including sales which made little or no profit. Only the sales which generated losses were not considered in the calculation. (Inclusion of substantial quantities of sales generating a loss in the CV profit calculation would be contrary to the preferred methodology for calculating CV profit.) The Department would not be generating a profit based on the actual profit amounts realized in connection with the production and sale of the FLP in the ordinary course of trade.³⁷

³⁷ See SAA at 840.

c. The Department Was Not Required to Use One of the Alternative Methodologies

With respect to the argument that the Department should have used one of the alternative methodologies, the Department concludes that this was not required. The respondents in the investigation argued that, by applying a uniform definition of FLP, the Department would be required to use one of the alternative CV methodologies, and that by using one of these other methodologies, the Department could include in its calculations those sales made below cost.³⁸ We disagree for two reasons. First, the Department is required by law to use the preferred methodology and is only to use one of the alternatives when actual data pertaining to the production and sale of the FLP are unavailable. In this case, the Department had information derived from products of the same general class or kind as the subject merchandise and was able to use the preferred methodology to derive the actual amounts for profit, thereby negating the need to use one of the alternative methods. We did not find it necessary to define the FLP more narrowly for purposes of this case because, as explained above, the use of a value-based cost methodology meant that profit margins generated by the softwood lumber sold in Canada in the ordinary course of trade could be reasonably compared to the U.S. sales for which no identical or similar match was found. Second, the Department has provided an adequate explanation that the term FLP is designed to accommodate different applications, depending on the language of the provision in which the term appears and the facts in the case, such as the availability of data. Furthermore, the Department notes that by applying the definition of FLP consistent with its

³⁸ See 19 U.S.C. § 1677b(e)(2)(B)(i)-(iii) (2002).

context, the Department can identify those FLP sales in the ordinary course of trade used to generate the CV profit.

3. Conclusion

Based on the facts of this investigation, for the CV profit calculation the Department applied subsection (c) of the definition of FLP, which was based upon the aggregate of each respondent's home market sales made in the ordinary course of trade during the period of investigation (POI). The Department properly applied the law by using the preferred methodology to calculate CV profit, specifically because actual data concerning profits realized in connection with the production and sale of the FLP made in the ordinary course of trade was available for use in the Department's calculation. The Department therefore properly and reasonably concluded that the preferred methodology should be applied in this case.

B. Value-Based Cost Allocation Methodology

This section responds to the Panel's instruction that the Department re-allocate joint production costs using a value-based cost allocation methodology which takes into account dimensional differences between different jointly-produced products.

Although the Department continues to believe that the random nature of the movement in relative prices between the various dimensions precludes dimension-specific prices from being a sound basis for a cost allocation, we have complied with the Panel's instructions. To calculate a value-based cost across dimension, we employed the same methodology used to calculate a value-based cost across grade in the investigation. We note that this methodology was not challenged by any of the

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parties. We revised each company's wood and sawmill costs by re-allocating its total reported wood and sawmill costs among its reported control numbers (CONNUMs). First, we determined the net realizable value (NRV) of all sales reported for each CONNUM, by subtracting costs of production, other than wood and sawmill costs (i.e., costs downstream from the split-off point), from the net home market sale prices.

Second, we weight-averaged the resulting positive NRVs by species, grade, thickness, width and length across CONNUMs using sales quantities.³⁹ By doing this, the other CONNUM distinctions were lost and we obtained an NRV by species, grade, thickness, width and length.

Third, we extended the species-grade-thickness-width-length specific NRVs by the corresponding production quantities, to calculate a total for each species. Then we determined the percentage of the relative value of each species-grade-thickness-width-length NRV to the total value for the species.

Fourth, we extended the wood cost, sawmill cost, and by-product revenue fields used in the Final Determination by production quantity to derive the totals by species. We allocated the totals by species based on the relative value percentages of each species-grade-thickness-width-length specific per-unit costs. Variable and fixed wood and sawmill costs were calculated separately.⁴⁰

This methodology was the most reasonable basis for satisfying the Panel's instructions given the limited and varying evidence provided by the respondents. We also note that the result of this re-

³⁹ For those NRVs with a negative value, these were set to zero for purposes of this calculation.

⁴⁰ See e.g., NAFTA Panel Remand Calculation Memorandum for Abitibi, dated August 27, 2003.

allocation has been to increase the margins of certain respondents while decreasing others. We believe this confirms our conclusion during the underlying investigation that the record evidence did not reveal a pattern of consistent price differences that was attributable to the minor dimensional differences that were compared.

C. Difference in Merchandise Adjustment

In light of our application of a value-based cost allocation methodology that accounts for dimensional differences, as described above, we now have a basis upon which to calculate cost-based difference in merchandise (DIFMER) adjustments and have done so.⁴¹

D. FJF

The NAFTA Panel remanded the case to the Department with instructions that the agency provide a complete explanation of its decision that FJF is part of the same single class or kind of merchandise that covers other products under the scope of the investigation. The Panel stated that, while the Department “need not provide an explicit explanation for every point of analysis,” it “must leave a sufficient decisional map from which a reviewing court may discern the path of reasoning that led to the decision.” The Panel asserts that the Department has not explained why, in this case, the identified factors were deemed not to constitute evidence that FJF was a separate class or kind of merchandise, or how the facts on the record support this determination. It instructs the Department to explain how it applied each of the Diversified Products criteria to FJF, the determinations reached with respect to each factor, and how it weighed these factors in reaching its determination.

⁴¹ See the NAFTA Panel Remand Calculation Memoranda for each of the six respondents.

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In accordance with the Panel's instructions, we provide the following supplemental Diversified Products analysis for FJF.

1. Physical Characteristics

The respondents have essentially provided five arguments pertaining to the "unique" nature of FJF, based on physical characteristics. One respondent has argued that its special finger-jointing process for FJF, which includes deeper finger-joint cutting and special gluing and curing procedures, makes FJF unique.⁴² A second argument provided by the respondents was that FJF is unique among softwood lumber products due to the special quality requirements that the wood used be straighter, denser, stronger, more stable and more dry than would be expected in other softwood lumber products subject to the order.⁴³ A third argument pertains to the length of FJF; the respondents argue that because it is so long, it is clearly a separate class or kind of merchandise. A fourth argument highlights the machine stress ratings of FJF and asserts that because the machine stress-ratings demonstrate that FJF has been specifically manufactured to be light but strong, it should be treated as a different class or kind of merchandise. Finally, and more generally, in an argument that overlaps with their finger-jointing and machine stress rating positions, the respondents claim that because FJF is manufactured (finger-jointed) to meet specific machine stress rating standards, it is an "engineered wood product." The

⁴² See Letter from Abitibi to the Department, dated May 21, 2001, (Public Record No. 205) (Abitibi May 21, 2001, Letter) at 7-9.

⁴³ See Tembec's Case Brief, dated March 12, 2002, (Public Record No. 1265) (Tembec Case Brief) at 47.

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argument that FJF is an “engineered” product is a central element of Tembec’s position that FJF be treated as a separate class or kind of merchandise.⁴⁴

The petitioner argues that many softwood lumber products are manufactured using a special finger-jointing process and FJF does not differ sufficiently from other finger-jointed softwood lumber products to set it apart. The petitioner insists that length alone is not an adequate reason to segregate and treat a lumber product as a separate class or kind within the scope. The petitioner also argues that the scope of the order covers many machine stress-rated (MSR) lumber products with similar physical characteristics. The petitioner disputes Tembec’s characterization of FJF as an “engineered” wood product,⁴⁵ contending that it is the I-joist beam, and not its component FJF, that represents an actual engineered product.

Analysis:

In deciding whether physical differences in merchandise rise to the level of a class or kind distinction, the Department looks for a clear dividing line between product groups, not merely the presence or absence of physical differences. See Final Affirmative Less Than Fair Value Determination: Sulfur Dyes, Including Vat Sulfur Dyes, from the U.K., 58 FR 3253 (January 8, 1993). We have found that the “engineered” nature, particular strength ratings, lighter weight and different dimensions of FJF do have commercial implications, but these characteristics do not make FJF

⁴⁴ Id. at 53.

⁴⁵ See The petitioner’s Rebuttal Brief, dated March 18, 2002, (Public Record No. 1288) at 12.

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sufficiently unique among all other softwood lumber products so as to create a separate class or kind of merchandise.

a. What is FJF?

FJF is finger-jointed lumber manufactured to be a component of I-joists, which are further assembled non-scope products used primarily as flooring support. Flange stock may also be cut from single solid pieces of dimension lumber, provided the solid pieces meet the particular length and strength requirement. However, FJF is produced from two or more pieces of solid lumber finger-jointed together. The FJF producer resaws a lumber board to remove flaws, such as knots, that might compromise the structural integrity of the finished FJF, and then finger-joints the resawn pieces together in such a way that they meet the specific strength and dimension requirements for their intended use as a component of an I-joist.

I-joists are normally produced by separate, specialized, remanufacturers. The I-joist manufacturers, after purchasing FJF from the lumber mill, will cut notches in the FJF and glue boards (generally a width of oriented strand board) perpendicular to the FJF to create the I-joist. b. The

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In analyzing whether or not FJF should be considered a separate class or kind on the basis of its physical characteristics, it is critical to understand the process of finger-jointing. To finger-joint any

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two pieces of lumber, whether the purpose is to produce FJF or finger-jointed lumber for some other application, a shaper machine is used to cut a grooved profile, or “fingers,” on the ends of the pieces of lumber to be joined. The grooved profile ends of the respective pieces of lumber are then joined together with glue under pressure and dried (i.e., “cured”). The strength of the finger-jointed product will vary depending on the type and quality of the softwood used, the depth of the profile (fingers) cut, the type of glue applied and the way in which the freshly finger-jointed product is cured. The finger-jointing procedures that a lumber mill uses for a particular product are dictated by the strength requirements for the product’s intended use. Abitibi made this distinction when it compared its production of FJF to its production of finger-jointed studs.⁴⁶ However, while there is variation in the strength of the finger-jointing, we note that all finger-jointed lumber has common methods of further manufacturing in the form of profile cutting, gluing, and curing.

c. The Manufacture and Resulting Physical Characteristics of FJF are Not Unique

The respondents have argued that in manufacturing a longer lumber product from two or more shorter pieces of lumber, and ensuring that this manufactured product meets the precise customer specifications, FJF producers are creating “engineered wood products” distinct from what the respondents identify generally as “dimension lumber.” However, even if one accepts the argument that FJF is an engineered product, this does not make FJF unique among other softwood lumber products, even based on the respondents’ criteria.

⁴⁶ See Abitibi May 21, 2001, Letter at 7-9.

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First, with respect to the “finger-jointed” aspect of FJF, the scope of the order encompasses a variety of finger-jointed products, all of which share similar manufacturing processes with FJF. Finger-jointed MSR products, other than FJF, are especially comparable, but the Department found that the physical characteristics of FJF provide no basis for distinguishing FJF as a separate class or kind of merchandise from any of the other finger-jointed products, including finger-jointed studs.⁴⁷ In turn, the pool of finger-jointed products in the scope shares common physical characteristics with solid dimension lumber products, and no clear dividing lines can be drawn on the basis of the physical characteristics of finger-jointed versus non-finger-jointed products.

Second, finger-jointed lumber products are not the only scope products that are further worked (engineered) beyond being sawn lengthwise from the log. The scope specifies inclusion of various coniferous wood products that may be “tongued, grooved, rabbeted, chamfered, V-jointed, beaded, molded, rounded or the like.”⁴⁸

Third, although FJF products are often longer than other lumber products, length alone is not a reason to segregate a product for different class or kind treatment.

⁴⁷ For descriptions of various finger-jointed products manufactured by several respondents in the investigation, see e.g., Canfor Section A Response (June 22, 2001) (Canfor Section A) at Ex. A-19.; West Fraser Section A Response (June 22, 2001) (West Fraser Section A) at Ex. A-24; Tembec Section A Response (June 22, 2001) (Tembec Section A) at Ex. A-25; and Abitibi Section A Response (June 22, 2001) (Abitibi Section A) at Ex A-23. For additional description of finger-jointing process, see also Domtar Letter (from counsel Covington & Burling) (August 24, 2001) (Domtar Letter). See also www.potlatchcorp.com (Potlatch Corp. Website) regarding finger-jointed studs; www.lpcorp.com (Louisiana-Pacific Corp. Website) regarding finger-jointed studs; “Special Report - Stud Lumber Market,” *Wood Markets Quarterly*, 3rd Quarter ‘98 at 10; and www.jdirving.com (J.D. Irving Limited Website) regarding J.D. Irving’s White Pine and Spruce Pine Fur (SPF) finger-jointed lumber.

⁴⁸ Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products from Canada, 67 FR 36067 (May 22, 2002) (Public Record No. 1406) (Amended Final Determination) at 36068-36069.

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Fourth, the relatively higher wood quality of finished FJF, resulting from a stringent quality control process, is not unique to FJF, but is shared by other high-end lumber specialty products used for both structural and appearance purposes.

Fifth, FJF is just one example of MSR lumber. The scope of the order covers MSR lumber products in general. The machine stress rating test simply provides a precise measurement of the structural strength of a lumber product. Since other lumber products manufactured for particular load-bearing functions must also meet specific machine stress rating benchmarks, FJF's particular machine stress rating grade confers no unique status.

d. Other Finger-Jointed Products Are Subject to the Order.

The respondents, in claiming that FJF is a unique "engineered wood product," highlight the fact that FJF is finger-jointed. The scope is explicit in specifying that the general coniferous wood products described are covered, whether or not planed, sanded or finger-jointed. This inclusion of finger-jointing with planing and sanding reflects the Department's understanding of the commonplace nature of this operation in the lumber industry. The following is only a sample of the many lumber products that are finger-jointed to manufacture specific dimensions for which solid lumber pieces may not be available in a given mill or timber market:

- Finger-jointed lumber specifically produced for structural applications requiring higher modular elasticity (e.g., truss components and rafters) or for other applications where a

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higher elastic strength is required. FJF falls into this category.⁴⁹ These pieces may or may not be MSR;

- Finger-jointed 2X4 studs, subject only to visual inspection, which are used for framing houses in exactly the same manner as their solid counterparts;⁵⁰
- Finger-jointed garage door cores, recreational vehicle product stock and refrigerator stock sold as components;⁵¹
- Finger-jointed shop grade and better lumber products made by dry kilning, sorting, finger-jointing, molding smaller pieces of more expensive old-growth Sitka Spruce, Douglas Fir, Hemlock and Western red cedar, used chiefly as appearance lumber;⁵²
- Finger-jointed fascia;⁵³
- Furring Strips.⁵⁴

⁴⁹ See e.g., American Forest and Paper Association (American Wood Council) (AWC) brochure, Engineered and Traditional Wood Products at 3 on the AWC website (www.awc.org).

⁵⁰ See Canfor Response to Section A of the Questionnaire, dated June 22, 2001, (Canfor Section A Response) (Public Record No. 329) at Exhibit A-19. For general definition, see WWPA Manual at 7-8. See also www.potlatchcorp.com (Potlatch Corp. Website) regarding finger-jointed studs; www.lpcorp.com (Louisiana-Pacific Corp. Website) regarding finger-jointed studs; “Special Report - Stud Lumber Market, “ Wood Markets Quarterly, 3rd Quarter ‘98 at 10; and www.jdirving.com (J.D. Irving Limited Website) regarding J.D. Irving’s White Pine and SPF finger-jointed lumber.

⁵¹ See Issues and Decision Memo at Comment 57.

⁵² See Letter from Fred Tebb & Sons, Inc. to the Department, dated May 31, 2001 (Public Record No. 221) at Exhibit A.

⁵³ See e.g., Canfor Section A Response at Exhibit A-19. See also www.Canfor.com (Canfor Website) which advertises “finger-jointed long lengths” as one of the features on the fascia it produces. See also www.normanlbr.co (Norman Lumber Website).

⁵⁴ See e.g., Canfor Section A Response at Exhibit A-19.

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All of the above products were considered part of a single class or kind of merchandise comprising the scope of the investigation. Finger-jointed structural lumber products, particularly those which are used as truss components and rafters, are comparable to FJF in terms of their manufacture and resulting stress ratings. Because these other finger-jointed high-elasticity products must meet specific load-bearing requirements, as is the case with FJF, they are subject to similar manufacturing processes and stress-testing.

While Abitibi can point to a contrast between the white glue used to finger-joint its studs and the stronger resin glue used to finger-joint its FJF, no such contrast exists when we compare FJF to other finger-jointed structural lumber produced for applications requiring higher modular elasticity. The question thus arises whether the Department can distinguish FJF as a separate class or kind of merchandise based on its physical characteristics, while disregarding the comparable physical characteristics of other high elasticity products, not to mention those of the other finger-jointed lumber products. Even if the Department was to group the other structural lumber products with the FJF (which is not what the respondents are requesting), finding a clear dividing line between the finger-jointed structural products and other lumber would be problematic. In their elastic strength ratings, finger-jointed structural lumber, be it FJF or truss components (which may also be MSR), share common ground with solid (sawn as a single piece) MSR lumber. The length of solid MSR lumber is limited by log size, but the modular elasticity that the two products have in common signifies that there is a direct intersection between solid, more minimally “engineered” dimension lumber products and FJF in terms of physical characteristics.

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Other finger-jointed and non-finger-jointed products overlap in terms of physical characteristics. We note that Abitibi recognized that its finger-jointed studs “compete against, and are interchangeable in most uses with regular studs.”⁵⁵ In recognizing this, Abitibi acknowledged an intersection between standard solid framing lumber and further manufactured (i.e., finger-jointed) lumber products, which underlies the Department’s logic of explicitly including finger-jointed products in a single class or kind with solid dimension lumber. Abitibi argued that specific factors regarding its finger-jointing of FJF, including a deeper-cut profile, stronger resin glue, and a radio frequency curing process, put FJF in its own class or kind, separate from other lumber including the finger-jointed studs. The Department disagrees with Abitibi’s distinction. Just as the structural strength of solid dimension lumber (sawn as one piece from the log) can vary depending on the species and condition of the log from which the different pieces are sawn, the relative strength of finger-jointed lumber products will vary depending on the quality of the input pieces and the finger-jointing procedures used to join them. The Department recognizes, based on the respective normal applications and normal forms of the two products, that FJF would typically have a higher modular elasticity than finger-jointed studs and that different finger-jointing procedures could account for this variation. However, the existence of this variation by itself does not support separate class or kind treatment on the basis of physical characteristics. Similar arguments for separate class or kind treatment might be made for any of the other finger-jointed products, and this fact quickly blurs any line we attempt to draw. We find that the multiplicity of other finger-jointed lumber products in the scope makes it impossible to establish a clear

⁵⁵ See Abitibi May 21, 2001, Letter at 8.

dividing line for FJF by itself. Furthermore, the recognition that, in terms of physical characteristics, finger-jointed products in general overlap with solid dimension lumber products, argues against setting aside even a broader grouping of finger-jointed products.

e. Scope Products Other than Finger-Jointed Lumber are Further Manufactured Per Customer Specifications

The host of finger-jointed products which is directly comparable to FJF in terms of physical characteristics was a specific consideration behind the Department's decision to treat FJF as part of a single class or kind of merchandise encompassing all softwood lumber products in the scope.

However, at a more general level, the Department also considered the fact that, besides the finger-jointed products, the scope covers an abundance of other softwood lumber products that are manufactured per customers' specifications beyond the basic stages of being sawn lengthwise, planed and sanded. The scope of the investigation (and now, of the order) explicitly includes coniferous wood siding, other coniferous wood and coniferous wood flooring that is "continuously shaped (tongued, grooved, rabbeted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed."

While we recognize that, in general, these shaping processes are not as complicated as finger-jointing lumber for high-stress applications in construction, the shaping nevertheless is based on specific customer specifications, provides added value and requires special machinery in the mill. Log cabin siding is an example of one widely sold lumber product with special shaping requirements (rounding). Even more commonplace are tongue and groove flooring, decking and siding. While few would dispute

that these items fall in the same class or kind of merchandise as basic sawn dimension lumber, they are in fact further engineered when their edges are reshaped to meet the requirements of their intended end use. These shaped lumber products provide a more general argument of why it is difficult to draw clear dividing lines around FJF on the basis that it is “engineered.” Instead, the Department maintains that there is a spectrum of lumber products, all of which was originally cut from softwood logs, that is then subject to different degrees of further processing before it comes to market.

f. FJF Is Not Always Produced in 66-foot sections, and Length Alone Does Not Warrant Separate Class or Kind Treatment

A major element of Tembec’s position that physical characteristics set FJF apart relates to the unusual length of certain FJF it produces. Tembec has highlighted its production of 66-foot flange and asserts that, in contrast to the longer FJF, Canadian primary mills can produce solid lumber pieces no longer than 24 feet.⁵⁶ While Tembec claims that its most common FJF lengths range from 48 to 52 feet,⁵⁷ it concedes the existence of shorter FJF production, reporting that it produces FJF as short as 16 feet.⁵⁸ Abitibi produces FJF up to 48 feet, but does not indicate the length of its typical product.⁵⁹

⁵⁶ See Letter from Tembec to the Department, dated May 21, 2001, (Tembec May 21, 2001, Letter) (Public Record No. 201) at 8.

⁵⁷ See Tembec Case Brief at 48.

⁵⁸ See Tembec May 21, 2001, Letter at 6. See also Tembec Case Brief at 48.

⁵⁹ See Abitibi Response to Section A of the Questionnaire, dated June 22, 2001, (Public Record No. 330) at Exhibit A-23.

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Canfor provides an example of an alternative range of FJF lengths in its product brochure where it advertises FJF ranging from 8 to 32 feet in length.⁶⁰ The comparison that the Department must make in its analysis is not simply between longer flanges and standard length 8- to 20-foot framing lumber. We must take into consideration that FJF is also sold in lengths that correspond to the standard lengths for framing lumber and that other lumber products are finger-jointed to create longer dimensions. Given the range in FJF lengths and the fact that it is just one of several physical characteristics we consider, the greater-than-usual length of certain Abitibi and Tembec FJF does not in and of itself create a separate class or kind of lumber product.

g. The Wood Quality Standards for Tembec's FJF are Not Unique

Tembec has emphasized that its finished FJF contains fewer natural defects such as cracks, knots and curvature because these defects are removed during manufacture.⁶¹ It further claims that no such quality control process is employed in the production of softwood lumber.⁶² Tembec also asserts that the wood quality of FJF is better because extra care is taken to lower the moisture content of the input lumber pieces.

The Department recognizes that the wood quality of Tembec's FJF is going to be better than that of typical SPF dimension framing lumber because the applications of the latter product do not require this sort of quality control. However, the sorts of quality control measures that Tembec

⁶⁰ See Canfor Response to Section A at Exhibit A-19.

⁶¹ See Tembec Case Brief at 48.

⁶² Id.

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employs for its FJF products would apply to certain other specialty products produced as components for remanufacturers or as MSR lumber. Defects such as cracks and knots compromise the structural integrity of a piece of lumber and make it less likely that a particular piece will be sold for load bearing applications. Irregularities in the input lumber can also diminish the appearance value of lumber. If the mill in question has the capacity to finger-joint a particular lumber product, and the product is intended for either a load-bearing or appearance application, it is logical that the mill would resaw the input lumber to remove defects where possible, in order to produce more profitable specialty products in a manner similar to Tembec's production of FJF. Thus, producers of truss components, rafters (particularly exposed rafters where both strength and appearance are factors), and high-end paneling and siding, all products covered by the scope, must exercise a similar level of quality control.⁶³

h. Other MSR Lumber Products are Subject to the Order

While machine-stress rating provides a measure of one physical characteristic of wood products (the modular elasticity which reflects load-bearing strength), it is not a determinative factor for products covered by the scope of the order. The scope covers all MSR products that fit the physical description of the scope.⁶⁴ FJF is only one type of MSR lumber that is defined by its application.

MSR lumber products, whether finger-jointed or solid, are simply lumber products that have been

⁶³ See e.g., Western Lumber Product Use Manual (found on www.wwpa.org/pff/A.pdf) (WWPA Manual) at 10 which specifies design values for MSR lumber commonly used for truss and flange stock. See also WWPA Manual at 18-20 which outlines grading requirements for appearance lumber. In the investigation, respondents also stressed the special manufacturing processes required for Western red cedar products use in appearance and other applications. See Miller and Chevalier letter on behalf of Weyerhaeuser (July 20, 2001) at Attachment 5.

⁶⁴ For general definition of MSR lumber products, see e.g., WWPA Manual at 10. See also www.cwc.ca (CWC Website) and strategis.ic.ca at the Forest Industries page (Industry Canada Website).

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machine stress tested because they will be sold for structural applications where precise knowledge of the strength of the lumber is crucial.⁶⁵ Besides the FJF produced by Abitibi and Tembec, we found that West Fraser and Canfor both produced MSR lumber covered by the scope.⁶⁶ In addition to our consideration of machine stress rating-tested lumber products, we noted that even simple dimension lumber used for framing, which is generally not subject to machine stress rating testing, still needs to satisfy some basic strength requirements if it is to be used for building construction.⁶⁷ Therefore, within the broad range of lumber products and lumber product applications covered by the scope, there is also a broad range of stress ratings and general strength specifications which may or may not be measured on the basis of machine stress rating. FJF simply represents a particular set of stress ratings within the broader range of structural strengths for softwood lumber products. The stress ratings of FJF can overlap with the ratings of other lumber products. Because of this diversity of strength ratings, determined in part by the diversity of applications and different types of softwood lumber used, drawing a bright line between FJF and other lumber products in the scope on the basis of its specific MSR status would be difficult, given the number of products that are also MSR and the fact that even the broader range of lumber products is subject to some form of elastic strength standard.

i. Conclusion on Physical Characteristics

⁶⁵ See WWPA Manual at 10 and www.cwc.ca (Canadian Wood Council Website).

⁶⁶ See West Fraser Response to Section A of the Questionnaire, dated June 25, 2001, (Public Record No. 341) at 47 and Exhibit A-24. See also Canfor Section A Response at Exhibit A-19.

⁶⁷ See e.g., WWPA Manual at 6, Table 1, “Base Values for Western Dimension Lumber.”

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The respondents' arguments that physical characteristics such as the finger-jointing process, stress ratings, and length of the FJF represent unique distinctions from "ordinary dimension lumber"⁶⁸ raise questions concerning the pool of products within the scope that Tembec and Abitibi considered in drawing their class or kind distinction for FJF. The respondents' focus on a specific specialty product such as FJF, while ignoring other groups such as other MSR lumber, provides an incomplete context for the comparison that we must make in order to determine whether different physical characteristics provide the bright dividing line we need to find a separate class or kind. In other words, the scope of the investigation did not simply include ordinary dimension lumber for house framing, FJF, and nothing else. As the Department emphasized repeatedly in its class or kind analysis for the final determination (e.g., for Western red cedar), the scope of the softwood lumber investigation included a multiplicity of specialty lumber products that may overlap with standard dimension lumber which makes up the bulk of Canadian lumber shipments. FJF is one, among several, finger-jointed lumber products in the scope, and is also one among several forms of MSR lumber. Because the scope includes a number of other specialty products, which on the basis of physical characteristics would overlap with FJF, clear dividing lines based on different physical characteristics do not exist for purposes of making FJF a separate class or kind of merchandise.

The respondents represent FJF's calibrated strength, "engineered" manufacture and longer dimensions as significant physical differences between FJF and other softwood lumber products. We find that other finger-jointed products, including MSR lumber and even regular finger-jointed studs

⁶⁸ Id.

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(subject only to visual inspection) share these characteristics to the extent that FJF, as a specific product, cannot be clearly set apart from related products on the basis of its physical characteristics. Because FJF is particularly strong, light, and comes in unusual lengths does not mean that FJF is not a part of the broader family of softwood lumber products.

Thus, for all of the stated reasons, the Department determines that FJF's physical characteristics are not so unique as to warrant separate class or kind treatment under the scope of the order. The physical characteristics criterion shares equal weight with the FJF's ultimate use in our determination that FJF is not a separate class or kind of merchandise within the lumber scope.

2. End Use

Tembec and Abitibi have emphasized that their FJF is produced exclusively as an input for the production of I-joists and is sold exclusively to I-joist producers.

The petitioner argues that the respondents fail to address whether non-finger-jointed MSR lumber could be substituted for FJF in lengths less than 24 feet. The petitioner dismisses the importance of the unique applications of the longer lengths such as the 60-footer, asserting that it is nothing more than longer, finger-jointed, stress-rated 2x3 and 2x4 lumber that can easily be cut into shorter pieces of high grade lumber that would compete directly with other products. More generally, the petitioner argues that most lumber is used as a "component" in creating other products which hardly makes FJF unique.

Analysis:

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A fundamental underpinning of the respondents' argument is that FJF is not used, at least directly, as dimension lumber for structural or framing purposes, although it becomes part of an I-joist which does fulfill those functions. But this argument presupposes that, other than FJF, only lumber used in structural applications is covered by the order. While clearly the bulk of the products covered by the order is dimensional lumber products used in structural applications, the order covers many products that are used in non-structural or non-framing applications, such as lumber used for siding, flooring, trimming, decking, fencing, shakes and shingles, decorative purposes and other applications and as components for many other further assembled wood products. Nothing about the scope of the order limits coverage to lumber used only in framing applications. On the contrary, the scope of the order, as well as all other investigations on softwood lumber products that the Department has conducted in the last 20 years, covers all softwood lumber, whether used in structural or other applications.⁶⁹

We note that FJF is, in fact, defined chiefly by its end use. If the same MSR lumber that Tembec and Abitibi sell as FJF was sold for purposes other than I-joist beam assembly, it would be called something else. In this regard, it falls in the same category as numerous other lumber products under the scope which are sold as "components" for further assembled wood products that are outside the scope.⁷⁰ Comparable component lumber products covered by the scope that have been specifically examined during the investigation include truss components, pallet stock, bed-frame

⁶⁹ See Amended Final Determination at 36068-3606.

⁷⁰ See Letter from the Petitioner to the Department, dated June 18, 2001, (Public Record No. 309) (Petitioner June 18, 2001, Letter) at 50.

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components, window and door-frame components, furniture components, garage door cores, cedar shingle blocks for shingle production, finger-jointed stock for recreational vehicle and refrigerator manufacture, trellis stock, and box and crate components, among others.⁷¹ Some of these components are simply sawn pieces of dimension lumber while others such as the finger-jointed stock for recreational vehicles and refrigerators and certain window and door-frame components are further worked before they are sold as components. The Western Wood Products Association (WWPA) and the Canadian Wood Council (CWC) both indicate that a prime use of MSR lumber is the production of trusses.⁷² The WWPA also cites MSR lumber applications in floor and ceiling joists, as rafters and “for other structural purposes where assured strength capabilities are primary product considerations.”⁷³ The Industry Canada website also notes that MSR lumber production “is used in the manufacturing of I-joists, roof and floor trusses because these are sectors of the industry that demand economic and structural efficiency from the materials they employ.”⁷⁴ In all of these cases, the products are defined by their specific end uses in further manufactured wood products.

The NAFTA panel has expressed concern about the Department’s position that FJF is a “lumber product in a broad field of lumber products,” stating that the same observation “might be made

⁷¹ Except for those products specifically excluded by the scope. See e.g., Issues and Decision Memo at Comments 53, 56 and 57.

⁷² See WWPA Manual at 10 and www.cwc.ca (Canadian Wood Council Website).

⁷³ See WWPA Manual at 10.

⁷⁴ See www.strategis.ic.ca at the Forest Industries page (Industry Canada Website).

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with equal ease concerning wooden furniture or other manufactured goods of wood.”⁷⁵ However, there are some critical distinctions between the stages of production where we generally place wooden furniture and FJF. FJF is a lumber product used as a component of the I-joist. Wooden furniture is not lumber but, rather, it is a further assembled wood product made from lumber components. In this sense, the stage of production represented by furniture is more comparable to the I-joist stage than the FJF stage. In the same sense that finger-jointed studs are components of a frame to support dry walling in a house, FJF is a component of an I-joist to support flooring in a house. As with FJF, finger-jointed studs are assembled from smaller pieces of lumber. The studs, like their solid counterparts, are purchased by homebuilders to be incorporated into the house frame, while FJF goes through the intermediate step of being incorporated into an I-joist. Whatever distinctions might be made between the finger-jointed studs and solid dimension studs, we would certainly not place the finger-jointed studs in the same stage of production as a house or even a house frame.

Given the variety of scope products that, like FJF, is sold specifically as components to manufacturers’ carpentry or joinery products that are outside the scope, we found that the ultimate use of FJF provides no grounds for separate class or kind treatment.

3. Expectations of the Ultimate Purchasers

Tembec and Abitibi argue that the specific expectations of the I-joist producers concerning strength, lightness and dimension of FJF distinguish this product from other lumber products.

⁷⁵ Decision of the Panel, Secretariat File No. USA-CDA-2002-1904-02 at 167.

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The petitioner argues that customer expectations for FJF are not different than the expectations of purchasers of other types of stress-rated, high-quality dimension lumber. The petitioner minimizes the importance of I-joist manufacturers' expectations regarding FJF, contending that the respondents have failed to show the significance in the market place of the longer pieces.

Analysis:

We have already considered above the physical characteristics of FJF that I-joist producers demand. Customer expectations about a lumber product vary considerably depending on the grade, species and intended application. The specific customer expectations for FJF are, as we discussed above, defined primarily by its intended application which, in turn, defines the product. I-joist producers expect 2x3 and 2x4 lumber provided in specific lengths, stress ratings and product quality. However, the Department found that the purchasers of lumber components for a host of further assembled products, some of which we listed above in our analysis of ultimate use, have similar, and certainly equally specific, expectations regarding their lumber component purchases. Therefore, because we cannot isolate the end use of FJF for I-joist production from the end use of other lumber products as components of further manufactured wood products, we cannot establish a clear dividing line between FJF and such other lumber component products in the scope on the basis of the specific expectations of I-joist producers. In particular, purchasers of other MSR lumber products have very similar expectations to those who purchase MSR lumber to produce I-joists.

4. Channel of Trade

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Tembec and Abitibi contrast their direct sales of FJF to I-joist manufacturers with the more layered sales channels employed for the distribution of dimension lumber for construction. They argue that, because they make their sales directly to the consumer and the pool of consumers is limited to I-joist producers, FJF's channel of trade is unique.

The petitioner argues that the respondents fail to explain how the differences between direct sales to I-joist producers and sales of dimension lumber through distributors and retail stores set FJF apart from other products sold directly to manufacturers, such as bed-frame components and truss stock. They contend that FJF's channels of trade do not justify a separate class or kind, because they are remarkably similar to those of other wood components that are purchased to make final end products such as trusses, bed frames and furniture.

Analysis:

Evidence on the record indicates that FJF is normally sold by the lumber companies directly to producers of I-joists. Although Tembec and Abitibi have argued that this represents a unique channel of trade, we have not found any evidence to distinguish this direct sales channel from those employed by many other lumber producers that sell their lumber components to remanufacturers. We do not dispute the respondents' contention that the channel of trade for FJF is different from the channels of trade for most dimension lumber sold for building construction, which is normally sold through independent wholesaler or retailers. However, channels of trade for lumber mills that sell components directly to manufacturers of such items as pallets, door and window frames and many other further

assembled wood products are very similar to the channels for FJF. Therefore, we find no clear dividing line between FJF and all other lumber products on the basis of its particular channel of trade.

5. The Manner in which the Product is Advertised or Displayed

Abitibi reports that it advertises its FJF as a distinct product.⁷⁶ Tembec reports that, while it advertises its dimension lumber products in trade journals and other publications, it does not advertise its FJF, which it sells to [] established customers. Tembec suggests that the fact that it does not advertise FJF sets this product apart from other softwood lumber.

The petitioner maintains that there are many kinds of lumber products that are not advertised in the same way as “ordinary” dimension lumber, and yet these other products are still part of the continuum of products and considered part of the same class or kind of merchandise as other scope products.

Analysis:

The Department notes that Tembec has claimed that its FJF is sold directly to consumers without having been advertised or displayed,⁷⁷ and Abitibi has simply stated that it advertises FJF as a “distinct product” unlike other products such as dimensional lumber.⁷⁸ However, the record shows that other specialty lumber products are advertised as distinct products.⁷⁹ For example, the

⁷⁶ See Abitibi May 21, 2001, Letter at 11.

⁷⁷ See Tembec March 12, 2002 Case Brief on Scope and Class or Kind Issues at 57.

⁷⁸ See Abitibi May 21, 2001, Letter at 11.

⁷⁹ See Petitioner June 18, 2001, Letter at 28 and Attachment 25. See also Letter from the Government of Quebec to the Department, dated May 21, 2001 (Public Record No. 202).

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Department found during the investigation that certain companies had specific marketing efforts tied to Western red cedar, Eastern white pine, and Eastern white cedar.⁸⁰ This distinct product approach to marketing which is applicable to FJF, also applies to many other lumber products sold as components to remanufacturers. FJF may not be advertised in the the same way that certain dimensional lumber products are, but this distinct product marketing approach hardly makes FJF unique when compared to many specialty lumber products. In addition, we question Tembec's assertion that it does not advertise is FJF at all, given the fact that FJF is listed in its product brochure.⁸¹ This is a clear form of advertising comparable to what Tembec does for other products. We note that other Canadian producers advertise their flange stock in the same way.⁸²

E. SEBF COMPONENTS

The Panel remanded to the Department the issue of whether SEBF components are in the same class or kind as the other softwood lumber products subject to the investigation, with instructions for the agency to perform a complete analysis of the Diversified Products with respect to SEBF components, report its conclusions with respect to each of these factors, and report to the Panel on how it weighted its determinations with respect to each of these factors. Our analysis is presented below.

1. Physical characteristics

⁸⁰ See Issues and Decision Memo at Comment 52.

⁸¹ See Tembec Section A Response at Ex. A-25.

⁸² See Weyerhaeuser Section A Response at Ex. A-22; and Canfor Section A Response at Ex. A-19.

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SEBF components (including side and top rails, slats, L-braces, center supports, and end fillers) are narrow and flat strips of lumber not more than 1.25 inches thick, 4 inches wide and, generally, not more than 83 inches long. According to respondents, they are made from standard SPF⁸³ lumber boards which are kiln dried, planed, shaped, and sized according to the requirements of the box-spring manufacturer.

The respondents point out that SEBF components are shaped and sized to industry specifications. First, they are cut to specific size requirements dictated by the standard dimensions of the box springs into which they will be incorporated (single, double, queen or king). Second, they require superior surface and edge quality (rounded edges) to avoid product damage and manufacturing interruptions that would result if box-spring material snagged on rough wooden surfaces. Third, they must be produced to meet narrow size tolerances because they are standardized parts that are assembled in a highly mechanized manufacturing process. Finally, they have specific moisture content requirements.

The petitioner states that all species and types of softwood lumber used as SEBF components have similar physical characteristics.⁸⁴ It cites to a U.S. Customs Service (Customs) ruling on SEBF

⁸³ Sinclar Enterprises Ltd. (Sinclar) and the International Sleep Products Association (ISPA), in their letter to the Department dated May 21, 2001, (Sinclar and ISPA's May 21, 2002, Letter) (Public Record No. 204) explained that during the investigation, that SEBF components must be produced from wood that has small knots and a tight, fine grain structure, such as SPF, because they are thin and narrow products that are attached to other box-spring components by means of nails." Apparently, logs of other species, such as Southern Yellow Pine and Douglas Fir, have larger diameter than logs of Canadian SPF. Consequently, boards cut from Southern Yellow Pine and Douglas Fir logs have more knots and a coarser grain than boards cut out of SPF logs.

⁸⁴ See Letter from Dewey Ballantine LLP to the Department dated June 18, 2001, (Public Record No. 309), at 40.

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components,⁸⁵ stating that the boards “have been kiln dried, cut to rough sizes, surfaced, square cut on the ends and eased” and that “none of these operations would serve to remove the {boards} from the category of lumber.” It reiterates that the value-added operations described by respondents are processes common to great volumes of softwood lumber products, and that the fact that the boards are cut to size may limit their use, but that size alone is not a determinant for purposes of this analysis.

Analysis:

The description of this product provided by respondents highlights the fundamental similarity of SEBF components with other products covered by the scope of the order. The physical appearance, apart from minor differences, is generally indistinguishable from any other board of softwood lumber cut to similar dimensions. Generally, SEBF components come in nominal lengths between 25 inches and 83 inches; however, the length of SEBF components is not a distinguishing factor. Canfor, for instance, manufactures SEBF components in lengths up to 84 inches.⁸⁶ The length of SEBF components overlaps with many softwood lumber products, from FJF, which is manufactured in lengths as short as 7 feet or 84 inches,⁸⁷ to vegetable box components which are manufactured in precision-end-trimmed (PET) lengths of 11 1/8 inches or 18 1/4 inches and door jacks in PET lengths of 81 1/2 inches and 92 5/8 inches.⁸⁸

⁸⁵ Customs Ruling HQ 082085 (Jan. 13, 1989).

⁸⁶ Canfor’s Questionnaire Response Section A at Exhibit A-19.

⁸⁷ Tembec, Questionnaire response, Section A at Exhibit A-25.

⁸⁸ Letter from Weldwood of Canada Limited, dated August 17, 2001, Attach. At 64-65.

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The dimensions of SEBF components also overlap with many other softwood lumber products. For instance, Canfor produces SEBF components in nominal sizes of 1x2 inches through 1x4 inches but also boards in nominal sizes of 1x4 inches, fascia in 1x2 inches, and furring strips in 1x2 inches through 1x4 inches.⁸⁹ Alberta Spruce Industries produces furniture components in nominal sizes of 1x3 inches.⁹⁰ Abitibi produces SEBF components in dimensions of 1x1½ inches, 1x3 inches, and 1x4 inches, and fence components in 1x4 inches.⁹¹ Clearly, the dimensions of SEBF components do not provide any clear dividing line.

The manufacturing process used to produce SEBF components includes kiln-drying, planing, shaping and sizing to specific dimensions. As the petitioner points out, these are basically the same finishing operations of most lumber products. Specific size requirements do not provide a means to distinguish SEBF components from other lumber products, since many lumber products are manufactured to specific size requirements. Door components, for instance, are manufactured to the customer's specifications in sizes such as 1.075x1.42x96.5 inches.⁹² Furthermore, just like SEBF components, many other softwood lumber products are manufactured to meet narrow size tolerances (for instance, precision end trimmed lumber is trimmed to 1/16-inch tolerances⁹³ and Western hemlock

⁸⁹ Candor's Questionnaire Response Section A at Exhibit A-19.

⁹⁰ Letter from Alberta Spruce Industries dated August 16, 2001.

⁹¹ Abitibi's Questionnaire response, Section A, at Exhibit A-23.

⁹² Letter from Bridge side High dated August 16, 2001, attach. 1-2 (unnumbered).

⁹³ Random Lengths, Terms of the Trade, 2000 edition, at 255.

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stair-part turning squares are trimmed to tolerances of 1/32 inch.⁹⁴ Finally while SEBF components have specific moisture requirements, so do many other lumber products. For instance, Western hemlock stair-part turning squares have a moisture content of 10 to 12 percent.⁹⁵ Similarly, window and door components are dried to a moisture content between 8 and 10 percent.⁹⁶

Certainly once SEBF components have been shaped, cut, and so forth, they present the specific degree of surface smoothness, the narrow size tolerance, the moisture content, and the quality of the wood which is appreciated in the production of bed frames. However, many other softwood lumber products covered by the scope of the order are planed for a certain smoothness,⁹⁷ shaped for a particular usage, and cut to a particular size, as we have demonstrated above. Just because the smoothness of each product may be distinct, the shape of the wood might be thicker or thinner, round or straight, tall or short, and the cut of the wood might be distinct for a particular softwood lumber component -- these distinctions do not warrant treating SEBF components as a different class or kind of merchandise.

⁹⁴ Letter from Cahan Wood dated September 5, 2001.

⁹⁵ Id.

⁹⁶ Letter from Domtar dated August 24, 2001 at 2.

⁹⁷ For some lumber, such as stock to be used in the manufacture of musical instruments and snow boards, a smooth finish is desirable (See letter from Batts Patterson Mines dated July 19, 2001).

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If this was the case, every softwood lumber component would have to be treated as a different class or kind of merchandise. As the petitioner illustrates,⁹⁸ using a 2x4-inch stud as an example, an 8-foot stud is also cut to a certain size. Pallet stock, truss components, door frame components, door jambs, window parts, and flange stock, are all examples of products that are also produced to manufacturers' specifications in terms of quality and dimensions and delivered to the end user ready for installation. All of these products are covered by the scope of the order; but under the analysis offered by the respondents, we would be required to distinguish a separate class or kind of merchandise for each component based upon sizing and shape criteria. This is not the fundamental analysis required by the statute, nor is such an analysis consistent with the Department's practice over the last 20 years.

In conclusion, we acknowledge that SEBF components, like many other softwood lumber component products, have specific distinguishing attributes. However, based on their physical characteristics, we find that the differences between SEBF components and many other products covered by the scope of the order are not so significant as to warrant separate class or kind treatment.

2. End use

The purchasers of SEBF components are companies that manufacture bedding products that contain rigid inner frames (e.g., box springs).⁹⁹ One necessary input of box-spring manufacturing is SEBF components that are attached (usually by means of nails or staples) to other components to form

⁹⁸ See Letter from Dewey Ballantine LLP to the Department, dated June 18, 2001, (Public Record No. 309), at 43.

⁹⁹ See Letter from Tembec Inc. (Tembec) to the Department, dated May 21, 2001, (Public Record No. 201) at 13. See also Sinclair and IPA's May 21, 2001, Letter.

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the internal frame of the box spring. The respondents claim that SEBF components are pre-manufactured for such use and that they have no other use than to be incorporated into box-spring frames. They claim that this is due to the fact that they are manufactured in odd dimensions and sold through channels of distribution focused on bed-frame manufacturers.

The petitioner¹⁰⁰ agrees that SEBF components have only one end use -- to become part of a box-spring or mattress support. Yet, it also states that all softwood lumber components subject to the order are intermediate products used to produce something else, such as furniture, trusses, or wooden crates or spools. As the petitioner explains, the inputs of these end products are subject to the order, while the end products are not, and it would be illogical to treat individual components as separate classes or kinds of merchandise for every case.

Analysis:

We agree that SEBF stock has a specific and exclusive end use. However, this attribute does not lead to the establishment of a separate class or kind. Many softwood lumber products subject to the scope are used in further applications. For this reason they are produced to specifications appropriate for that specific application. For example, "Real Trim" is a proprietary fascia product made in custom sizes not duplicated by any other manufacturer in Canada or the United States, yet it is part of the single class or kind of softwood lumber.¹⁰¹ Alliance Forest Products requested exclusion of

¹⁰⁰ See Letters from Dewey Ballantine LLP to the Department, dated September 11, 2003 and June 18, 2001, letter at 43-44.

¹⁰¹ Letter from Woodtone dated August 16, 2001 at 1-2.

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angle-cut lumber for sheds produced and imported in specific sizes based on the customers' designs and parts' specifications,¹⁰² and those products are also part of the single class or kind of softwood lumber. Shaker town 1992, Inc. requested the exclusion of certain specialty cuts of Western red cedar in specific dimension and grades exclusively dedicated to shingle production. The Department did not grant this request because the imported material was still a cedar lumber product and did not yet have the physical characteristics of the end product.¹⁰³ Another manufacturer requested exclusion of softwood lumber products that are going to be used specifically to manufacture furniture, retail display shelving, or door sills and frames, but those products are also part of the single class or kind.¹⁰⁴ Numerous other lumber products are appropriately treated, shaped, and sized to be incorporated in trusses or in wooden crates; still other lumber products will be shaped to become bannisters, spindles, or moldings. Window and door components are shipped meeting the specific requirements of the window or door manufacturer, sized and cut to specific lengths and shapes.¹⁰⁵

All these lumber products have very specific dimensions and, in their semifinished state, can be utilized only in a limited number of applications. Trusses, crates, bannisters, and spindles are outside the scope, as we noted above, because these are finished end products. On the other hand, the pre-

¹⁰² Letter from Alliance Forest Products dated August 17, 2001.

¹⁰³ Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada from Bernard T. Carreau, Deputy Assistant Secretary to Faryar Shirzad, Assistant Secretary for Import Administration, at comment 57, B-17.

¹⁰⁴ Letter from Alberta Spruce, dated August 16, 2001.

¹⁰⁵ Letter from the Quebec Lumber Manufacturers Association (QMLA) dated August 17, 2001.

manufactured softwood lumber products which are used as inputs of those products, are not finished products and, therefore, are included in the scope of the order. In the case of SEBF components, the same analysis can be applied -- the end use of the components of all of these products subject to the order may be specific, but this does not make each product so unique that separate class or kind treatment is warranted under this Diversified Products factor.

3. Expectations of the Ultimate Purchasers

The respondents contend that manufacturers cannot substitute standard boards for bed-frame stock. ISPA points out that box-spring manufacturers require specific types of wood (SPF rather than Southern Yellow Pine or Douglas Fir) and specific qualities (“nailability,” narrow tolerances and a certain moisture content).¹⁰⁶ The petitioner rebuts that perfect substitutability is not the applicable standard.¹⁰⁷ It states, for example, that a home builder cannot use an eight-foot stud for framing when the architectural plans call for a ten-foot ceiling, but that does not make eight and ten foot studs separate classes or kinds of products.

Tembec asserts that the purchasers of bed-frame stock are box-spring manufacturers who are “not in the lumber business” and view the wood articles as but one of several commodities used in box-spring construction.¹⁰⁸ The petitioner notes that truss manufacturers, home builders, furniture

¹⁰⁶ See Sinclair and IPA’s May 21, 2001, Letter at 2-5.

¹⁰⁷ See Letter from Dewey Ballantine LLP to the Department, dated June 18, 2001, (Public Record No. 309), at 45.

¹⁰⁸ See Letter from Tembec Inc. (Tembec) to the Department, dated May 21, 2001, (Public Record No. 201), at 13.

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manufacturers, wood spool builders, etc., could also reasonably claim that they are not in the lumber business and view the wood products they purchase as merely a “commodity used in construction.” The fact that purchasers of bed-frame components or other lumber are “not in the lumber business” is certainly not dispositive of the issue of class or kind.¹⁰⁹

Tembec also states that it is the expectation of purchasers that radius-cut and square-cut pieces of bed-frame stock will be used together in the assembly of bed frames.¹¹⁰ The petitioner argues that this consideration may affect the marketing and the shipping of the product, but is irrelevant to a determination of a separate class or kind.

Analysis:

With regard to the quality of wood, the preferred quality of wood used for SEBF components is Canadian SPF, which is the largest represented wood product covered by the order. SPF is clearly within the class or kind covered by the scope. With regard to the sizing and shaping, moisture content and tolerance requirements, we view these SEBF component requirements as no different from the standards which apply to other pre-finished lumber products for use in specific applications. For example, truss components, pallet stock, slats for crates, and lumber stock for bannisters and spindles, all require a large number of specific criteria to fulfill the needs of the ultimate purchaser. Again, as explained above, just because each end product has its own production-specifications for each

¹⁰⁹ See Letter from Dewey Ballantine LLP to the Department, dated June 18, 2001, (Public Record No. 309), at 44.

¹¹⁰ See Letter from Tembec Inc. (Tembec) to the Department, dated May 21, 2001, (Public Record No. 201), at 13.

softwood lumber component, this expectation does not warrant treating all of the components as separate classes or kinds of merchandise.

4. Channel of Trade

The respondents claim that SEBF components are sold in a separate channel of trade from other softwood products -- to a single class of purchasers, on the basis of annual contracts, without Ascot® sales, and with no retail marketing. They are not sold individually, but they are sold in combination with other SEBF components. Both Tembec¹¹¹ and Abitibi¹¹² sell the bed-frame components as separate and distinct products exclusively to box-spring producers. They argue that this direct and exclusive distribution to box-spring producers constitutes a unique channel of trade. Abitibi argues that SEBF components are marketed distinctly from its other softwood lumber products and have a narrower channel of distribution than that of certain other softwood lumber. It states that SEBF components are not sold to retailers and are generally sold through annual contracts with fixed prices, whereas softwood lumber is sold to a variety of buyers, including retailers, is often sold in spot sales, is not sold under annually fixed contracts, and is subject to a high degree of price volatility.¹¹³

¹¹¹ Id. at 18.

¹¹² See Letter from Abitibi-Consolidated Inc. (Abitibi) to the Department, (Public Record No. 205), dated May 21, 2001, at 15.

¹¹³ Id.

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The petitioner counters that this channel of distribution is no more unique than the manner of trade of other manufacturers, such as truss manufacturers, furniture manufacturers, or boat builders.¹¹⁴ The petitioner further states that Abitibi's claim that its bed-frame components are sold exclusively to bed-frame manufacturers through sales agreements that are limited to bed-frame components is unsupported by any evidence and could apply to softwood lumber sold to a wide variety of manufacturers.

Analysis:

Neither Abitibi nor Tembec establishes how its direct distribution of bed-frame components to box-spring producers is different from the channels of trade used by lumber producers that manufacture components of other assembled products and sell them directly to manufacturers which assemble the finished product. Under the scope of this order, we note that flange stock, truss components, pallet stock, window and door-frame components, furniture components, garage door cores, cedar shingle blocks for shingle production, finger-jointed stock for recreational vehicle and refrigerator manufacture, trellis stock, and box and crate components, among others, have similar dedicated channels of distribution to producers of finished products.¹¹⁵

¹¹⁴ See Letter from Dewey Ballantine LLP to the Department, dated June 18, 2001, (Public Record No. 309), at 45.

¹¹⁵ See Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Softwood Lumber Products From Canada, incorporated in the Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 FR 15539 (April 2, 2002), (Decision Memorandum), (Public Record No. 1304), at Comment 57.

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In our Diversified Products criteria analysis, the Department does not establish that a unique channel of trade exists merely because one product out of many covered by the scope is sold exclusively and directly to one type of customer. When we consider whether the channel of trade is unique, we compare the way in which the specific product is marketed with the way other products in the same class or kind of merchandise are marketed. For example, if bed-frame components were the only lumber products sold directly to a manufacturer for further assembly, and all other lumber was sold through intermediaries, the channel of trade for bed-frame components could be considered to be significant for purposes of our analysis. However, the scope of the investigation includes a number of other lumber products sold directly to manufacturers as components of specific downstream products.

Furthermore, Canadian softwood lumber manufacturers use a product brochure as a marketing tool. Abitibi's product brochure includes SEBF components among the other softwood lumber products produced by the company, including dimension lumber, studs, boards, finger-jointed products, furring strips, and pallet components. The product brochure indicates that SEBF components can be purchased through either the company's Montreal or Vancouver sales offices, just like most of its other lumber products.¹¹⁶ Accordingly, there is clear record evidence that the sales and marketing of SEBF components are not distinct from the sales and marketing of other softwood lumber products. Based on the information provided in the questionnaire responses, it appears that including SEBF components

¹¹⁶ Abitibi, Questionnaire Response Section A at Exhibit A-23.

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in product brochures that are also used for sales and marketing of a wide variety of softwood lumber products is common practice throughout the Canadian softwood lumber industry.¹¹⁷

The sale of SEBF components to a box-spring manufacturer is not unique for this type of product. The record evidence shows that many softwood lumber producers sell their product directly to end users. Alliance Forest Products sells angle cut lumber for sheds directly to the shed builder.¹¹⁸ Window and door components are sold and shipped directly to the makers of windows and doors.¹¹⁹ Furniture component manufacturers sell and ship their components directly to furniture manufacturers.¹²⁰ And we could cite many more similar examples.

The evidence shows that SEBF components are sold through channels of trade that are very similar to many other channels of trade for lumber components sold directly to a manufacturer of a downstream product. We, therefore, conclude that the channel of trade for SEBF components is not so different from the channel of trade of other in-scope products to warrant separate class or kind treatment

5. The Manner in which the Product is Advertised or Displayed

¹¹⁷ See Questionnaire responses, Section A, by Slocan and Canfor (Exhibits A-18 and A-19, respectively).

¹¹⁸ Alberta Forest Products, *ibid.*

¹¹⁹ QMLA, *ibid.*

¹²⁰ Alberta spruce, *Ibid.*

Proprietary Information Removed

According to respondents, SEBF component manufacturers use few, if any, printed materials or other advertising to promote their products.¹²¹ The respondents claim that the bed-frame industry is a close-knit business community, characterized by a relatively small number of buyers and sellers. As a result, sales contracts are made and maintained based on the relationship that develops between bedframe component suppliers and the box-spring customers. Marketing is done by word-of-mouth. Abitibi states that its promotional materials identify bed-frame components as distinct products.¹²² The petitioner rebuts that the mere existence of marketing material does not indicate a finding that bed-frame stock is a separate class or kind. Virtually all producers must identify distinct products in their promotional materials.¹²³

Analysis:

The record shows that SEBF components are advertised. Product and sales brochures, documents that are clearly forms of advertising softwood lumber products, frequently feature SEBF components in the same way that those brochures feature other softwood lumber products. See e.g., Abitibi's Section A response at Exhibit A-23 (product brochure including SEBF components); Canfor's Section A Response at Exhibit A-19 (product brochure including SEBF components); Slocan's Section A Response at Exhibit A-18 (product brochure including SEBF components). We

¹²¹ See Letter from Abitibi to the Department, dated May 21, 2001, (Public Record No. 205) , at 6.

¹²² Id. at 15.

¹²³ See Letter from Dewey Ballantine LLP to the Department dated June 18, 2001, (Public Record No. 309), at 46.

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also note that Abitibi stated on the record that SEBF components “are produced, advertised, and sold as bedframe components, not as softwood lumber.”¹²⁴ Furthermore, ISPA confirmed that SEBF components are advertised in its case brief dated March 15, 2002. In the brief, ISPA described a trade show held on March 6-9, 2002, in which five exhibitors offered wooden bed-frame components.

Aside from these similarities, we recognize that the marketing and advertising approach used for SEBF components is somewhat different from the mass promotion of high-volume, standardized construction-grade lumber because there are no retailers involved in the distribution chain. Given the wide range of products included in the class or kind of softwood lumber products, many other lumber products which have the same pre-manufactured qualities and the same type of channel of distribution (from manufacturer directly to final user), do not rely on extensive advertising. For example, Tembec states that it sells flange stock to a limited number of I-beam manufacturers for assembly, to whom it does not advertise.¹²⁵ Similarly, furniture parts, refrigerator stock, and recreational vehicle products are other examples of products that are manufactured to exact specifications for limited markets.¹²⁶ Therefore, SEBF components are not so different from other in-scope product to warrant the establishment of a separate class or kind of merchandise.

Conclusion:

We examined SEBF components under the five Diversified Products criteria. We found that there were minor differences in physical characteristics between SEBF components and other softwood

¹²⁴ Letter from Arnold and Porter, dated August 7, 2001.

¹²⁵ See Letter from Tembec to the Department, dated May 21, 2001, (Public Record No. 201), at 10.

¹²⁶ See Decision Memorandum at comment 57.

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lumber components, but they were not sufficient to offset the basic similarities. We found that the ultimate use was unique, but not dissimilar from the unique ultimate use of other softwood lumber products. Furthermore, we found that the degree of “pre-manufacturing” for a specific application found in SEBF components is common to many other products included in the class or kind. We found that the level of expectations of the ultimate user also is similar to the expectations of the users of many other products in the class or kind. We found that the channel of distribution used by SEBF component manufacturers is very similar to the channel of distribution used by other lumber product manufacturers, whose products are included in the class or kind under the scope. And finally, the marketing and advertizing practices of SEBF component manufacturers were different from those of construction lumber producers, but no different from those followed by the manufacturers of similarly-situated lumber products also covered by the class or kind.

For these reasons, we concluded that under none of the above criteria could we find a clear dividing line warranting the establishment of a separate class or kind for SEBF components.

II. Respondent-Specific Issues

Abitibi

A. *Collapse of Abitibi and Scieries Saguenay Ltd. (SSL)*

The Panel found that the Department should not have collapsed Abitibi with SSL because the potential for circumvention of the antidumping order was negligible. More specifically, the Panel found a low likelihood of circumvention because of, inter alia, SSL’s low production capacity. The Panel

remanded the case to the Department in order for the Department to exclude SSL from the findings pertaining to Abitibi (i.e., not collapse them).

In order to exclude SSL from the findings pertaining to Abitibi the Department will notify the Bureau of Customs and Border Protection to apply to SSL the “all-others rate” calculated in this redetermination. Because SSL’s sales represented such a small percentage of sales in relation to Abitibi’s sales, the Department did not require SSL to report its sales in the original investigation. As such, the Department has not had to make any adjustment to Abitibi’s calculation based on the Panel Decision that the Department may not collapse SSL and Abitibi.

B. *Abitibi’s Stock Options Redemption Costs*

The Panel concluded that the stock option redemption costs could not be included in Abitibi’s COP and CV. Specifically, the Panel found that because the stock options were granted before the POI, the redemption should be excluded from the COP and CV for subject merchandise. The Panel remanded the case to the Department with instructions to exclude the stock option redemption costs from Abitibi’s COP and CV.

The Department has removed Abitibi’s stock option redemption costs from Abitibi’s COP and CV.

C. *Abitibi’s Trim Blocks*

In the original investigation the Department allowed Abitibi to report trimblocks as by-products and allowed another respondent, Canfor, to report trimblocks as subject merchandise. The Panel found, consistent with the Department’s request, that the case should be remanded to the Department

in order to develop a consistent trimblock reporting requirement. However, the Panel found that because Canfor had not challenged the Department's Final Determination the only manner in which to develop a consistent reporting requirement was to have Abitibi report trimblocks in the same manner as Canfor.

The Department has reclassified Abitibi's trimblocks as subject merchandise. Similar to Canfor, for the purposes of allocating costs to the subject merchandise, the Department has treated trimblocks as co-products rather than by-products. As such, we reduced Abitibi's by-product offset for the sales of trimblocks and included the sales value of trimblocks in the reallocation of costs to all products.

Tembec

D. Tembec's Cost of Wood Chips

In calculating COP or CV, the Department will offset the cost calculations by the amount of income derived from the sale of by-products produced as a result of the production of the subject merchandise. In this case, the production of softwood lumber results in the fabrication of wood chips. It is the sale of these wood chips which the Department then used in its calculations to offset the costs of production for softwood lumber. The Department used Tembec's internally set inter-divisional valuation of wood chips to calculate the by-product offset in this case. Tembec disputes this valuation methodology and argues that the Department should have used a "market value" instead of the actual, recorded amount of income received from the inter-divisional sale of wood chips as reflected in Tembec's books and records.

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Overall, in dealing with by-product revenue offsets, the Department is guided in its practice by the following policies. In the process of manufacturing the subject merchandise, by-products are produced, which are subsequently sold to other corporate divisions, affiliated companies, or unaffiliated companies. Specifically, wood chips are sold internally to other divisions, affiliated pulp mills, and unaffiliated pulp mills, thus reducing the lumber's production cost. Thus, it is necessary for the Department to review the treatment of by-products, and their valuation, in order to determine the cost of production of lumber.

In the case of a by-product offset resulting from a sale by a saw mill to an unaffiliated purchaser, the analysis is simple. The Department ensures that the amounts were actually received and recorded in the records of the producer.¹²⁷ The other two scenarios, by-product offsets resulting from a sale to a sister division (such as here with Tembec) and by-products sales resulting from a sale to an affiliated company (i.e., a separate legal entity), are more complex.¹²⁸

¹²⁷ In the instant case, all six producers made sales to unaffiliated purchasers and Commerce used those values for the Final Determination.

¹²⁸ It is important to distinguish the issue in each of these settings, which is framed by the corporate structure, and the nature of a by-product.

In the case of internal transfers between divisions (e.g., Tembec), the question is whether the internal transfer price of the by-product recorded in the records of the producing division reasonably reflects an amount that insures that the actual cost of producing the main product is obtained. This transfer price concept can be more easily understood conceptually in a situation where the producer of the subject merchandise receives a raw material from a sister division. In that situation, the Department's standard practice is to use the supplying division's actual cost of production and to remove any inter-divisional profit or loss.

In the case of sales to affiliated companies (e.g., West Fraser), the question is whether those sales reflect an arm's-length market price, inclusive of profit, unaffected by the affiliation between the buyer and seller. Again, to illustrate using a situation where the producer of the subject merchandise receives a raw material from a sister division, if the transfer price is below a market (i.e., arm's length) price, the Department would replace the transfer price with the market price, since the use of the transfer price would understate the cost of the subject merchandise. In cases like this one of a by-product offset, it is the same principle.

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The statutory provision, 19 USC §1677b(f)(1)(A), directs the Department to calculate COP or CV using "costs, . . . , based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the (GAAP) of the exporting country, . . . , and reasonably reflect the costs associated with the production and sale of the merchandise." The Panel noted that this provision applies to the costs associated with the production of the subject merchandise and, thereby, as an offset to the cost calculation. The Department should use the figures reported in a company's books and records to value a by-product, provided that the inter-divisional valuation of the by-product reflects a company's "actual" costs, exclusive of profit. Thus, upon remand, the Panel directed the Department to a) clarify the reason the Department believed the transfer prices between Tembec's British Columbia (BC) sawmills and pulp-mills were "reasonable surrogate(s) for the actual cost of wood chips, b) determine the average profit by Tembec on its sales of wood chips to unaffiliated purchasers, c) provide a reason why the Department's conclusion did or did not result in an adjustment to transfer prices to more accurately reflect COP of wood chips, and d) clarify how this profit factor was taken into account with respect to the COP in divisional sales in Eastern Canada.

In this investigation, the transactions in dispute were inter-divisional transactions, reported by Tembec in its own books and records. In accordance with 19 USC §1677b(f)(1)(A), the Department's general presumption with respect to inter-divisional transactions, such as those between Tembec's sawmills and pulp-mills, is that the valuation of a by-product reported in the books and records is the appropriate value to use in its cost calculations, unless other evidence exists on the record to question the reasonableness of that value.

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Tembec, for its part, during the investigation, claimed that the values it assigned to wood chips were unrealistically low. Rather than providing any information to support its claim, however, it relied upon the fact that its sawmills sold wood chips to unaffiliated purchasers for higher prices. This difference in price, alone, Tembec argued, was proof that the inter-divisional figures were unreasonable. As the Department articulated in its initial brief to this Panel, in calculating a company's COP, the Department's practice is to value inter-divisional transfers at the supplying division's actual cost of producing such inputs -- which may be lower than a market value, given the existence of profit. The same can also be said of the inter-divisional valuations of cost calculation offsets, including the value of a by-product offset: a market value for that by-product may, by its very nature, be greater than the cost of producing such a by-product. Thus, the mere fact that Tembec's "market value" was greater than its inter-divisional transfer prices for wood chips did not, in and of itself, call into question the reasonableness of the value on Tembec's books and records. Furthermore, Tembec's mere claim that these valuations were "arbitrary," without any further record support, did not undermine the reasonableness of the figures on its books and records, because such statements could be self-serving, as the larger the by-product offset, the lower a respondent's COP and CV (and therefore, the lower the dumping margin).

Thus, as the Panel has indicated, the only remaining issue was whether Tembec's inter-divisional transfer prices were so unrealistic, as Tembec argued, that the record would support its claim that these values were arbitrary. Had the value of by-products reflected an actual COP, this issue would not exist. The Department would just apply the actual cost, as directed by the statute.

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However, by-products, by their very nature, have no separately identifiable costs associated with their production. Therefore, the Department was left with no alternative but to compare the weighted-average wood chip transaction price between Tembec divisions and the prices of wood chips sold to, or purchased from, unaffiliated parties, and determine whether the difference between these two values, in light of all other factual information on the record, warranted a finding that Tembec's recorded values were unreasonable and, therefore, unuseable.

The Department verified that the weighted-average sales price between Tembec's BC divisions was CN\$ [] during the POI, while the weighted-average sales price to unaffiliated parties was CN\$ [] during the same period, a difference of [] percent. Thus, Tembec's "average profit" on sales of wood chips to unaffiliated parties was [] percent. The Department also verified that the weighted-average sales price between Tembec's Eastern Canadian divisions was CN\$ [] during the POI, while pulp mill purchases from unaffiliated Eastern Canadian suppliers was CN\$ [] during the same period, a difference of [] percent. We note that Tembec's Eastern Canadian divisions had no sales of wood chips to unaffiliated parties.

While the difference between Tembec's BC market value and inter-divisional transactions may seem large at first glance, the difference appears far less significant compared to the prices for which the other respondents sold their wood chips during the POI. For example, Abitibi sold chips to unaffiliated parties for only [] than it sold wood chips to affiliated parties, while Slocan, on the other hand, sold wood chips to unaffiliated parties for prices [] than the amount it charged affiliated parties. Weyerhaeuser sold chips to unaffiliated parties for prices that were

Proprietary Information Removed

[] than the prices it charged affiliated parties, while Canfor and West Fraser actually sold wood chips to unaffiliated parties for

[], than the amount they charged affiliated parties.¹²⁹

Several factors can explain the variations in price provided here. The percentages can differ widely because of the wood species, the quality of the wood chips, the physical proximity of the wood chip suppliers and purchasers, and supply and demand market forces. In addition, all of these listed comparisons involved affiliated and unaffiliated parties, while Tembec actually had inter-divisional transactions. All of this must also be taken into consideration with the fact that by-products, by their nature, have no separately identifiable actual COP and, therefore, valuation both within and outside of the corporate structure, is left to a determination of the parties involved in the transactions without a cost basis.

In light of these factors, the precise determination of an “average profit” realized from the sale of a by-product “normally” earned by any producer of subject merchandise is virtually impossible.

Here, the Department found differences between the “market value” (unaffiliated sales price) of wood chips and non-market value (affiliated transfer price) wood chips which were along a wide range of prices, both larger and smaller than that of Tembec.

¹²⁹ See Abitibi Response to Section D of the Questionnaire, dated July 23, 2001 (Public Record No. 475), Annex D2 and Supplemental Volume II of III, Annex 8; Canfor Response to Section D of the Questionnaire, dated July 23, 2001 (Public Record No. 476), Exhibit 5; Slocan Response to Section D of the Questionnaire, dated July 23, 2001 (Public Record No. 481), Volume IV, Exhibit D-3; West Fraser Response to Section D of the Questionnaire, dated July 23, 2001 (Public Record No. 479), Appendix 2; and, Weyerhaeuser Response to Section D of the Questionnaire, dated July 23, 2001 (Public Record No. 478), Exhibit 5 of Volume 1.

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Thus, the Department's analysis relied upon three factors:

First, consistent with its statutory obligations, the Department presumed that Tembec's recorded by-product, inter-divisional values were reliable, barring information on the record indicating that these figures were unreasonable.

Next, the Department noted that the "market values" for Tembec's by-products were greater than its inter-divisional values, a distinction that was expected in light of the standard relationship between the costs of production and market value of products, given the existence of profit. As we explained, this difference in price exists for cost offsets as well as actual costs, even though the existence of "profit" doesn't easily apply in the context of by-products, because by-products have no actual underlying COP.

Finally, the Department looked to the experience of other respondents of the investigation to determine if the difference between the prices Tembec charged unaffiliated purchasers of wood-chips and the prices Tembec's sawmills charged its own pulp-mills was "reasonable." Given the vast array of pricing experiences between the different respondents, the Department determined that the differences in price, in both BC and Eastern Canada, were reasonable.

Thus, the Department determined the inter-divisional values Tembec recorded in its own books and records were reasonable, and it applied these values as the by-product offset for purposes of those inter-divisional transactions.

E. *Tembec's G&A Expenses*

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The Department is required by statute to calculate a respondent's costs "normally" based on that party's books and records,

if such records are kept in accordance with the generally accepted accounting principles (GAAP) of the exporting country, . . . , and reasonably reflect the costs associated with the production and sale of the merchandise. The administering authority shall consider all available evidence on the proper allocation of costs

19 USC § 1677b(f)(1)(A). During the investigation, Tembec provided the Department with its audited financial statements, which included Tembec's company-wide G&A expenses. Accordingly, the Department then took Tembec's audited figures and used them to calculate the G&A expenses for the production of Tembec's subject merchandise during the POI. More specifically, the Department looked to Tembec's company-wide G&A expenses and allocated the total G&A proportionally to subject merchandise using a ratio.¹³⁰

Tembec is a large, multi-national corporation. Its corporate structure is divided in such a way that, although there is one Chief Executive Officer and one Board of Directors, there are multiple, business-specific divisions (i.e., forest products, pulp, paper, paperboard, chemical and other products). One particular division specifically covers forest products.¹³¹ During the investigation, Tembec explained to the Department that it internally calculates many expenses on a division-specific

¹³⁰ To derive this ratio, the Department took Tembec's overall G&A expense figures and divided them by the total cost of goods sold of all Tembec's merchandise. This ratio was then multiplied by Tembec's cost of manufacturing of only the subject merchandise. The result was a proportion of G&A allocated to Tembec's cost of manufacturing the subject merchandise.

¹³¹ See Tembec Response to Section A of the Questionnaire, dated June 22, 2001 (Public Record No. 328) (Tembec Section A Response): Tembec's 2001 Annual Report at p.65 listing the corporate officers and Board of Directors and at p. 38-39 listing the business segments within the company.

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level, including what it termed “division-specific G&A.” Thus, it argued that the Department should not calculate G&A proportionally through its standard methodology, using the information derived from Tembec’s audited financial statements but, instead, it should use the figures reported by the Forest Products Division.¹³²

During the investigation, the Department conducted a verification of Tembec’s books and records. For purposes of G&A expenses, the Department verified Tembec’s audited company-wide books and records.¹³³ With respect to Tembec’s “divisional” G&A figures, the Department verified 1) that each of the five divisions did indeed report a particular figure which it labeled “G&A” and that 2) the total combination of these figures together equaled the amount Tembec reported for the company overall in its financial statements.¹³⁴

The Panel has remanded this matter to the Department, instructing the Department to “explain its reasoning that concludes, based upon consideration of the entire record, that the calculation of the G&A ratio at the corporate level, contrary to the verified records of the company, accurately reflects, . . . , the cost of production of the subject merchandise.”

G&A expenses are, by their nature, applicable to a company as a whole. The term G&A encompasses a wide range of costs which are used for general management and administration. For example, the salaries of the upper management and administrative staff of the company, computer

¹³² Tembec Case Brief at p. 11-12.

¹³³ See Cost Verification Report for Tembec, Inc. in the Antidumping Duty Investigation of Softwood Lumber from Canada, dated January 29, 2002, (Public Record No. 1138) (Tembec Cost Verification Report) at 26.

¹³⁴ See Tembec Cost Verification Report, Cost Verification Exhibit 20, (Fiche # 895, Frame #40).

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services, the legal expenses paid by the company to prevent legal mishaps or defend the company if litigation arises, and insurance costs are all examples of G&A expenses. Two factors bind all of these expenses together: they are all general in nature and they are all associated with a specific period of time. G&A expenses, in other words, are NOT associated with the production of a particular product, by the very definition of the term.

Tembec's response is that such a technicality does not prevent its own internal accounting from still applying G&A to its particular divisions. As Tembec explains its accounting methodology, it has "G&A" costs which relate to the production activities of a particular division and, in addition, a proportion of company-wide G&A is paid by each division.¹³⁵ Tembec then adds these two figures together, and this is the figure Tembec proposed the Department use.

The Department considered the claims made by Tembec in light of the divisional data on the record during the investigation, and determined it preferable to use the G&A figures appearing in Tembec's audited financial statements. The Department made this determination based upon the lack of record evidence supporting Tembec's claims and the existence of evidence supporting the use of Tembec's company-wide data. 19 U.S.C. § 1677b(f)(1)(A) provides that the Department will use information on a company's books and records, provided those books and records are kept in accordance with the country's GAAP.

¹³⁵ Id.

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The Department has a higher level of assurance that a company's books and records are kept in accordance with GAAP if those books and records have been audited. In the case of Tembec, the auditor's report that accompanied its financial statements explained that the auditor had audited ". . . the consolidated balance sheets of Tembec, Inc. and the consolidated statements of operations, retained earnings, and cash flows . . ." ¹³⁶ Financial information for each division appears in a note to the financial statements but this segment information was not specifically mentioned in the auditor's report. ¹³⁷ Thus, the auditors only reviewed and confirmed that one set of G&A figures was consistent with Canadian GAAP -- those company-wide figures appearing in Tembec's Financial Statements. Accordingly, pursuant to the requirements of 19 U.S.C. § 1677b(f)(1)(A), the Department used the company-wide figures in its calculations.

With respect to the Panel's directions, we note that neither the cost verification report, nor any other part of the case record, indicates that the forest product division G&A was verified. ¹³⁸ During the on-site verification, Tembec provided no evidence that the division-specific data at issue had been audited and/or were in accordance with Canadian GAAP. The Department never reviewed a "break down" of the various expenses which were included within Tembec's overall division-specific "G&A" expenses, never reviewed the methodologies Tembec used to allocate and calculate these expenses, and never reviewed these calculations in light of the same or similar calculations allegedly being made in

¹³⁶ Tembec's 2000 Financial Report at 29 ("Auditor's Report"). See Tembec Section A Response.

¹³⁷ Id. at 44-45 ("Segmented Information").

¹³⁸ See Tembec Cost Verification Report at 26.

the other Tembec divisions. In short, the Department knows very little about these expenses Tembec claims should be used in its calculations. Furthermore, even if we were to verify the accuracy of Tembec's allocation, it is not appropriate for purposes of calculating G&A expenses. As explained above, G&A expenses are period costs that relate to the company as a whole, not to any particular division.

Thus, Tembec's division-specific figures were not audited nor were they supported at verification. Furthermore, even if Tembec were to claim that the division-specific information was consistent with GAAP, this would not mean that this information was necessarily reliable for purposes of the Department's calculations. The Canadian Institute of Chartered Accountants (CICA) establishes Canadian GAAP. The CICA Handbook section 1701 titled "Segment Disclosures" articulates Canadian GAAP's approach to division-specific reporting of various expenses. Section 1701 indicates that since the objective of segment information is to report results as reviewed by the chief operating decision maker to make business decisions, the information should be reported on the same basis as it is reported internally, even if it is not in conformity with GAAP or the accounting policies used in the consolidated financial statements.¹³⁹ In other words, Canadian GAAP does not require that "division-specific" information reported in a financial statement be consistent with Canadian GAAP.

From a practical perspective, the CICA treatment of such information makes sense. Accounting classification and allocation problems are inherent in segment reporting. An issue in determining the profit and loss in segment reporting is how to allocate common costs that are operating

¹³⁹ See "Financial Reporting Release," PriceWaterhouseCoopers, December 1998, at 2.

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expenses incurred by the company that benefit more than one operating segment. These costs are reported in segment information only if they are allocated in the reports provided to management. General corporate expenses incurred for the benefit of the corporation as a whole, which cannot be specifically attributed to any segment, are therefore not reported in segment information. Accordingly, a company cannot be expected to calculate its “general” expenses on a division-specific level.

Tembec’s proposed methodology contradicts the general nature of G&A expenses, and is based on the fallacious assumption that general costs are incurred on a divisional rather than a company-wide basis. The Department disagrees with Tembec that G&A expenses can be attributed to segments of the business such as forest products because, by their very nature, these costs cannot be directly attributed to individual segments.

Tembec’s division-specific figures are unaudited and its calculations are unverified. On the other hand, Tembec’s company-wide G&A data were audited, consistent with Canadian GAAP, verified, and reliable. Thus, for purposes of this case, the company-wide G&A data were superior.

As the Department explained in its Final Determination and in its briefing to the Panel, as a policy matter, the Department prefers to use company-wide G&A data in every investigation for purposes of its calculations, because G&A expenses are not associated with production of a particular product, such data is reliable and accurate, and parties benefit from a predictable methodology.

Tembec’s proposed change in that methodology is unsupported by the facts of the record and would, in fact, result in more uncertainty, not less, as Tembec claims, in the Department’s conclusions. The Department’s standard methodology is in accordance with the statute’s requirement that the

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Department use actual data pertaining to the production and sales of the FLP, is predictable, consistent, and avoids distortions that may result if, for business reasons, greater amounts of company-wide general expenses are allocated disproportionately between divisions. Thus, for all of the reasons stated above, the Department has concluded, based upon consideration of the entire record, that the calculation of the G&A ratio at the corporate level, consistent with the verified records of the company, accurately reflects the COP of the subject merchandise.

F. *Tembec's Ministerial Error Allegation*

The Panel remanded this case to the Department with instructions that the Department explain why its final decision did not contain a ministerial error with respect to the calculation of Tembec's credit expenses concerning Canadian-dollar denominated sales. If, however, there is such an error, address whether the Department is under a mandatory duty to correct the error. We continue to maintain that the "errors" alleged by Tembec in its briefs before this Panel are not errors. However, upon consideration of comments filed by Tembec addressing this remand, the Department recognizes that its initial calculations regarding U.S.-dollar denominated sales made for the final determination were correct. Accordingly, the Department is now correcting an error made in the amended final determination, the result of attempting to correct an error where none existed. Specifically, Commerce is changing two lines of computer programming language: line 159 of the comparison market program and line 1981 of the margin program. The respective lines of programming are "IF GRSUCRH = 'USD' THEN CREDITH=CREDITH/1.5" and "IF GRSUCRU = 'USD' THEN CREDITU=CREDITU/1.5". This programming language limits the correction to sales denominated in

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U.S. dollars, in accordance with record information. See Exhibit 1 for pages from the computer program which show this change.

As for the errors alleged by Tembec before this Panel, relating to Canadian-dollar denominated sales, the Department has not made any corrections because it continues to hold that to make the changes suggested by Tembec would create errors where no errors exist. As verified by the Department, during the investigation, Tembec incorrectly overstated credit expenses reported on its U.S. dollar-denominated sales by a factor of 1.5, by converting credit value on U.S.-dollar denominated sales to Canadian currency.¹⁴⁰ The Department thus modified these calculations to correct this mistake. On April 8 and 9, 2002, Tembec and the petitioner both filed allegations alleging that the Department had made a ministerial error in these modifications. The parties alleged that the Department made an error in that it divided the credit expense by 1.5, (Tembec's average exchange rate during the POI from Canadian to U.S. dollars), rather than multiplying the credit expense by that same figure.¹⁴¹

The Department agreed with the parties that a ministerial error had been made in its attempt to correct Tembec's original mistake. Analysis Memorandum of Tembec to The File From Christopher

¹⁴⁰ Specifically, as stated on page one of the Department's January 31, 2002 sales verification report, "{o}n sales where the credit expense was denominated in U.S. dollars Tembec erroneously used a conversion factor designed to convert from Canadian to U.S. dollars." Memorandum From Charles Riggle to Gary Taverman Re: Sales Verification Report, dated January 31, 2002, at 1 (emphasis added), (Public Record No. 1149). It was clearly the Department's understanding that the scope of the problem was limited to U.S. dollar-denominated sales, a conclusion that was not challenged by the respondent upon the release of the report.

¹⁴¹ Letter from Petitioner to the Department Re: Tembec Inc. Ministerial Error Corrections, dated April 9, 2002 (Public Record No. 1364) at 2-3; Letter from Tembec to the Department Re: Clerical and Ministerial Errors, dated April 16, 2002 (Public Record No. 1380) at 2.

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Riker, dated April 26, 2002 (Public Record No. 1392). It, therefore, revised its calculations by multiplying the credit field by a factor of 1.5 for U.S. dollar-denominated sales in both the U.S. and Canadian market datasets. This was the correction suggested by both petitioner and Tembec.

On May 1, 2002, the Department released disclosure materials to Tembec, indicating the changes that it would be making to its calculations in the Final Determination.¹⁴² Tembec filed an untimely submission with the Department alleging a clerical error with respect to the credit value on Canadian-dollar denominated sales, which the Department rejected pursuant to section 351.224(c)(2) of its regulations.¹⁴³ Tembec's proposed correction then was the same modifications it proposed to the Panel in its Brief. While the Department rejected this error allegation as untimely, it also maintained that no error existed with respect to Tembec's Canadian-dollar denominated sales.

Tembec has suggested that line 1981 should be written "IF GRSUCRU NE 'USD' THEN CREDITU=CREDITU/1.5." Such a change in the computer program would result in two things: (1) U.S. dollar-denominated credit values would not be modified, although this is where the problem arose from verification and (2) Canadian dollar-denominated credit values would be reduced by a factor of 1.5. In other words, where a problem existed, i.e., with respect to U.S.-dollar denominated sales,

¹⁴² Letter from Charles Riggle to All Interested Parties re: Clerical Errors and Amended Final Determination, dated May 1, 2002, (Public Record No. 1394); see also Package Tracking Form, dated May 1, 2002 (signed by Armando Tabora at 11:42 a.m. - one of several attachments to the clerical error letter, specifically found on microfiche at Fiche #378A, Frame #02).

¹⁴³ Letter from the Department to Tembec Re: Clerical Error Submission Rejection, dated May 14, 2002, (Public Record No. 1394) (one of several attachments to the clerical error letter, specifically found on microfiche at Fiche # 378A, Frame #36).

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Tembec would prevent the Department from modifying its calculations, and where no problem exists, i.e., on Canadian-dollar denominated sales, Tembec would then create a new problem.

In its reply brief before the Panel, apparently recognizing the flaws in its proposal, Tembec presented an entirely new argument, suggesting that the Department instead recalculate Tembec's credit expenses using interest rates from its April 15, 2002, submission.¹⁴⁴ In making this argument, Tembec states that the Executive Committee, in its October 21, 2002, reply brief before the Panel, suggested the same recalculation. In fact, the Executive Committee stated in that brief (at 22) that it "continues to believe that the Department did not make such an error," referring to Tembec's ministerial error allegation, and it only suggested the recalculation as a means of closing any protracted debate on the subject. The Department is not making any changes because there is no methodological error with respect to Tembec's interest rate used. Moreover, the Department verified that credit value was reported correctly in Tembec's home market sales database with respect to Canadian-dollar denominated sales. Thus, no error exists with respect to credit on these sales. Furthermore, Tembec has not commented on these issues in response to the Department's draft remand.

However, Tembec did file comments on the Department's draft remand whereby Tembec now argues that the Department's correction of Tembec's U.S.-dollar denominated credit expense was appropriate in the final determination. The Department agrees and has recalculated Tembec's credit expense on U.S.-dollar denominated sales, as explained above.

West Fraser

¹⁴⁴ See Tembec's Reply Brief.

G. West Fraser's Sales of Wood Chips to Affiliates

With respect to West Fraser Mills Ltd., the Panel remanded the determination to the Department with instructions to consider West Fraser's de minimis argument concerning wood chips on the merits. The Panel further instructed the Department, in so doing, to further consider the cumulative effect of two related issues that implicate the quality of West Fraser's unaffiliated sales data for wood chips: whether the timing of the unaffiliated sales (in the earlier part of the POI) and the presence of the long-term contract, together with the asserted de minimis quantum of sales, cause the unaffiliated sales data to be not fairly reflective of the prices in the POI. The Department's consideration of these issues in light of the Panel's instructions is explained below.

In applying section 773(f)(2) of the Act, the Department normally compares the transfer price received by the respondent to the price that a respondent receives directly from an unaffiliated party for by-products because it represents the respondent's own experience in the market under consideration.¹⁴⁵ If the respondent does not sell its by-products to unaffiliated parties, the Department then compares the transfer price to the price at which the affiliated party purchased its by-products from unaffiliated suppliers. If this is also not available, then section 773(f)(2) allows the Department to base the market price on other reasonably available information, e.g., prices to and from other parties in the market.

¹⁴⁵ As explained in section D above, the issue between affiliates making sales is to ensure that these sales reflect an arm's-length price.

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In the case of West Fraser, its BC mills did in fact have sales of by-products to unaffiliated parties in BC. As this is the Department's first preference in establishing a market price, those sales have been used to judge the arm's-length nature of West Fraser's sales of wood chips.

West Fraser argues that the Department should not use the sales of wood chips from its BC mills to unaffiliated parties because they are de minimis in quantity. Further, West Fraser argues that the majority of the unaffiliated sales in question were made during the first two months of the POI, when chip prices were at their lowest, and subject to the constraints of a long-term contract. As the panel has noted, West Fraser concludes that these factors together cause the unaffiliated sales data to be unreflective of prices during the POI, and thus are unable to provide the substantial evidence needed to support the Department's findings. Upon remand, the Panel instructed the Department to further consider the effect of these two related issues and their impact on the usability of West Fraser's unaffiliated sales data.

As explained below, the Department finds that West Fraser's sales to non-affiliates were sufficient in number or quantity and were at market prices. Moreover, these sales were not compromised by the fact that some of them were made early in the POI or subject to the terms of a long-term contract. As such, the Department determines that West Fraser's sales of wood chips to unaffiliated parties were the best benchmark for West Fraser's affiliated sales.

In applying its normal methodology, the Department seeks to "establish that sales to unaffiliated purchasers are sufficient in number or quantity sold to serve as a benchmark for testing affiliated party transactions." Preamble to 19 CFR § 351.407, 62 FR 96, at 27355 (May 19, 1997). If the

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Department finds that those sales are “sufficient in number or quantity,” then they are used as a benchmark. These are questions of fact, rather than law. Here, the Department is following its standard practice.

The Department’s normal practice is to use a company’s unaffiliated sales data, where such data are available. In Pure Magnesium From Israel, the Department was faced with the situation where the respondent had sales to both affiliated and unaffiliated parties – in other words, exactly the same scenario as West Fraser. The Department concluded:

When a respondent sells the same byproducts to affiliated and unaffiliated parties at different prices, the Department considers the prices received from unaffiliated parties by the respondent to be at arm's length. In this case, the average sale price of chlorine charged to the affiliated party exceeded the average sale price charged to the unaffiliated parties. Thus, for the final determination, we used the average sale price of chlorine received from unaffiliated parties to calculate the byproduct offset to production costs. (Emphasis added).¹⁴⁶

The Department’s practice as stated above is to use a company’s own sales to unaffiliated parties. If the Department finds the numbers or quantity of sales insufficient, those sales will not be used. In Porcelain-on-Steel Cookware From Mexico: Final Results of Antidumping Duty Administrative Review, 63 FR 38373, 38376 (July 16, 1998) (Comment 2), the Department stated that “we decline to find that the prices for Cinsa's minimal purchases of enamel frit from an unaffiliated producer are an appropriate basis for determining whether their purchases from ESVIMEX reflect fair market prices.” That case states that the “minimal purchases” were business proprietary information.

¹⁴⁶ See Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium From Israel, 66 FR 49349 (September 27, 2001) and accompanying Decision Memo at Comment 6.

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However, we note that this is the only case where otherwise commercial sales were found to be insufficient. The word “minimal” means: “constituting the least possible in size, number or degree.”¹⁴⁷

19 C.F.R. § 351.403 (c) allows the Department to use sales to an affiliated party “. . . only if satisfied that the price is comparable to the price at which the exporter or producer sold the FLP to a person who is not affiliated with the seller.” This rule relates to use of affiliated sales for purposes of assessing NV, but the concepts are the same as those for assessing affiliated sales for cost purposes. In the Preamble to this regulation, the Department explained its practice in determining whether affiliated sales can be valid as follows:

{T}he appropriate means to make this determination is by comparison to known arm's length prices. In order to perform such an arm's length test, the Department first must establish that sales to unaffiliated purchasers are sufficient in number or quantity sold to serve as a benchmark for testing affiliated party transactions. If sales to unaffiliated purchasers are insufficient, we simply will not use sales to affiliated purchasers

62 FR at 27355 (May 19, 1997) (Emphasis added).

Underlining the fact that commerciality is the primary focus of determining whether prices are “usually reflected” in the market, rather than a rigid numerical test, in Mannesmannrohren-Werke AG v. United States, 77 F. Supp. 2d 1302, 1307 (CIT, 1999), the Court was faced with an appeal involving a company that had both affiliated and unaffiliated sales. The Department had found that input sales between Mannesmann and its related affiliate HKM did not reflect market value, so that the Department, pursuant to § 773(f)(2) and (3) of the Act, 19 U.S.C. § 1677b(f)(2) and (3) (1994), used market prices to value the inputs purchased from the affiliate HKM, and, in turn, to calculate

¹⁴⁷ Webster’s Third New International Dictionary (unabridged)(1986), Volume 2, page 1438.

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Mannesmann's COP. "Finding the price paid to the non-affiliated party to be 30.9 % higher than the price paid to HKM," the Department had increased the transfer prices reported for all HKM billet sales to Mannesmann by 30.9% to approximate market value." Id. Indeed, the Court confirmed the Department's use as the market price benchmark of a small amount of input -- a single sale -- sourced from a non-affiliated supplier, which data formed the amount of the revision in the prices of affiliated sales. In a "facts available" context which would not affect the nature of the test applied, the Court found that this approach was rationally related to the purpose of establishing an arm's-length value. "The Department did no more than use available record evidence of a market price to help it approximate other market prices." Id. at 1319. The same approach is appropriate here.

The use of unaffiliated sales "sufficient in number or quantity" is a sensible benchmark test used by the Department, and was employed in the case of West Fraser also. In absolute terms, West Fraser had substantial sales of wood chips to unaffiliated parties, with a significant tonnage and a significant commercial value.¹⁴⁸

¹⁴⁸ See Memorandum to Neal M. Halper through Michael P. Martin from Tajia Slaughter: Verification Report on the Cost of Production and Constructed Value Data Submitted by Canfor Corporation, dated February 4, 2002 (Public Record No. 1160) (Canfor Cost Verification) at 23 (Exhibit 2 to West Fraser's Brief).

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Rather than address these unaffiliated sales and to prove somehow that West Fraser's unaffiliated sales pricing is not at market value,¹⁴⁹ or that the sales were otherwise not commercial,¹⁵⁰ West Fraser argues that its sales should have been considered de minimis.

West Fraser ventures far afield seeking support for its de minimis theory. However, though West Fraser cited section 351.413, the Department's regulations make clear that West Fraser's citation of this section is inapposite to this situation. This provision relates to minor adjustments, and does not support a de minimis rule in other contexts.

West Fraser seeks to convince the Panel that the relevant standard is a percentage — which it is not. The standard is: arm's-length sales "sufficient in number or quantity sold." West Fraser seeks to promote a meaningless percentage, namely, a measure of a respondent's unaffiliated sales to its total

¹⁴⁹ Such evidence would have needed to have been submitted to the Department prior to verification, and it was West Fraser's responsibility to do so. Aside from West Fraser's claims in its NAFTA brief here that it was subject to a long-term contract and that prices in the POI increased (Brief at 13 (chart 2), West Fraser did not submit evidence before verification demonstrating that its chip sales prices to unaffiliated customers in BC were not reliable. To the contrary, a long-term contract is evidence of the expected long-term market price.

¹⁵⁰ When presented with requests to assess the commerciality of certain sales, the Department did so. For example, with respect to Canfor, the Department determined that certain of Canfor's Alberta sales were distorted by the nature of its contracts. Thus, the Department found that during the POI, Candor sold its by-product wood chips produced at its 11 sawmills to its affiliated pulp mills, Lakeland and The Pas, in the province of BC, so Canfor had no unaffiliated sales in BC. See generally, Canfor Verification Report, (Public Record No. 1160). Two of Canfor's sawmills, Grande Prairie and Hines Creek, sold wood chips only to unaffiliated companies in Alberta. Id. The Grande Prairie and Hines Creek transactions in Alberta were complicated agreements; specifically, Canfor's only unaffiliated transactions during the POI fixed the wood chip prices below market levels in exchange for other products and other company's chip products at below market prices. See Canfor Cost Verification, at 28; Canfor Second Supplemental Section D Response, dated December 12, 2001, (Public Record No. 1053) at Exhibit D-61; Canfor's COP and CVC Adjustments Memorandum, dated March 21, 2001, (Public Record No. 1305).

The Department also found, inter alia, in relation to Canfor's unaffiliated sales in Alberta the following: "Specific to Canfor, the verified information shows that the fair market value that Canfor's mills obtain for sales of wood chips to unaffiliated purchasers is clearly distorted due to its contractual agreements." (Citing to: Candor Cost Verification, at 27-28). Issues and Decision Memo at Comment 11.

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sales. This is an irrelevant proposal. The issue is not how significant West Fraser's unaffiliated sales are as compared to its affiliated sales. The issue under section 773(f)(2) of the Act is whether these sales are at prices "usually reflected" in the market. The test is commercial -- i.e., whether its unaffiliated sales are at arm's length in number or quantities sufficient to serve as a benchmark. Thus, commercial sales that are not minimal in "number or quantity" are the standard.

The Department has applied this test properly here. It finds that there were significant West Fraser sales, which were sufficient to serve as a benchmark. While these amounts were not large in relation to the market, they were in no sense minimal. As long as the sales are made at arm's length and are sufficient in number or quantity (e.g., not samples), they qualify as a commercial benchmark for this purpose.

Additionally, contrary to West Fraser's assertions, the fact that a portion of its sales of wood chips to unaffiliated parties in BC were subject to a long-term contract does not negate the validity of these sales nor detract from their usability as a proper benchmark for market value. In fact, a long-term contract is equally valid evidence of prices over the course of the POI as are any temporary sale prices, and prices under such a contract should not be disregarded. Presumably, any expected movements in market prices are inherently built into the terms of the sale by the parties involved, and only radical, unexpected movements might render such contract prices invalid. Over the course of the investigation, no party has provided evidence that any such unexpected movements occurred. Finally, the timing of these contract sales (occurring in the first two of the twelve months of the POI) does not detract from their usefulness. First, these two months were a material part of the POI. Second, they were market

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prices at that time. Third, they are not the only source of West Fraser's sales data to third parties and, thus, the composite nature of these two types of data enhances the representativeness of these several types of commercial sales by West Fraser in BC.

The record nowhere states that West Fraser's contract prices from its McBride mill were not reflective of the market. West Fraser never made such an argument. West Fraser's Cost Verification Report records only that: "the McBride mill had a long-term contract in effect for chip sales when the mill was purchased and that all sales occurred in April and May 2000. They explained that the sales value of chips increased in May 2000 and that they were obligated to sell the chips at the lower contracted price." These prices represented West Fraser's market experience. Together with the sales from the Pacific Island resources mill -- which West Fraser has never contended were not arm's-length transactions -- these two sets of mill sales were reflective of West Fraser's prices during the POI. Thus, when West Fraser was prepared to sell wood chips (pursuant to this commercial contract, and without it), this was the best evidence of a fair market price for its wood chips, rather than the higher, inflated prices at which it sold to its affiliates.

The paragraph summarizing the Department's findings that West Fraser's sales to its affiliated companies were not at arm's length is cited below:

With respect to West Fraser, for purposes of the final determination, we have compared West Fraser's sales of wood chips to affiliated and unaffiliated parties separately for Alberta and British Columbia. Based on this comparison we find that West Fraser's sales of wood chips to affiliated parties in Alberta during the POI were made at arm's-length prices. We also find, however, that West Fraser's sales of wood chips to affiliated parties in British Columbia during the POI were not made at arm's-length prices. Thus, for sales of wood chips in British Columbia, we used the

average sales price for wood chips received from unaffiliated parties to value the sales to affiliated parties and adjusted West Fraser's by-product offset for the final determination.

Final Determination, Issues and Decision Memo at Comment 11. (Emphasis supplied.)

Accordingly, in response to the Panel's remand, the Department confirms that it acted appropriately in applying the affiliated party transaction rule to West Fraser's affiliated sales using its unaffiliated sales as a benchmark. Contrary to West Fraser's assertion, the Department has not erred by using West Fraser's unaffiliated party sales, and West Fraser failed to present credible evidence that these sales were improper. The Department had before it a substantial number of valid commercial sales, and did not find those to be minimal, *i.e.*, "the least possible in size, number or degree." Neither the timing of those sales, nor their connection to a long-term contract, detracted from their usefulness as part of the data used by the Department on the basis of their commerciality. The Department exercised reasonable judgment in evaluating the record, and the record adequately supports the Department's decision. The Department's methodology must be upheld unless it is unreasonable.¹⁵¹ Thus, upon remand, we have continued to use West Fraser's own sales to unaffiliated parties as the proper benchmark to determine whether its sales to affiliated parties were at arm's length, and have continued to adjust the company's reported wood chip revenues accordingly.

III. Comments From Interested Parties

¹⁵¹ See Fujitsu Gen. Ltd. v United States, 88 F.3d 1034, 1038 (Fed. Cir. 1996).

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On September 5, 2003, Slocan submitted comments on our Draft Remand.¹⁵² On September 11, 2003, the petitioner, Weyerhaeuser, and Tembec submitted comments on our Draft Remand.¹⁵³ On September 15, 2003, the petitioner, Tembec, Abitibi, and West Fraser submitted comments on our Draft Remand.¹⁵⁴ In addition, on September 15, 2003, all of the respondents filed joint comments.¹⁵⁵ All of these comments are addressed below.

General and Scope Issues

A. Comment 1: Calculation of CV Profit/Definition of FLP

The respondents argued that the Department's Draft Redetermination still fails to provide an adequate explanation as to why it chose to use the "aggregate method" of defining FLP as merchandise in the "same general class or kind of merchandise" subject to the investigation.¹⁵⁶ Specifically, the

¹⁵² See Letter from the Slocan to the Department, dated September 5, 2003, (Remand Public Record No. 25) (Slocan September 5, 2003, Letter).

¹⁵³ See Letter from the petitioner to the Department, dated September 11, 2003, (Public Record No. 50) (Petitioner September 11, 2003, Letter). See also Letter from Weyerhaeuser to the Department, dated September 11, 2003, (Public Record No. 49) (Weyerhaeuser September 11, 2003, Letter). See also Letter from Tembec to the Department, dated September 11, 2003, (Public Record No. 51) (Tembec September 11, 2003, Letter).

¹⁵⁴ See Letter from the petitioner to the Department, dated September 15, 2003, (Public Record No. 56) (Petitioner September 15, 2003, Letter). See also Letter from Tembec to the Department, dated September 15, 2003, (Public Record No. 53) (Tembec September 15, 2003, Letter). See also Letter from Abitibi to the Department, dated September 15, 2003, (Public Record No. 52) (Abitibi September 15, 2003, Letter). See also Letter from West Fraser to the Department, dated September 15, 2003, (Public Record No. 55) (West Fraser September 15, 2003, Letter).

¹⁵⁵ See Letter from all of the respondents to the Department, dated September 15, 2003, (Public Record No. 54) (All Respondents September 15, 2003, Letter).

¹⁵⁶ See All Respondents September 15, 2003, Letter at 2. In their briefs challenging the Final Determination, the respondents focused their arguments on the claim that the Department applied inconsistent definitions of FLP resulting in unreasonably high profit rates. See Joint Brief of Respondents, p.79-90 (Aug. 2, 2002).

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respondents argued only two points. First, they simply incorporated, by reference, their arguments previously made in their briefs before the Panel.¹⁵⁷ Second, the respondents state that the Department's explanation relating to the use of value-based costing methodology for the Final Determination was an insufficient explanation of the reasonableness of the Department's choice. The respondents argue that this explanation is an attempt to justify the Department's choice rather than explain it.¹⁵⁸

The Department's Position:

The Department maintains that the explanation provided in this Remand Determination continues to illustrate the reasonableness of the Department's conclusion that using aggregate home market sales to calculate CV profit, through its application of the FLP definition, was appropriate. The use of aggregate data results in a reasonable and practical measure of profit that we can apply consistently in each case. By contrast, the respondents' proposals would add an additional layer of complexity and uncertainty to this proceeding without necessarily generating more accurate results.

Moreover, the respondents' proposal would also make the statutorily preferred CV profit method inapplicable to most cases involving CV. As explained above, the preferred methodology under U.S. law for calculating CV profit requires the Department to use sales of the FLP (defined to include sales of the same general class or kind of merchandise) that are made in the ordinary course of trade (i.e., that pass the cost test). Use of the aggregate home market sales did not distort the CV profit calculation, particularly given the steps the Department has taken to adjust the value-based cost

¹⁵⁷ Id. at 3.

¹⁵⁸ Id. at 3 and 4.

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allocation applied in this case. For these reasons, the Department was not required to use any of the alternative methodologies for calculating CV profit.

To the extent that the Complainants have incorporated by reference the arguments offered in their briefs before the Panel, those arguments pre-date the Federal Circuit's SKF USA Inc. decision and have been overtaken by events; therefore, they do not detract from the Redetermination. Those arguments focused on the claim that the Department applied inconsistent definitions of the term FLP. See Joint Brief of Respondents, p.79-90 (Aug. 2, 2002). As noted above, the Federal Circuit and this Panel have accepted the agency's explanation of how it defines the statutory term.

We also disagree with respondents' argument that the reference to the value-based costing methodology is not an explanation but, rather, a justification of using the aggregate FLP sales for calculating CV profit. The Department's revised value-based cost allocation provides further factual support for the Department's findings. Because the Department revised its cost allocation methodology to include dimension, each product's costs are more reflective of its market value. Therefore, it is not a valid assumption that certain products must be sold at low or no profit. The lower cost of these low-value products should allow them to generate a profit more commensurate with that of the higher value products. We note that the value-based cost methodology, in addition to making it possible for low-value products to earn a profit, also lowers the profit rate of the higher-value products, by raising their cost. Therefore, using the aggregate methodology reflects a more accurate result since all products in the total pool of eligible sales will have a narrower range of profit rates than occurred when a volume-based cost methodology was employed. As such, using the aggregate of these profit rates, from

products within the scope and sales made in the ordinary course of trade, yields a more accurate result in the CV calculation.

For these reasons, use of the preferred methodology for calculating CV profit was reasonable, supported by substantial evidence, and in accordance with law.

B. Comment 2: FJF

Tembec argues that the Department's Draft Remand analysis of whether FJF is a separate class or kind of merchandise "remains contrary to law and unsupported by substantial evidence."¹⁵⁹ It observes that the NAFTA Panel remanded the Final Determination with instructions to "provide a complete explanation of its decision that {flangestock} is included within the single 'class or kind' that encompasses the other products . . . how it applied each of the Diversified Products factors in respect of {flangestock}, the determinations reached with respect to each such factor, and how it weighed these factors in reaching its conclusion."

Tembec argues that the Department has significantly altered its analysis of FJF in response to the Panel's instructions asserting that in the original Final Determination, the Department examined FJF under only three of the five Diversified Products criteria (physical characteristics, channels of distribution and methods of advertising), whereas in the Draft Remand the Department "touches on" all five Diversified Products criteria.¹⁶⁰ Tembec contends that the Final Determination compared FJF's

¹⁵⁹ See Tembec September 15, 2003, Letter at 2.

¹⁶⁰ Id. at 3.

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channel of trade and manner of advertising to those of other “specialty lumber products” without defining these specialty products. It asserts that the Department continues to compare FJF with a variety of “specialty lumber products” in the remand determination without providing a definition of this category (specialty lumber products). Tembec contends that while “{t}he Department’s path of reasoning might now be clearer to the panel . . . the conclusions remain no less contrary to law and unsupported by substantial evidence.”¹⁶¹

Tembec argues that the Department’s analysis in the Draft Remand confuses the scope of the investigation with the class or kind of merchandise under investigation. It contends that the NAFTA panel instructed the Department to compare FJF to “goods unambiguously within the ‘class or kind’” of merchandise under the Diversified Products factors as required by law.¹⁶² In a footnote, Tembec argues that (in Tambac’s words) “{t}he Department acknowledges, in various places, that flangestock differs from products unambiguously within the class or kind”¹⁶³ and cites the following statements from the Draft Remand:

FJF is not used, at least directly, as dimension lumber for structural or framing purposes (Draft Remand at 34-35).

We do not dispute the respondents’ contention that the channel of trade for FJF is different from the channels of trade for most dimension lumber sold for building construction. ((Draft Remand at 39).

¹⁶¹ Id. at 3-4.

¹⁶² Id. at 3-4. Tembec cites to Bohler-Uddeholm Corp. V. United States, 978 F. Supp. 1176, 1183 (Ct. Int’l. Trade 1997) and Wirth Ltd. V. United States, 5 F. Supp. 2d 968 981 (Ct. Intel. Trade 1998).

¹⁶³ Id. at 4, footnote 12.

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Tembec asserts that “the Department’s determination rests on comparisons between flangestock and specialty lumber products, unique from each other and all other softwood lumber products by the Department’s own admission, which could not possibly be unambiguously the same class or kind or merchandise *{sic}*.”¹⁶⁴ Tembec supports this assertion by citing the Department’s statements in the remand determination that a number of specialty wood products are “defined by their specific end uses;” that “purchasers of a host of lumber components . . . have similar, and certainly equally specific, expectations;” that FJF channels are similar to sales channels for other mills that sell wooden components “directly to manufacturers of such items as pallets, door and window frames and many other assembled wood products. . .;” and that “[t]he record shows that other softwood products are advertised as distinct products.”¹⁶⁵

Tembec argues that the Department’s Draft Remand on FJF hinges on its “lengthy description of the similarities between facets of flangestock and facets of a wide array of other softwood lumber ‘specialty’ products in terms of particular physical characteristics and production steps.” Tembec contends that the Department “only made a list of Flange stock’s physical characteristics and production steps, and matched each one with a selected characteristic of a strategically selected softwood lumber specialty product.”¹⁶⁶ Tembec dismissed the Department’s approach to the analysis

¹⁶⁴ Id. at 5-6.

¹⁶⁵ Id. at 5, footnote 13.

¹⁶⁶ Id. at 5.

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as “*ad hoc*” and “results-driven,” and consequently “contrary to law” because, in Tembec’s view, “by the Department’s own analysis, flangestock is not like any of these other products, nor in the ensemble of physical characteristics, like any other product within the scope of the order.”¹⁶⁷ Tembec asserts that the Department must compare FJF to what it considers “merchandise unambiguously within the same class or kind of merchandise.” Tembec contends that in the Draft Remand, the Department has only compared FJF to what Tembec calls “a handful of cherry-picked specialty products that may be within the scope, but may themselves not be within the same class or kind.”¹⁶⁸

Tembec argues that the Department must conduct its analysis under all five Diversified Products factors and contends that the Department has based its conclusion that FJF is part of a single broader class or kind on “isolated characteristics of selected products under the physical characteristics factor.”¹⁶⁹ It notes that the Panel has stated that the Department must find “commonalities in physical characteristics, uses, customer expectations, channels of trade or advertising methods” among different products in the single class or kind and that the products must “reasonably be united by one or more common factors.”¹⁷⁰ Tembec contends that, “at most,” the Department has found one superficial

¹⁶⁷ Id.

¹⁶⁸ Id. at 6.

¹⁶⁹ Id. at 6.

¹⁷⁰ Id.

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physical similarity between FJF and each of the specialty products identified. It contends that these same specialty products are “otherwise unlike flangestock under the Diversified Products factors.”

Tembec argues that the Department “has failed to support with substantial evidence many of the new factual findings upon which its remand analysis relies.”¹⁷¹ It cites as examples the Department’s claims that “finger-jointed high elasticity products must meet specific load-bearing requirements,” that they are produced with “stronger resin glue,” and that “the optimization process that flangestock undergoes ‘would apply to certain other specialty products produced as components for remanufacturers or as machine stress-rated lumber.’” Tembec asserts that the Department has no factual basis for stating that FJF sold for purposes other than I-joist beam assembly would be called something other than FJF.

Tembec dismisses the Department’s analysis of the criteria of end use, customer perceptions, channels of distribution and mode of advertising for FJF as being nothing more than an exercise of recognizing that FJF is unique in these criteria and linking FJF to other lumber products that also have unique end uses, customer expectations, channels of distribution and modes of advertising. As an example, Tembec asserts that the Department does not find that the other specialty products have an end use similar to FJF – manufacture of I-joists – but instead has found that the disparate end uses of

¹⁷¹ Id. at 7.

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the other products “are similar in the sense that they are shared with no other softwood lumber products.”¹⁷²

Tembec argues that the petitioner in its initial comments on the Draft Remand “echo the Department’s impermissible approach.”¹⁷³ It contends that the petitioner makes many false or misleading assertions regarding FJF. Tembec disputes the petitioner’s claim that there is nothing on the record but “bald assertions” to suggest that FJF is an engineered wood product and accuses the petitioner of “ignoring sworn declarations on the record attesting to this fact.”¹⁷⁴ Tembec also argues that the petitioner’s claim that Louisiana Pacific requested an exclusion for MSR lumber to be used to manufacture I-joists is wrong because the MSR lumber was intended for the production of FJF.¹⁷⁵ Tembec notes that the petitioner has argued that the glue used for FJF is no stronger than any other while the Department “acknowledges that Abitibi has contrasted ‘the white glue used to finger-joint its studs and the stronger resin glue used to finger-joint its {flangestock}.”¹⁷⁶ It asserts that the petitioner has not rebutted multiple sworn declarations that stated that FJF is not marketed or displayed like other softwood lumber products. Tembec criticizes the petitioner’s “piecemeal application of the Diversified Products factors” that is “contrary to law for the same reason that the Department’s Draft Remand

¹⁷² Id. at 8.

¹⁷³ Id. at 9.

¹⁷⁴ Id.

¹⁷⁵ Id. at 9-10.

¹⁷⁶ Id. at 10.

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remains contrary to law.” Tembec notes that the petitioner has reiterated its concern that basing separate class or kind treatment on unique end use, channel of distribution and method of advertising could result in “hundreds” of classes or kinds and argues that the Panel has rejected this particular argument with respect to the Department’s original determination.

Abitibi has limited its comments to the Department’s class or kind determination regarding SEBF components.¹⁷⁷ However, Abitibi states that it joins fully in Tembec’s comments regarding FJF. Abitibi argues that the Department’s position that SEBF components are part of a single class or kind of merchandise is unsupported by substantial evidence and is contrary to law. Abitibi contends that the Department’s position is flawed because it fails to follow its own standard and compares SEBF to “other forms of softwood lumber unambiguously within the identified ‘class or kind’ of merchandise.”¹⁷⁸ Abitibi asserts that “[i]t appears that the Department is purporting to compare bed-frame components with pallet stock, truss components, door frame components, door jambs, window parts, flange stock, and other so-called ‘pre-manufactured components’; however the Department never identifies the characteristics of these products under each of the Diversified Products criteria.”¹⁷⁹ According to Abitibi, not all of the products that the Department is using for comparisons with SEBF are unambiguously within the class or kind of merchandise, specifically citing FJF, noting the class or kind status of FJF is being disputed in this very proceeding. Also, as Tembec does for FJF, Abitibi argues

¹⁷⁷ See Abitibi Letter September 15, 2003, at 1.

¹⁷⁸ Id. at 2.

¹⁷⁹ Id. at 3.

that the Department is erroneously treating as similarities “differences” between products to which it compares SEBF in a flawed attempt to establish commonalities required by the Diversified Products analysis.¹⁸⁰

Of direct relevance to FJF, Abitibi has proposed that, if the Department determines it will not treat SEBF components as a separate class or kind of merchandise, it should, alternatively, determine that all products that the Department has now termed “lumber components pre-manufactured for a specific application,” -- pallet stock, truss components, door frame components, door jambs, window parts, flange stock, etc. -- together with SEBF components, comprise a “distinct class or kind” of merchandise.

The petitioner agrees generally with the Department’s position that FJF is part of a single class or kind of merchandise encompassing all softwood lumber.¹⁸¹ The petitioner provides comments on each of the Diversified Products criteria and reviews in some detail facts on the record relevant to each criterion. The petitioner examines the substance of both the Panel’s decision and the respondents’ positions on the class or kind status of FJF in the context of the Diversified Products criteria.

Physical Characteristics

The petitioner identifies seven different general physical characteristics discussed in the Panel’s decision as listed below:

- FJF is an engineered product;

¹⁸⁰ Id. at 4.

¹⁸¹ See Petitioner September 11, 2003, Letter at 2.

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- FJF is a manufactured product;
- FJF is produced in specific lengths;
- FJF is kiln-dried;
- FJF is machine stress-rated;
- FJF is finger-jointed and;
- FJF undergoes specific gluing/joining processes.

Engineered Product:

The petitioner argues that there is no universally accepted definition of an “engineered” softwood product. It contends that while most industry experts would agree that I-joist or I-beam – the finished product of which FJF is one component – is an engineered product, there is nothing on the record but “bald assertions” by the respondents that industry experts consider FJF to be an engineered product. However, the petitioner argues, if one assumes for argument’s sake that FJF is engineered, the characteristics that seem to support this assumption are that FJF is finger-jointed and MSR. The petitioner argues that there are many other types of finger-jointed lumber which are unambiguously within the scope of the order, but no party has argued that finger-jointed lumber generally is a separate class or kind of merchandise. The petitioner also asserts the MSR lumber is unambiguously within the single class or kind of lumber that comprises the scope of the order. The petitioner thus contends that the fact that a particular piece of lumber is an engineered product on the basis of finger-jointing and machine stress-rating does not provide the clear dividing line necessary for finding a separate class or kind.

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In the petitioner's discussion of FJF as an "engineered" product, the petitioner argues that the Department made a "subjective" judgement in stating in the Draft Remand that it "recognizes that FJF is sturdier than finger-jointed studs as a result of different finger-jointing procedures."¹⁸² The petitioner contends that the term "sturdier" is "a subjective description that is not entirely accurate, without factual basis on the record and should be avoided."¹⁸³ The petitioner asserts that there is nothing on the record that indicates a 2x3 FJF is sturdier than a 2x4 or 2x6 finger-jointed stud. The petitioner argues that such "unhelpful subjective comparisons" were provided to the Panel by the Canadian parties and contributed to the Panel's remand of the FJF issue.

Manufactured Product:

The petitioner argues that all the thousands of softwood products that are unambiguously within the single class or kind of lumber subject to the AD order are manufactured products because trees must be grown, timber must be harvested, logs debarked and sawn, lumber planed, dried, sorted, graded, packaged and transported to have even the most basic lumber product. The petitioner thus asserts that whether it is rough sawn green lumber or FJF, it is a manufactured product.

The petitioner argues that the Panel's decision reflects a possible misunderstanding of the difference between the manufacture of softwood lumber and the manufacture of other articles of wood. The petitioner notes the Panel stated: The observation that something is a "lumber product in a broad

¹⁸² Id. at 4, footnote 2.

¹⁸³ Id.

field of lumber products” might be made with equal ease concerning wooden furniture or other manufactured goods of wood.¹⁸⁴

The petitioner contends that Panel’s observation that wooden furniture could be described as a “lumber product in a broad field of lumber products” reflects a fundamental misunderstanding of wood products and lumber products. The petitioner refers to product tariff classifications in the Harmonized Tariff Schedule of the United States (HTSUS) for different products made from wood noting that under U.S. law wooden furniture is not an “article of wood” classified under HTSUS Chapter 44 in which lumber products are found, but is classified instead under HTSUS Chapter 94 (Heading 9403). The petitioner notes that paper and cardboard are also under different HTSUS classifications and argues that “{t}he fact that lumber, furniture, and paper are all manufactured from trees does not make them comparable products.”¹⁸⁵ The petitioner thus contends that a comparison of wood furniture to lumber has no bearing on the class or kind determination. The petitioner also stresses that not only is wooden furniture not a manufactured good of wood (in the sense of a manufactured good of wood classified under Chapter 44), but many manufactured goods of wood are not lumber.¹⁸⁶ The petitioner observes that while all lumber is a manufactured good of wood, there are many goods of wood that are not considered to be lumber, such as telephone poles and logs in HTSUS 4403; railway ties in HTSUS 4406; sheets of veneer for plywood in HTSUS 4408; particle board in HTSUS 4410; fiberboard in

¹⁸⁴ See Panel Decision at 167.

¹⁸⁵ See Petitioner September 11, 2003, Letter at 5.

¹⁸⁶ Id.

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HTSUS 4411; plywood in HTSUS 4412; picture frames in HTSUS 4414; barrels and casks in HTSUS 4415; broom and mop handles in HTSUS 4417; wooden spoons in HTSUS 4419; wooden cigar boxes in HTSUS 4420; and tongue depressors in HTSUS 4421. The petitioner concludes that the fact that FJF is a manufactured good is a similarity it bears with other lumber products and not a difference.

Length:

The petitioner notes that the Panel found that FJF is distinguishable by its length, in that it can be produced in lengths up to 66 feet, while other lumber products are limited by the length of the log. The petitioner argues that based on the definition of “unique” as something that is the only one of its kind, the length of FJF is not unique insofar as the record does not indicate that all FJF is longer than all other softwood products. The petitioner notes that while the respondents highlighted that FJF is produced in lengths up to 66 feet, they also placed information on the record documenting a wide range of FJF lengths. The petitioner observed that Tembec initially reported that it sold FJF in lengths from 18 to 60 feet.¹⁸⁷ The petitioner asserts that in its subsequent response to Section A of the questionnaire, Tembec provided evidence that it sold FJF in lengths of seven to 60 feet.¹⁸⁸ The petitioner also notes investigation submissions from Canfor, Weyerhaeuser and Abitibi indicating that FJF, machine

¹⁸⁷ See Tembec May 21, 2001, Letter at 6.

¹⁸⁸ See Tembec Section A Response at Ex. A-25.

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evaluated lumber (MEL) and MSR lumber to be used as I-joist flanges were offered for sale in lengths ranging from eight to 48 feet.¹⁸⁹

The petitioner also identifies substantial record evidence that shows a significant overlap between the length of FJF and other lumber products unambiguously in the same class or kind of merchandise. The petitioner cites submissions from Canfor, West Fraser, Slocan, and Tembec documenting products whose lengths overlap with FJF.¹⁹⁰ These sources on the record show a range of lumber products such as fascia, dimension lumber, stress-rated lumber, decking, and log cabin siding that, in Canfor's case, were sold in lengths of 18 feet or greater, and for the other companies ranged from six to 24 feet. The petitioner argued that given record evidence that FJF is sold in a variety of lengths, some as short as seven feet, there is significant overlap in the lengths of FJF and other lumber products described in the record.

The petitioner also reviewed record evidence that there are a number of softwood lumber products that can claim their own "unique" length. One example presented by the petitioner involved PET box components and door jacks in pre-designated lengths produced by Weldwood of Canada, Ltd.¹⁹¹ The petitioner also noted that Alberta Spruce Industries sells furniture components in specific

¹⁸⁹ See Canfor Section A Response at Ex. A-19; Weyerhaeuser Section Response at A-22; and Abitibi Section A Response at Ex A-23.

¹⁹⁰ See Canfor Section Response A at Ex. 19; West Fraser Section A Response at Ex. A-24; Slocan Section A Response at Ex 18; and Tembec Section A Response at Ex. A-25.

¹⁹¹ See Weldwood August 17, 2001, Letter at Attachment at 64-65.

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lengths.¹⁹² It notes that in Canfor's product brochure, Canfor states that it will manufacture custom products and grades for specialized applications.¹⁹³ The petitioner contends that the fact that FJF is produced in "unique" lengths per customer specifications represents a similarity rather than a difference with many other softwood lumber products because the majority of lumber products are cut to a specific length suitable for their intended application. The petitioner notes that even PET studs produced by Canfor are manufactured in unique lengths.¹⁹⁴

The petitioner argues that the Panel's observation that "other products are limited to the length of the log "is inaccurate at best," since there is nothing that limits any softwood product to the length of the log.¹⁹⁵ The petitioner contends that many solid-sawn products are shorter than the log from which they were produced, while any type of finger-jointed product can be longer or shorter than the logs from which its components were made. The petitioner asserts that finger-jointed lumber is unambiguously part of the single class of merchandise within the scope of the order and FJF is no different from other finger-jointed lumber with respect to length.

¹⁹² See Letter from Alberta Spruce Industries to the Department, dated August 16, 2001, (Public Record No. 603) (Alberta Spruce August 16, 2001, Letter) at attachment.

¹⁹³ See Canfor Section A Response at Ex. A-19.

¹⁹⁴ Id. at Ex. A-16, p. 19.

¹⁹⁵ See Petitioner September 11, 2003, Letter at 10.

Kiln-Drying:

The petitioner holds that there is nothing related to the process of kiln-drying lumber that distinguishes FJF, noting that the overwhelming majority of softwood lumber is kiln dried.¹⁹⁶

Machine Test Rating:

The petitioner notes as a preliminary matter that machine stress rating is simply a grading process which does not change the product, but enables the purchaser to compare and select products based on a known modulus of elasticity. The petitioner notes that MEL represents another grading process which sorts lumber products into various strength classifications. The petitioner asserts that both MSR and MEL products are unambiguously within the single class of subject merchandise and no party has argued that these products represent a separate class or kind. The petitioner argues that there is nothing about the Machine stress rating process that distinguishes MSR FJF from other MSR lumber and that it is a type of MSR lumber similar to other MSR lumber. The petitioner argues that much MSR lumber other than FJF is described on the record. The petitioner cites Canfor's MSR lumber which the company does not identify as FJF, but more generally as "the product of choice for engineered applications."¹⁹⁷ It highlights Tembec's "truss stock" that includes 2x3 and 2x4 framing products in lengths five to 20 feet that are MSR.¹⁹⁸ The petitioner observes that Abitibi also

¹⁹⁶ As an example, the petitioner cites to Canfor Section A Response at Ex. 16.

¹⁹⁷ See Canfor Section A Response at Ex A-19.

¹⁹⁸ See Tembec Section A Response at Ex. A-25.

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manufactures MSR lumber in lengths from three to 20 feet¹⁹⁹ and Slocan produces 2x3 to 2x10 MSR lumber in lengths from six to 20 feet.²⁰⁰ Finally, the petitioner cites the example of Louisiana Pacific which sought an exclusion from the scope for 2x3 or 2x4 finger-jointed lumber with a machine stress rating of 1650 and above, which the company intended to use as an input for the production of structural I-joists at a North Carolina facility.²⁰¹ The petitioner argues that Louisiana Pacific accurately described FJF in calling it MSR lumber in this exclusion request. The petitioner concludes that the machine stress rating test performed on FJF does not provide a clear dividing line between FJF and other products that are unambiguously within the single class or kind of in-scope softwood lumber.

Finger-Jointing:

The petitioner argues that there is nothing unique about finger-jointed lumber as there are a variety of finger-jointed products other than FJF that are unambiguously within the single class or kind of subject merchandise. The petitioner cites as examples on the record, “finger-jointed fascia and trim boards” from Canfor,²⁰² finger-jointed studs from West Fraser,²⁰³ a variety of finger-jointed products

¹⁹⁹ See Abitibi Section A Response at Ex. A-23.

²⁰⁰ See Slocan Section A Response at Ex. A-18.

²⁰¹ See Letter from Louisiana Pacific to the Department, dated May 21, 2001, (Public Record No. 193) (Louisiana Pacific May, 21, 2001, Letter).

²⁰² See Canfor Section A Response at Ex. A-19.

²⁰³ See West Fraser Section A Response at Ex. A-24.

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from Abitibi,²⁰⁴ and finger-jointed door and window components from Tembec.²⁰⁵ The petitioner notes another Canadian company, Domtar, which described for the record its process of producing finger-jointed door and window components following a process which the petitioner argues is similar to that which the Panel noted for Tembec's FJF.²⁰⁶ The petitioner notes that Domtar first kiln-dries green lumber and then cuts defects from the lumber prior to finger-jointing. The petitioner argues that the processes that the various producers use to make these finger-jointed products are highly similar to the well-documented processes used to produce FJF.

The petitioner also argues that there is evidence on the record that at least one company has imported non-finger-jointed lumber to be used in the production of I-joists.²⁰⁷ As discussed in the petitioner's section on machine stress rating, Louisiana Pacific sought to exclude MSR lumber "whether or not finger-jointed" which it uses as flange stock to assemble I-joists in a North Carolina mill.²⁰⁸ The petitioner argues that there is thus some evidence that not all flange stock is finger-jointed at the time it is imported. The petitioner argues that no party has asserted that non-FJF is a separate class or kind of merchandise and contends that the record evidence is clear that there is not only no clear dividing line

²⁰⁴ See Abitibi Section A Response at Ex. A-23.

²⁰⁵ See Tembec Section A Response at Ex. A-25.

²⁰⁶ See Letter from Domtar to the Department, dated August 24, 2001, (Public Record No. 653) (Domtar August 24, 2001, Letter).

²⁰⁷ See Petitioner September 11, 2003, Letter at 13.

²⁰⁸ See Louisiana Pacific May 21, 2001, Letter.

between FJF and other in-scope finger-jointed lumber, there is also no clear dividing line between FJF and non-FJF.

Specific Gluing/Joining Process:

The petitioner notes that the Panel observed that the adhesive used to finger-joint individual pieces of lumber is cured with radio-frequency energy. The petitioner holds that the type of glue used to finger-joint lumber cannot possibly provide a clear dividing line between FJF and all other subject merchandise. The petitioner notes that Canfor reports using Polyvinyl Acetate adhesive in its finger-jointed studs that “penetrates the wood fibres and the bond strengthens with age.”²⁰⁹ The petitioner argues that Canfor’s Polyvinyl Acetate also provides a specific gluing process, but Canfor’s finger-jointed studs are still within the single class or kind of softwood lumber. The petitioner asserts that there is no objective evidence on the record that one type of adhesive used to finger-joint lumber is better than another and, thus, there is no basis to find a clear dividing line between FJF and other in-scope products based on the type of glue used.

The petitioner also argues that there is record evidence that other types of subject merchandise also consist of distinct pieces of lumber joined together through a specific process to form “an engineered/manufactured product.”²¹⁰ In this regard, the petitioner cites the example of the

²⁰⁹ See Canfor Section A Response at Ex. A-19.

²¹⁰ See Petitioner September 11, 2003, Letter at 14.

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Weldwood's "'triple corners' that are manufactured from three pieces of 2x4 lumber nailed together and trimmed to exact length."²¹¹

In the petitioner's view, FJF is not the only product that is joined by adhesive or manufactured from multiple pieces of lumber joined together in a certain way, cut to a specific length and used for a specific purpose. The general physical characteristics of FJF, the petitioner concludes, are highly similar to the general physical characteristics of softwood lumber that are unambiguously within the scope of the order, and there is thus no clear dividing line to support a separate class or kind find.

End use

The petitioner contends that the Panel noted only one end use for FJF, as a component of I-beams or I-joists, and based on this observation, the Panel concluded that FJF has a unique use. The petitioner argues that there is a significant quantity of subject merchandise produced for unique use in the same sense as FJF. For record evidence of this assertion, the petitioner identified as examples on the record, proprietary fascia (RealTrim(TM)),²¹² angle-cut lumber for sheds produced in specific sizes,²¹³ and window and door components,²¹⁴ all of which the petitioner stresses, are part of the single class or kind. In addition to these products the petitioner found record evidence of lumber products

²¹¹ See Weldwood August 17, 2001, Letter at 64.

²¹² See Letter from Woodtone to the Department, dated August 16, 2001, (Public Record No. 612) (Woodtone August 16, 2001, Letter) at 1-2.

²¹³ See Letter from Alliance Forest Products to the Department, dated August 17, 2001, (Public Record No. 619) (Alliance Forest Products August 17, 2001, Letter) at 2.

²¹⁴ See Letter from QLMA to the Department, dated August 17, 2001, (Public Record No. 616) at 2.

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specifically intended for furniture production, retail display shelving and door sills or frames which were also part of the single class or kind of merchandise.²¹⁵ As additional examples, the petitioner cited Western Hemlock stair-part turning squares from Cahan Wood Products;²¹⁶ garage door core, recreational vehicle products, and refrigerator stock from Bridge side High Forest Industries, Ltd.;²¹⁷ and “door jacks” from Weldwood²¹⁸ as products in the single class or kind that have unique end uses. The petitioner notes that various parties requested exclusion of their products from the scope at least in part on the basis that there was only one end use. The petitioner argues that if separate end use alone supported a finding of a separate class or kind, there would be hundreds of classes or kinds in the scope. The petitioner contends that this result would not be workable or in accordance with the Department’s practice.

Expectations of the Ultimate Purchasers

The petitioner states that the Panel has noted that FJF is manufactured to purchasers’ specifications; accompanied by a test report; frequently custom-made in specific lengths and strengths; sold on the basis of testing and certification that related to the quality of the lumber used as well as the quality of the manufacturing process; and that the customer expectations for FJF are unique and thus

²¹⁵ See Alberta Spruce August 16, 2001, Letter.

²¹⁶ See Letter from Cahan Wood Products, Ltd. to the Department, dated September 5, 2001, (Public Record No. 689) (Cahan September 6, 2001, Letter) at 2.

²¹⁷ See Letter from Bridge side High Forest Industries Ltd. to the Department, dated August 16, 2001, (Public Record No. 614) (Bridge side High August 16, 2001, Letter).

²¹⁸ See Weldwood August 17, 2001, Letter at attachment.

distinguishable from other “non-manufactured” forms of lumber because of FJF’s unique applications and channels of trade. The petitioner argues that Tembec’s record evidence, Tembec’s product brochure in this case, indicates that the company markets FJF as “lumber” as follows:

A wide range of lengths and grades are available, including precise lengths to meet customer specifications. Our modern facility, with an annual capacity of 37 million board feet, can adapt quickly to specific requirements that meet your finger-jointed lumber needs.²¹⁹

The petitioner contends that Tembec has contradicted its own brochure by insisting throughout the proceeding that FJF is not “lumber.”²²⁰ It asserts that this is “further evidence of the contrived nature of Tembec’s claim that FJF is a separate class or kind of merchandise.”²²¹ The petitioner notes that on the same page of the brochure where FJF is described as “lumber,” Tembec writes that its “Tembec MSR lumber is available in a wide range of lengths and grades and can be delivered to your exact length specifications.”²²² The petitioner argues that MSR lumber is unambiguously in the single class or kind of in-scope softwood lumber. It emphasizes that the fact that both FJF and MSR lumber can be produced in a wide range of lengths and grades to meet customers’ exact specifications “is compelling evidence that FJF is highly similar to other in-scope merchandise.”

²¹⁹ See Tembec Section A at Ex. 25.

²²⁰ See e.g., Canfor Letter to the NAFTA Secretariat (August 2, 2002), File No. USA-CDA-2002-1904-02, Vol II at 42.

²²¹ See Petitioner September 11, 2003, Letter at 17.

²²² See Tembec Section A at Ex. 25.

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The petitioner rejects the notion that the fact that some FJF is sold on the basis of testing and certification provides some sort of dividing line. The petitioner argues that virtually all MSR lumber, a product unambiguously within the single class or kind of subject merchandise, is also certified to possess certain physical characteristics that make it suitable in accordance with the customer's expectations. In the petitioner's view, the fact that customers expect testing and certification for some FJF represents a similarity with other products such as MSR lumber.

The petitioner reflects that “[i]f the end use of a product creates unique expectations on the part of the customer, then virtually every softwood lumber product will create unique expectations for the customer who buys them.”²²³ The petitioner provides examples of several products described on the record for which customer expectations are very specific, such as components for vegetable boxes and 87 3/4-inch PET studs with 1/16 inch of tolerance.²²⁴ The petitioner also cites “lumber dried to a particular moisture content for use in the manufacture of doors or walk-in refrigerators” for which the customer expects a very specific moisture content.²²⁵ The petitioner notes that purchasers of stair-part turning squares expect the product to contain 10-12 percent moisture and be precision end trimmed to a tolerance of plus or minus 1/32 of an inch.²²⁶ The petitioner concludes that the customer expectations

²²³ See Petitioner September 11, 2003, Letter at 18.

²²⁴ Id.

²²⁵ See Bridge side High August 16, 2001, Letter at Attachment.

²²⁶ See Cahan September 6, 2001, Letter.

of FJF purchasers are the same as those of purchasers of other lumber products – “they all expect the product to be suitable for its intended use.”²²⁷

Channel of Trade

The petitioner examines the Panel’s observations that FJF is marketed differently than other softwood products, sold to a single class of customer and occupies a distinct channel of trade because it is sold directly to I-beam producers, and argues that the record does not support such conclusions. The petitioner contends that Tembec’s product brochure on the record includes FJF in the truss stock section where it is grouped with MSR lumber and “Turb-oWeb” lumber, and generally includes all Tembec lumber products.²²⁸ The petitioner notes that Tembec markets and sells its FJF through the same “Sales and Marketing” address in Timmins, Ontario through which it sells other truss stock products.²²⁹ The petitioner asserts that the record thus clearly shows that the sales and marketing of FJF are not distinct from the sales and marketing of other products. The petitioner highlights the fact that FJF is included in product brochures that are also used for selling a wide variety of softwood lumber products not only in Tembec’s case, but throughout the Canadian industry.²³⁰

²²⁷ See Petitioner September 11, 2003, Letter at 18.

²²⁸ See Tembec Section A Response at Ex. 25.

²²⁹ Id.

²³⁰ See Weyerhaeuser Section A Response at Ex. A-22 (product brochure including flange stock, construction grade lumber and MSR/MEL lumber); West Fraser Section A Response at Ex. A-24 (product brochure including MSR lumber, green lumber, studs, and “specialty items”); Canfor Section A Response at Ex. A-19 (product brochure including FJF, finger-jointed studs, SPF lumber, plywood, finger-jointed fascia, MSR lumber, furring strips and other specialty products). The petitioner notes that Canfor’s product brochure includes a category of “specialty value-added lumber products” comprised of FJF, bedframe components, boards, clears/cutstock, decking, square edge/export, fascia, finger-jointed studs, furring strips (solid or finger-jointed), MSR lumber, and log cabin siding.

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With respect to the observation that FJF occupies a distinct channel of trade exclusively to I-beam manufacturers, the petitioner maintains that “{a} direct sale of FJF to an I-joist producer is simply a sale of a softwood lumber component directly to a manufacturer of a non-softwood lumber product.”²³¹ It asserts that the record evidence demonstrates that there are many softwood lumber producers that sell their products directly to purchasers who make something. The petitioner cites Alliance Forest Product’s sales of angle-cut lumber for sheds to shed builders;²³² window and door components sold direct to window and door manufacturers;²³³ furniture component manufacturers direct sales to furniture producers;²³⁴ stair-part turning squares sold directly to stair and stair-part manufacturers;²³⁵ and garage door cores, recreational vehicle products and refrigerator stock sold directly to manufacturers of garage doors, recreational vehicles and refrigerators.²³⁶ The petitioner argues that FJF is sold through channels of trade that are very similar to other channels of trade for lumber components sold directly to manufacturers of other products that include lumber components.

The Manner in which the Product is Advertised or Displayed

²³¹ See Petitioner September 11, 2003, Letter at 20.

²³² See Alliance Forest Products August 17, 2001, Letter at 2.

²³³ See QLMA August 17, 2001, Letter at 2; see also Domtar August 24, 2001, Letter at 2.

²³⁴ See Alberta Spruce August 16, 2001, Letter.

²³⁵ See Cahan September 6, 2001, Letter at 2.

²³⁶ See Bridge side High August 16, 2001, Letter.

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The petitioner disputes the Panel's observation that FJF is advertised differently than other softwood lumber products because FJF is not advertised.²³⁷ The petitioner asserts that the record shows that product and sales brochures, which the petitioner holds are clearly forms of advertising, frequently present FJF in the same way that these brochures present other softwood lumber products.²³⁸ The petitioner finds that the differences in advertising for FJF and other products "are slight, if not illusory," and argues that there is no clear dividing line evident in this category.

The Department's Position:

We agree with the positions taken by the petitioner for each of the Diversified Products criteria examined with regard to FJF. We find that the record evidence cited by the petitioner in support of its arguments strongly supports the Department's remand determination regarding the class or kind status of FJF. We note that the Department in its Draft Remand failed to recognize that Tembec does indeed provide information on FJF in its product brochures. We agree with the petitioner that this is a clear form of advertising comparable to what Tembec does for other products.

Regarding the petitioner's argument that the Department made a subjective comparison in stating that FJF is "sturdier" than finger-jointed studs in the Draft Remand, we agree in part.²³⁹ In our final remand determination, the Department has thus clarified this statement to say that, based on the respective normal applications of FJF and finger-jointed studs, we recognize that in general FJF is

²³⁷ See Petitioner September 11, 2003, Letter at 21.

²³⁸ See e.g., Tembec Section A Response at Ex. A-25; Weyerhaeuser Section A Response at Ex. A-22; and Canfor Section A Response at Ex. A-19.

²³⁹ See Petitioner September 11, 2003, Letter at 4, footnote 2.

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“sturdier” than most finger-jointed studs, in the sense that it has more modular elasticity. The record indicates the normal applications of FJF and finger-jointed studs and thus the Department can make an objective judgement on the relative strength of the most common forms of FJF. The point to emphasize here is that even if the respondents had overwhelming proof that the “strength” measured by any criterion) of FJF is unique among lumber products -- and the respondents clearly have not demonstrated this -- such a unique characteristic by itself would not render FJF a separate class or kind of merchandise under our Diversified Products tests. As the record clearly shows, there is a broad range of strength ratings in the spectrum of lumber products and the higher modular elasticity of Tembec’s FJF is just one example.

The respondents essentially present two general lines of argument in their comments. First, under the Diversified Products analysis, Tembec has amply explained the physical characteristics of its FJF and the end uses, customer expectations, channels of trade and methods of advertising in the narrow context of the I-joist manufacturing, but it has not sufficiently isolated it from other lumber products to constitute a separate class or kind. It remains our position that FJF by any other name would still be as light and strong and applicable to both I-joist production and other lumber product applications as FJF specifically designated as an I-joist beam input. The Department considers more than sufficient the substantial evidence that it has presented to show that there are a whole range of lumber products with Diversified Products criteria in common with FJF. However, in addition to what the Department has presented, the petitioner, in its comments, has provided an even more detailed inventory of substantial evidence on the record to support the position that FJF has too much in

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common with other lumber products to be treated as a separate class or kind of merchandise. We have summarized the petitioner's relevant comments above.

Regarding Tembec's discussion of the unique end use of flangestock for I-joist manufacture, Tembec continues to mistake a particular end use for a piece of lumber as being a class or kind-defining factor by itself. While clearly the end use of a product normally must be distinct from the end uses of other products in the scope for it to be considered a separate class or kind of merchandise, such a difference must be considered in light of differences in other criteria. With FJF, what is shared in physical characteristics and channels of trade with other products makes it unreasonable to attempt to draw a dividing line based on end use. Whether or not lumber manufactured as FJF is sometimes sold for a purpose other than I-joist manufacture, the fact remains that the physical characteristics of FJF are such that it could be used in other lumber product applications and, thus, dividing lines are difficult to establish simply on the basis of the end use that the customer selects for the lumber purchased. Additionally, as the petitioner made quite clear in its comments noted above, record evidence clearly shows that there many other softwood lumber products unambiguously part of the single class or kind of subject merchandise which are, in fact, identified by their specific end use. We agree with the petitioner's conclusion that the fact that there are other products with distinct end uses clearly within the single class or kind of merchandise, makes FJF's specific end use a shared characteristic rather than a unique one.

The respondents' second, broader line of arguments concerning FJF is misplaced in light of the Panel's determination. Tembec takes the Department to task for purportedly failing to compare FJF to

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“goods unambiguously included within the class or kind or the merchandise” and, instead, compares FJF to “scope products.”²⁴⁰ Rather than relying upon the Panel’s fairly extensive analysis of the Department’s ability to determine the “classes or kinds” of merchandise covered by the scope of an order, the respondents fall back upon the arguments which they made initially to the Panel and which were rejected by the Panel. The respondents argued in their brief to the Panel that the Department was obligated to compare all products under the scope to one product which (they believed to be) noncontroversial and was unquestionably the class or kind of merchandise under the Diversified Products criteria. The product they suggested for such comparison purposes was construction-grade SPF lumber. The Panel rejected this argument, noting that “the Department has considerable discretion in defining the ‘class or kind’ of merchandise subject to an antidumping investigation.”²⁴¹ For example, in the case of Western red cedar, the Panel explained that there was “substantial evidence in the administrative record to establish that Western red cedar has a number of common physical characteristics with other forms of softwood lumber which are unquestionably within the identified ‘class or kind’ of merchandise under investigation.”²⁴² The Panel went on to explain that Western red cedar was an “appearance” grade lumber which could be compared with other “appearance” grade lumber --

²⁴⁰ See Tembec September 15, 2003, Letter.

²⁴¹ See Panel Decision at 156.

²⁴² Id.

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despite the fact that these different “appearance” grade softwood lumber products were certainly not interchangeable, nor useable for “construction” grade purposes.²⁴³

Under the analysis offered by Tembec and Abitibi, the Department should ignore the Panel’s analysis and select a product which they believe to be unquestionably within the class or kind, and then compare FJF to that single product. Tembec suggests that the only scope products that can be unambiguously within a single class or kind of merchandise are “products that are a primary subject of the petition,” *i.e.*, in Tembec’s view, standard dimension/construction lumber.²⁴⁴ In other words, Tembec disagrees with the Panel’s rejection of the “one benchmark comparison” argument offered by Tembec in its initial briefs, and now it is trying to impose that requirement on the Department by selectively quoting from the Panel. In particular, Tembec and Abitibi highlight from the Panel’s analysis a sentence which says that, “The Department’s Final Determination does not point to any other engineered, assembled or manufactured products which are unambiguously within the class or kind of merchandise.”²⁴⁵ Solely based on this statement, the respondents suggest in-scope products that are not dimension/construction lumber are not worthy of comparison in our Diversified Products analysis.

²⁴³ Id.

²⁴⁴ See Tembec September 15, 2003, Letter at 4-5 and footnote 12 starting at 4.

²⁴⁵ See Panel Decision at 166-167. In the remand redetermination, we address the Panel’s stated concern by identifying a number of other “engineered, assembled or manufactured products” within the scope of investigation which are also unambiguously part of the same class or kind of merchandise. In our reading of the Panel’s decision, we find no prejudgement that other specialty lumber products’ inclusion in the single class or kind of the lumber scope is ambiguous. Furthermore, in our discussion of the Diversified Products criteria, we establish a clear linkage not only between FJF and other specialty component products, but also between the component products and the more generalized category of dimension lumber (see e.g., our discussion of solid and finger-jointed studs).

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Abitibi provides a similar argument, explaining that because FJF is being contested in this proceeding, and certain pallet stock has been excluded, they must not be “unambiguously” within the class or kind.²⁴⁶ As the Department understands the argument, Abitibi asserts that because someone is contesting its product being included in a class or kind, this dissenting opinion automatically renders that product “ambiguous” for purposes of a ‘class or kind’ analysis. Tembec appears to be making the same conclusion in clearly limiting the “unambiguous products” to dimension lumber and claiming that the Department has only compared FJF to “a handful of cherry-picked specialty products that may be within the scope, but may themselves not be within the same class or kind.”²⁴⁷

The respondents thus argue that lumber products such as finger-jointed studs and truss components, which the Department compares to FJF, must not be “unambiguously” within the class or kind of merchandise, although the reason those products are not unambiguously within the same class or kind as other softwood lumber subject to the order is left unanswered. It is also left unexplained why a product, such as pallet stock, which is excluded from the order, is somehow not “unambiguously” in the same class or kind of merchandise. Pallet stock is simply another lumber product and the Department’s decision to exclude it from the scope was made pursuant to the mutual consent of the involved parties. All of the exclusion decisions were totally unrelated to any arguments concerning class or kind. One must presume the respondents believe the status of these products is ambiguous based on the respondents’ own very specific assessment of what does and does not belong in the single class or

²⁴⁶ See Abitibi September 15, 2003, Letter at 3.

²⁴⁷ See Tembec September 15, 2003, Letter at 6.

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kind of merchandise. All of this, of course, contradicts the Panel's extensive explanation of the Department's analysis and ability to determine the classes or kinds of merchandise covered by the scope of an order.

The Department has compared in great detail FJF with other products in the same class or kind of merchandise under the Diversified Products factors in this remand redetermination, as required by this Panel. As the Binational Panel found in the Countervailing Duty case covering the softwood lumber scope of that order, "the Department's task is to compare the contested product with all other merchandise covered by the CVD investigation to determine whether the contested product is 'so distinct and unique' as to differ from other subject merchandise."²⁴⁸ In that case, the Panel found that "Finger-Jointed Flangestock is not 'so distinct and unique' as to warrant separate 'class or kind' treatment."²⁴⁹ This Panel should make the same finding once it reviews the Department's detailed explanation in this remand redetermination.

Tembec argued before the Panel that in its Final Determination the Department did not provide a thorough enough explanation why FJF was not, in and of itself, deserving of separate class or kind treatment. The Panel remanded to the Department to explain further why such treatment was, or was not, warranted. The Department has subsequently provided a greater explanation in its remand redetermination, and now Tembec complains that the Department provides fuller explanations than it

²⁴⁸ Article 1904 Binational Panel Review, In the Matter of Certain Softwood Lumber Products From Canada, Decision of the Panel, August 13, 2003, at 47.

²⁴⁹ Article 1904 Binational Panel Review, In the Matter of Certain Softwood Lumber Products From Canada, Decision of the Panel, August 13, 2003, at 52.

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provided before. This is correct, and the reason is clear -- the Department is following the mandate of the Panel.

Tembec also claims that the Department makes statements which are unsupported by the record, but these assertions are incorrect. With respect to both the specific cites which Tembec provides as examples of purported unsupported factual findings²⁵⁰ and Tembec's general premise that the Department failed to support its analysis with substantial evidence, on the very pages cited by Tembec,²⁵¹ the Department has cited directly to the record, or to publicly available lumber product websites maintained by producers (many of whom are interested parties in the proceeding) and industry standards organizations. In addition, Tembec is incorrect in its assessment regarding the lack of substantial evidence, when, for example, it suggests that the Department claimed to know that other products were made from a "stronger resin glue," when the Department made no such claim.²⁵²

Finally, in response to Abitibi's call for a separate class or kind of merchandise for "lumber components pre-manufactured for a specific application," this is not the analysis ordered by the Panel, and is therefore outside of the purview of this remand redetermination. Furthermore, Abitibi had the opportunity to request such an analysis during the investigation, but failed to do so, and therefore failed to exhaust its administrative remedies. Thus, it would be inappropriate for the Department to conduct

²⁵⁰ See Tembec September 15, 2003, Letter at 7.

²⁵¹ Id.

²⁵² Id.

such an analysis for the first time during this remand. For these reasons, the Department has provided only the analysis and descriptions in the remand redetermination specifically requested by the Panel.

C. Comment 3: SEBF Components

Abitibi claims that the Department's determination regarding SEBF components is unsupported by substantial evidence and not in accordance with law. Abitibi claims that the Department's comparisons to certain "pre-manufactured components" are flawed because these products are not unambiguously within a single class or kind of merchandise or there is incomplete record evidence regarding these products. According to Abitibi, there is insufficient record evidence to permit the Department to make complete findings as to the physical characteristics, uses, purchaser expectations, channel of trade, and advertising as to some or all of these comparison products. Abitibi further claims that the Department's Diversified Products analysis has three basic flaws under each factor:

1) the Department fails to make specific factual findings as to the characteristics of bed-frame components and the product or products to which bed-frame components are compared.

When the Department makes such findings, they are incorrect and not supported by the record evidence;

2) the Department misapplies the Diversified Products test. To conclude that the factor supports a single class or kind finding, the Department must find shared or common characteristics. Differences between products cannot support a finding of commonality; and

3) the Department's analysis under many of the factors is inconsistent with the Panel's own analysis.

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Specifically, with respect to the first factor concerning physical characteristics, Abitibi states that the Department has not followed the Panel's express order to identify and compare the physical characteristics of the product to the physical characteristics of any of the comparison products.

According to Abitibi, the product description provided by the Department is wrong. Abitibi provides its own description:

bed frame components . . . are custom manufactured, in unique sizes and shapes, to fit together to make a specific design box-spring frame. They have unique actual dimensions, are sold on the basis of actual, not nominal dimensions, and are not sold as individual components, but instead as sets of all the frame components necessary for a specific model, including radius-end components. The relevant commercial "product" that is sold is not individual components, but rather sets of components.

Abitibi further claims that the Department's description is contradicted by the record evidence and the Panel's finding, since SEBF components include pieces such as end-fillers and L-braces that do not fit the Department's description.

Moreover, Abitibi contends that the sizing and shaping of SEBF components, and the additional cost and price resulting from such processing, renders these products commercially unsuitable for any other use. According to Abitibi, the Department's observation that other products are also produced to manufacturers' specifications represents a difference, not a similarity. The physical characteristic of SEBF components, pallet stock, and truss components are all different, not similar. None is interchangeable with, nor substitutable for, any other.

Lastly, Abitibi claims that the Department has not followed the Panel's express order that it identify and compare physical characteristics of any comparison product. It is Abitibi's view that, once

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the relevant “specifications” to which the Department refers are identified and compared, the differences will be apparent.

With respect to the second criterion regarding end use, Abitibi states that the Department’s finding that SEBF components are not so customized that they cannot be used in any other application is unsupported by substantial record evidence. Abitibi states that, under Diversified Products, actual use, not theoretical use, is the relevant test. According to Abitibi, “the evidence supports only the conclusion that bed frame components are, in fact, used exclusively in the manufacture of bed frame components” Additionally, Abitibi claims that it is unable to discern the product or products to which the Department is comparing bed-frame components under this factor or what the ultimate uses of such products are, and how those uses are common to the uses to which bed-frame components are put, and cites to cedar boards used to manufacture shingles. Finally, Abitibi claims that the Department in numerous cases has found that components dedicated exclusively for use in finished products are part of the same class or kind of merchandise as that finished product.

With respect to the third criterion and purchaser expectations, Abitibi contends that the Department failed to make a finding for SEBF components and any other products, to compare the two, and to identify any common expectations. Abitibi claims that the Department appears to be analyzing SPF, rather than SEBF components. To the extent that the Department has determined that purchasers of bed-frame components have specific criteria, just as purchasers of truss components, pallet stock, and slats for crates, such a finding could support a single class or kind determination only if such criteria were the same or similar. The Department has not made such finding, according to Abitibi,

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nor is there evidence on the record regarding purchasers' expectations or criteria for any of these products. Abitibi claims that the expectation of the SEBF component purchasers is that the components delivered to them will fit perfectly with each other and with radius end components, without processing, and that their workmen can simply staple the components together. No other lumber product meets these expectations.

With regard to channel of trade, Abitibi claims that the Department misused the term "remanufacturer" in a couple of instances. Abitibi claims that direct distribution of bed-frame components to box-spring producers is a different channel of trade than that of any other lumber product, in that no other lumber product is directly distributed to box-spring producers and SEBF components are not distributed to any other user. Abitibi concludes that if mutual exclusivity is not sufficient to establish a different channel of trade, it cannot imagine what is. However, the Department failed to make actual findings identifying the channels of trade for SEBF components and for any other specific product and to determine whether they are common.

With respect to advertising, Abitibi claims that the Department also failed to make specific findings regarding specific products, failed to make comparisons, and erroneously determined that differences in marketing to different types of customers somehow should be regarded as similarity.

In conclusion, Abitibi states that SEBF components are not substitutable for, and do not compete with, any of the other products to which the Department has purported to make a comparison. In Abitibi's view, the Department has failed to identify any overlap under any of the Diversified Products factors, and the Department's analysis, according to Abitibi, has no basis in law or in fact.

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The petitioner concurs with the Department's finding that SEBF components are part of one class or kind of subject merchandise and recommends that the Department further buttress the agency's correct analysis with specific citations to the record, as provided in its submission.

With regard to physical characteristics, the petitioner states that the length of SEBF components is not a distinguishing factor. It claims that in terms of the general physical characteristic of length, there is not a clear dividing line between SEBF components and FJF, a product emphasized by the Canadians for its unique length, since SEBF components are manufactured in lengths up to 84 inches. The petitioner cites to a number of products that are manufactured for specific uses in very specific dimensions, varying from 11 1/8 inches to 92 5/8 inches. In addition, the petitioner cites to a number of products that are produced in dimensions that overlap with those of SEBF components. The petitioner concludes, again, that the dimensions of SEBF components do not provide a clear dividing line and that specific size requirements do not provide a means to distinguish SEBF components from other lumber products. In addition, the petitioner lists a number of lumber products that, like SEBF components, must be produced to meet narrow size tolerances and that have specific requirements for surface and edge quality, as well as for moisture content.

With regard to the second criterion addressing end use, the petitioner acknowledges that "SEBF Components have only one end use -- the products are used exclusively by manufacturers as components of wooden frames that will become part of a box spring or mattress support."²⁵³

²⁵³ Letter from Dewey Ballantine dated September 11, 2003 at 25.

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However, it states that a large share of lumber products is produced for a unique use and provide record documentation to support its statement.

With regard to purchaser expectations, the petitioner claims that the expectations of SEBF component purchasers are identical to those of other lumber products -- they all expect the product to be suitable for its intended use. Addressing the fourth criterion concerning channels of trade, the petitioner claims that the channels of trade of SEBF components are remarkably similar to those of other softwood lumber products (product brochures, direct sales to manufacturers of downstream products) and provide ample documentation. Speaking to the manner in which the product is advertised or displayed, the petitioner claims that, contrary to the Panel's opinion, this product is advertised through product and sales brochures just like other lumber products, and that Abitibi is on record saying that SEBF components are advertised (as bed-frame components, not as softwood lumber). The petitioner claims that the differences in advertising between SEBF components and other lumber products are slight, if not illusory.

Department's position

The Department disagrees with Abitibi's contention that the analysis leading to the Department's current determination is incorrect. Abitibi claims that the Department fails to make specific factual findings as to the characteristics of bed-frame components and the product or products to which bed-frame components are compared. Abitibi further claims that the Department misapplies the Diversified Products test, since differences between products cannot support a finding of commonality.

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This assessment stems from the fact that Abitibi envisions a type of analysis which is different from the analysis conducted by the Department. Abitibi would have the Department examine the physical characteristics, the end use, the purchaser expectations, the channels of distribution, and the type of advertising of SEBF components and of the other comparison products and look for similarities and differences. Similarities, in terms of product substitutability and interchangeability, would lead to a finding of the same class or kind. Differences, or lack of substitutability, would lead to separate classes or kinds.

If the Department followed this type of analysis, it would have to establish different classes or kinds for lumber products of different dimensions and subject to variations in processing, manufactured for different uses (for instance pallet stock, furniture parts, spindles for staircases, musical instrument stock), sold to different types of customers (expectations of a bed-frame manufacturers are different than those of a pallet manufacturer, or of a refrigerator manufacturer, or of a garage door manufacturer) through separate channels of distributions. And yet, all of these products are unquestionably softwood lumber products. They are all part of a class or kind that covers an intermediate wood product that has been processed in accordance with the requirement of the next manufacturing stage (pallet stock to be incorporated into a pallet, a 2x4-inch stud to be incorporated in a building, a window frame component to be incorporated into a window frame). Nevertheless, these are still all softwood lumber products meeting the specifications provided in the description of the scope of the order and, as such, are part of the same class or kind. Once processed to the specifications of the next manufacturing stage, the various types of lumber products are no longer interchangeable, the end use varies from product to

product, the expectations of the ultimate purchaser will be different, and the channels of distribution, although similar, will lead to different types of customers.

Abitibi essentially ignores the Panel's analysis and attempts to have the Department create an illegal test. The Panel affirmed the Department's determination that Eastern white pine and Western red cedar were not separate classes or kinds of merchandise, even though those products were examples of "appearance" grade lumber which, under the Diversified Products criteria, were different from "structural" grade lumber, but by no means were exactly the same as each other.²⁵⁴ Abitibi's "exactly the same" test is completely inconsistent with the Panel's determination that the Department "enjoys broad discretion in defining the 'class or kind' of merchandise subject to an antidumping investigation."²⁵⁵

The Department has compared in great detail SEBF components with other products subject to the same class or kind of merchandise under the Diversified Products factors in this remand redetermination, as required by this Panel. As the Binational Panel found in the countervailing duty case covering the softwood lumber scope of that order, "the Department's task is to compare the contested product with all other merchandise covered by the CVD investigation to determine whether the contested product is 'so distinct and unique' as to differ from other subject merchandise."²⁵⁶ In that case, the Panel found that both FJF and SEBF were "not 'so distinct and unique' as to warrant

²⁵⁴ Panel Decision at 156.

²⁵⁵ Panel Decision at 150.

²⁵⁶ Article 1904 Binational Panel Review, In the Matter of Certain Softwood Lumber Products From Canada, Decision of the Panel, August 13, 2003, at 47.

separate ‘class or kind’ treatment.”²⁵⁷ This Panel should make the same finding once it reviews the Department’s detailed explanation in this remand redetermination.

Abitibi alleges that when the Department makes factual findings in the context of this analysis, the Department is incorrect and the factual findings are not supported by the record evidence. Abitibi further states that the Department’s analysis under many of the factors is inconsistent with the Panel’s own analysis. This remand addresses these allegations in the context of the factor-by-factor analysis below.

Physical Characteristics

According to Abitibi, the description of SEBF components provided by the Department is inaccurate. In the Draft Remand, the Department stated that SEBF components “are narrow and flat strips of lumber not more than 1 inch thick, 2 inches wide and, generally, “25 inches to 83 inches long.” This definition is consistent with the manner in which Sinclair, a Canadian manufacturer of SEBF components, and the ISPA, a trade association whose members include manufacturers of bedding products, describe SEBF components:

The vast majority of these products {bed-frame components} are generally made of wood and have nominal dimensions that do not exceed 83 inches in length, 4 inches in width, and 1 1/4 inches in thickness Bed-frame components are much shorter than standard lumber products, usually ranging in length from 25 to 83 inches (compared to 96 inches for a standard 2x4 stud).²⁵⁸

²⁵⁷ Article 1904 Binational Panel Review, In the Matter of Certain Softwood Lumber Products From Canada, Decision of the Panel, August 13, 2003, at 52.

²⁵⁸ See Sinclair and ISPA’s May 21, 2001, Letter at 1 and 3.

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SEBF components include not only slats but also end-fillers, L-braces, and central supports, which are shorter than 25 inches in length. For this reason the product description states that SEBF components are “generally” (which means not always) 25 inches to 83 inches long. The Department has therefore added more specific language to the product description listing all the components of bed frames (slats, L-braces, center supports and end-fillers), as we did in the Final Decision Memorandum.²⁵⁹ As the Sinclair/IPA submission confirms, however, the description included in the Draft Remand captured the great majority of the SEBF components and this remand is therefore in compliance with the Panel directions.²⁶⁰

The Department examined the “essential physical characteristics” of SEBF components proposed by Abitibi and finds that they do not capture the physical appearance of the product. Attributes such as “custom manufactured in unique sizes and shapes to fit together to make a box spring” do not describe the physical characteristics of SEBF components. Similarly, it is not helpful for purposes of this analysis to state that these components have “unique actual dimensions” unless Abitibi states what those dimensions are. While Abitibi has provided the dimensions in a prior submission

²⁵⁹ Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada from Bernard T. Carreau, Deputy Assistant Secretary, to Faryar Shirzad, Assistant Secretary for Import Administration, dated March 21, 2002 (Final Decision Memorandum).

²⁶⁰ In reviewing the record, the Department realized that its product description can be made more precise, without affecting the content of our analysis. The Department is amending the maximum width to 4 inches in accordance with the information on the record (see e.g., letter from the QLMA dated May 21, 2001, at 17). With regard to thickness, the draft provides the actual, rather than nominal, thickness. Since the length and width measurements provided are nominal (see Sinclair and IPA’s May 21, 2001, Letter at 3), the Department will amend the measurement of the thickness from 1 inch to 1/4 inches.

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(May 21, 2001), Abitibi does not include in its comments those dimensions as part of this description of the essential physical characteristics.

Based on this product description, Abitibi claims that the “relevant commercial ‘product’ that is sold . . . is not individual components, but rather sets of components.” This is incorrect. The record shows that purchases of SEBF components occur both in sets and as individual components. For instance, Empire Wholesale Lumber Company, a wholesaler shipping a large volume of bed-frame components to manufacturers of mattresses, states:

The assembly plants order the individual components on an ‘as needed’ basis to minimize their inventory investment. The ratio of quantities ordered will vary from shipment to shipment as a result of on line rejection of components, mishandling, special order needs, midshipmen by other vendors, and other stimuli outside the control of the exporter of any specific shipment.²⁶¹

Sinclar/IPA plainly states that “bed-frame components have been manufactured, marketed, and purchased on a per-component basis. Producers, resellers, and purchasers simply do not think of their bedframe requirements in terms of ‘kits.’”²⁶² And again, as another example of record information showing that trade of this type of product does not always occur strictly in sets, see Sinclar/ISPA’s December 3, 2001, submission in which Sinclar/IPA asks the Department to grant an exclusion for kits of bed-frame components in bulk (rather than individually wrapped). In that submission, Sinclar/IPA provides an example of how Customs could ensure that all the pieces that are necessary to make a certain number of frames are accounted for in a shipment, thus deserving the “kit” exclusion: “Any

²⁶¹ See Letter from Empire Wholesale Lumber Co., September 25, 2001.

²⁶² See Sinclar and ISPA’s August 23, 2001, Letter at 8-9.

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other box-spring frame components loaded on the same carrier that do not make up a full “kit” would not benefit from the exclusion.” *Id.* Clearly, shipments may include more than the exact set of pieces necessary to make a set number of bed frames.

Abitibi claims that the sizing and shaping of SEBF components, and the additional cost and price resulting from such further processing renders these products commercially unsuitable for any other use. This is correct. Under this aspect, SEBF components have a lot in common with numerous other lumber products that are also shaped and sized for very specific applications. Similarly, pallet stock,²⁶³ sold separately, not in a kit, is also lumber specifically processed and sized for a well-defined application, just like SEBF components. The “differences” between these two products and the fact that they cannot be substituted for one another do not offset the fact that, at this stage of manufacturing, the general physical characteristics of each of the SEBF components, slats or L-braces, or center supports, or of the piece of pallet stock are much closer to those of a lumber product, than to those of a bed frame or a pallet.

Based on the above rationale, the Department is not specifically focusing on similarities and differences in the physical characteristics of each comparison product, since, as explained above, variations in dimensions, degree of moisture content, type of surface finish, or other physical characteristics, are perfectly consistent with the dimensions and the manufacturing processes of lumber products. For instance, with regard to sizing, there are a number of products whose sizes overlap with

²⁶³ The Department is using pallet components as a proxy for all other products it already listed as being similarly situated as bed frames for purposes of this analysis: truss components, door frame components, FJF, door jambs, window parts, bannisters, spindles, etc.

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the SEBF components, such as furniture components which are manufactured in a variety of specific lengths, including 60 1/8 inches and 63 1/2 inches,²⁶⁴ boards which are manufactured in nominal sizes of 1x4 inches, fascia in 1x2 inches, and furring strips in 1x2 inches through 1x4 inches.²⁶⁵ Additionally, furring strips are also manufactured in 1x2 inches, 1x3 inches, and 1x4 inches, pallet components in 1x3 inches and 1x4 inches, and fence components in 1x4 inches.²⁶⁶

With regard to narrow size tolerances, SEBF components are also not unique. The following lumber products, for example, also require the same precision sizing as the SEBF components: PET lumber, trimmed to 1/16 inch tolerances²⁶⁷ and Western hemlock stair-part turning squares, trimmed to tolerances of 1/32 inch.²⁶⁸

With regard to surface and edge quality treatment, lumber products present a vast variety of finishes, including the type of smoothness that is required of SEBF components. For instance, stock for musical instruments and for snow boards requires a smooth finish²⁶⁹ but combtex fascia requires instead a rough and textured surface.²⁷⁰ Yet, both stock for musical instruments and combtex fascia are included in the class or kind of softwood lumber products.

²⁶⁴ See Alberta Spruce Industries August 16, 2001, Letter.

²⁶⁵ See Canfor Section A response at Exhibit A-19.

²⁶⁶ See Abitibi Section A response at Exhibit A-23.

²⁶⁷ Random Lengths, Terms of the Trade, 2000 edition, at 255.

²⁶⁸ Letter from Cahan Wood, dated September 5, 2001.

²⁶⁹ Letter from Batts Patterson Mines dated July 19, 2001.

²⁷⁰ Letter from Canfor dated August 17, 2001, at 3.

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In conclusion, the physical characteristics of SEBF components do not provide a clear dividing line from which the Department can establish a separate class or kind for this product.

End Use

The Department takes note of the petitioner's new position, that SEBF components have only one use: incorporation into a bed frame. As stated in the analysis in the Draft Remand, the unique end use alone does not lead to the establishment of a separate class or kind. Many lumber products are used in limited types of applications for which they are specifically manufactured.

Abitibi claims it was unable to discern the Department's analysis on certain points. This is because Abitibi is confused as to the applicable legal analysis under the Diversified Products factors. The test which the Department must apply is not to look for substitutability or interchangeability between lumber products. Of course a piece of a door frame, or a spindle, or a piece of truss stock cannot be used to manufacture bed frames. We are not examining here whether or not other lumber products could be substituted for SEBF components. Instead, we are examining whether the class or kind of softwood lumber products includes other products that are similarly situated as SEBF components because they have been sized and processed to the point that they have a limited number of, if not unique, applications.

Cedar boards, which are the product that Abitibi claims not to be able to discern, are mentioned in the Final Decision Memorandum at comment 57, item B number 17.²⁷¹ Shaker town 1992 Inc. requested that the Department exempt from the scope of the investigation certain specialty

²⁷¹ See Final Decision Memorandum at comment 57, item B number 17.

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cuts of Western red cedar (boards) cut from shingle blocks on shingle saws in nominal lengths of 18 inches, 15 inches, 12 inches and 9 inches. Shaker town provided grading standards for this specialty cut material. Sizing and grading requirements were determined by the further manufacturing process to which these boards were dedicated, the manufacture of shingles. The Department ruled that these boards were covered by the scope in that they still were cedar products and not yet shingles (which are subject to a different HTSUS classification and are outside the scope of the order). Thus, other products in the class or kind were uniquely manufactured for specific uses and were therefore similarly situated as SEBF components. Yet, because they did not reach the manufacturing stage of a finished product (a shingle in this case, bed frames in the case of SEBF components), they were still considered softwood lumber products included in the scope of the order and therefore part of the same class or kind of subject merchandise. Abitibi claims that spark plugs too have a unique use, but that does not put them in the same class or kind of merchandise as bed-frame components. This is correct. They are not in the same class or kind because, among many other factors which need not be addressed at this time, they are a finished product. SEBF components are without question not a finished product.

Finally, Abitibi challenges the Department's distinction between components and finished products, stating that the Department in numerous past cases has found that components dedicated exclusively for use in finished products are part of the same class or kind of merchandise as that of the finished product. This is not the Department's standard practice. Generally, in establishing the class or kind of merchandise subject to the investigation, the Department takes into account the scope as outlined in the petition. If the petitioner claims to have been injured as a producer of both the parts and

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the finished product, and the International Trade Commission finds that injury has occurred with respect to both the product and its parts, the Department may include both finished products and its parts in the scope, based on the circumstances outlined in the petition. None of these circumstances has occurred in the instant case.

Expectations of the Ultimate Purchasers

Abitibi would have us analyze the expectations of each purchaser (for instance, of a box-spring manufacturer) and compare those to the expectations of the purchaser of another lumber product in the same class or kind (for instance, a pallet or truss manufacturer). To the extent that the Department would find similar expectations, Abitibi claims it could then find support for a single class or kind.

Abitibi's analysis is narrowly focused on the expectations of the purchaser based on the requirements of the final product in which the lumber will be incorporated. We recognize that there are differences at that stage. However, we also find many similarities. The class or kind of softwood lumber products includes lumber processed for use in a wide range of applications. The expectations of the purchaser will differ on a product-by-product basis (the vegetable box producer requires a type of lumber that is quite different from the truss producer), but that does not mean that each product must constitute a different class or kind. Truss components and vegetable box components are both softwood lumber products. In both cases, purchasers expect that they fulfill the requirements of the manufacturing process in which they will be used. To this extent, the expectations of the purchasers are identical to those of box-spring manufacturers, who expect that the SEBF components fit perfectly with

each other and with radius-end components and that their workmen can simply staple the components together.

Abitibi also claims that the Department appears to be analyzing SPF rather than SEBF components. This is incorrect. The Department prefaced its analysis with a statement that the preferred type of wood for SEBF components was SPF. There is no further mention of SPF in its analysis.

Channel of Trade

Abitibi's point with regard to manufacturers, remanufacturers, and end users is correct; therefore, the Department has made the appropriate corrections in the remand. However, the incorrect use of the word "remanufacturer" in several instances does not detract from the validity of the Department's argument, that the channel of trade of direct sales from the SEBF component producer to the box-spring manufacturer is not so unique as to require the Department to establish a separate class or kind for SEBF components.

Once again, Abitibi is looking for products that can be sold through the same channel of trade through which SEBF components are sold to box-spring producers and finds none. Therefore it concludes that SEBF components should be granted a separate class or kind. No softwood lumber product other than SEBF components is sold to box-spring manufacturers. However, the point is inconsequential. This is not the legal analysis recognized by the Panel in its decision.²⁷² Direct distribution channels of a product to the manufacturer are used by a long list of other softwood lumber

²⁷² See Panel Decision at 150.

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products, such as, truss components, pallet stock, window and doorframe components. These channels do not need to be interchangeable. The fact the customers are different is not determinant for purposes of this analysis. Thus, SEBF components are not unique among other softwood lumber products in having a direct channel of trade.

The Manner in which the Product is Advertised or Displayed

Once again, Abitibi would like to have the Department compare the advertising channels of SEBF components and those of the comparison products, and find these channels are not interchangeable. Abitibi states that differences in marketing to different types of customers should not be regarded as similarities. The fact that different lumber products are advertised to different classes of customers through comparable channels (direct contacts with manufacturers, brochures, promotional materials, trade shows²⁷³) confirms the fact that those products are in the same class or kind. Abitibi would have us demonstrate that all products in a class or kind are sold to the same type of customer through the same channel. This, of course, is not the appropriate analysis pursuant to the Panel's instructions, nor pursuant to the law governing class or kind determinations.

In conclusion, the Department is not persuaded by Abitibi's arguments and continues to find that SEBF components are within the class or kind of softwood lumber products.

Company-specific Issues

D. Comment 4: Tembec's Cost of Wood Chips

²⁷³ See Sinclair and ISPA's March 15, 2002, Letter.

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Tembec claims that the Draft Remand continues to ignore the fact that Tembec's internal transfer prices were not reflective of market value. Tembec reiterates its contention that the statute prohibits the Department from using internal transfer prices in its COP calculations unless those internal transfer prices reflect market value. Tembec continues to argue that when internal transfer prices diverge materially from market prices they must be rejected because these internal transfer prices cannot represent real costs required by the statute. Tembec claims that the Department is "legally required to accept this argument, and that this 'legal requirement' is the essence of the Panel's instruction." Tembec maintains that its internal transfer prices should be revalued to reflect the market prices that would occur in an arm's-length transaction between unaffiliated parties in order to determine the cost of woodchips.

The petitioner did not comment on these points.

The Department's Position:

Our decision to rely on Tembec's books and records was reasonable, in accordance with the law, and in accordance with the Panel's instruction. Consistent with its statutory obligations,²⁷⁴ the Department accepted Tembec's recorded by-product, inter-divisional values as reliable absent a showing that the costs as recorded in its books and records were unreasonable. We disagree with Tembec that its own internal transfer prices ever needed to be equivalent to market values for them to be deemed reasonable for use in establishing the production cost of Tembec's wood chips. The

²⁷⁴ 19 U.S.C. § 1677b(f)(1)(A): "Costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records...reasonably reflect the costs associated with the production and sale of the merchandise."

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Department noted in the Draft Remand that the market values for Tembec's by-products were larger than its inter-divisional values, a distinction that was expected in light of the standard relationship between COP and market value. Tembec argues that we should apply a bright-line test whereby internal transfer prices must be rejected when they diverge from market prices. This bright-line test was in no way adopted by the Panel in its decision, makes little sense in light of facts which differ from case to case, and is supported by no standard accounting authority. Given the vast array of pricing experiences between the different respondents in the investigation, the Department determined that the difference in price, in both BC and Eastern Canada, was reasonable and, therefore, applied these values as the by-product cost offset. This determination was consistent with the Panel's instruction and was supported by the facts on the record.

E. Comment 5: Tembec's G&A Expense

Tembec argues that the SG&A expenses of the Forest Products Group are the SG&A expenses that pertain to the production and sales of the FLP. Tembec maintains the SG&A expenses of the Forest Product Group are actual data and should be used by the Department. Tembec disagrees with the Department's claim that these expenses are not audited and that the Forest Products Group G&A expense calculation was unverified.

The petitioner did not comment on these points.

The Department's Position:

Our decision to rely on Tembec's audited financial statement data was reasonable, in accordance with the law, and in accordance with the Panel's instruction. G&A expenses are, by their nature, applicable to a company as a whole, not to particular segments or divisions determined arbitrarily by a company's management. G&A expenses, in other words, are not associated with the production of a particular product or division. The Department's method proportionally allocated actual company-wide G&A expenses to the merchandise under investigation based on the cost of merchandise sold by Tembec, as explained above.

Tembec is incorrect in its assertion that the divisional G&A amounts were verified by the Department. In order to verify Tembec's divisional G&A amounts, the totals and allocations at every Tembec division would have had to be verified. This was simply not done. Moreover, verifying what Tembec did would not mean its allocations were appropriate or acceptable. Tembec's assertions rely on a consolidation worksheet provided to substantiate the Forest Products Division's wood and sawmill costs, as part of the overall reconciliation of manufacturing costs to the financial statements during the verification. Whether the numbers on the worksheet could be tied to source documents does not mean that Tembec's G&A figures for the Forest Products Group were audited, verified or reasonable to use. In addition, we note that neither Canadian nor U.S. GAAP requires an auditor to attest to the reasonableness of segment or division data reported in financial statements. Indeed, the applicable accounting standards allow management of the company to present segment data in the manner it pleases, with no required consistency from company to company.

F. Comment 6: West Fraser's Sale of Wood Chips to Affiliates and Non-affiliated Customers/Commercial Benchmarks

West Fraser argues that the Department's reasons for relying upon West Fraser's unaffiliated sales of wood chips in BC as market prices are unsupported. According to West Fraser, none of these reasons supports the Department's conclusion that West Fraser's unaffiliated sales are a reasonable benchmark for market prices in BC.

West Fraser purports that the Department suggests in its draft determination that so long as a respondent's sales are commercial, those sales are a reasonable benchmark. West Fraser then goes on to suggest that such an argument is inconsistent with section 773(f)(2) of the Act which requires the Department to determine whether affiliated transactions fairly reflect the amount usually reflected in the market under consideration. West Fraser contends that the mere fact that a transaction is commercial says nothing about whether the transaction was reflective or representative of market prices.

Additionally, West Fraser contends, the benchmark must be based on a sufficiently large number of transactions. West Fraser asserts that the draft determination provides no analysis of how its sales satisfy this standard, but instead relies upon mere assertions that West Fraser's unaffiliated sales were substantial in absolute terms, significant in tonnage and commercial value, and in no sense minimal.

West Fraser argues that the draft determination incorrectly states that the relative amount of its sales to unaffiliated parties in BC is irrelevant in determining whether those sales provide a reasonable benchmark. According to West Fraser, the fact that it sold over 99.7 percent of its BC production to affiliated parties shows that any unaffiliated sales were not representative of its normal sales practice

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and thus should not be used in the Department's dumping analysis. West Fraser cites a Memorandum to Robert S. LaRussa from Richard W. Moreland, Re: Issues and Decision Memo for the Administrative Review of Gray Portland Cement and Clinker from Mexico dated March 15, 2000 at comment 3 and asserts that the Department's practice in similar contexts is to recognize the relative significance of particular transactions as part of a company's overall sales in determining whether those transactions can be used in the dumping analysis.

West Fraser argues that, even more importantly, the insignificance of its own sales to unaffiliated parties relative to other evidence of BC market prices shows that its own sales do not provide a reasonable benchmark. According to West Fraser, if a respondent's unaffiliated sales constitute only a minuscule percentage of the overall market, the statistical probability that a respondent's own sales will be representative of market prices will be low. West Fraser cites In re Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997) (Chevron), which states that a sample must be "of sufficient size so as to achieve statistical significance to the desired level of confidence in the result obtained."

West Fraser contends that the Department's statements in its Draft Remand as to why unaffiliated wood chip sales from West Fraser's McBride mill were reflective of market prices do not withstand scrutiny. Specifically, West Fraser asserts that the Department's presumption that expected movements in market prices are inherently built into the terms of a long-term contract and that these sales were at market prices at that time is incorrect. West Fraser cites the Cost Verification Report at 23 and points out that its officials told the Department that the sales value of wood chips increased in

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May 2000 and that it was obligated to sell chips at the lower contracted price. Additionally, West Fraser maintains, the Department's statement in its draft determination that April and May 2000 were a material part of the POI is irrelevant, and says nothing about whether sales from McBride in those two months fairly reflected market prices for the entire twelve-month POI. Furthermore, West Fraser asserts, the Department's statements that unaffiliated sales from McBride and Pacific Inland Resources represented West Fraser's market experience overlook the fact that the McBride contract was executed before West Fraser became responsible for operations at McBride. Thus, West Fraser concludes, it is incorrect to say that the McBride sales represented the prices at which West Fraser was willing to sell wood chips in arm's-length transactions, and the only sales that truly represent such prices are the sales from its Pacific Inland Resources mill.

West Fraser argues that the draft determination ignores evidence and arguments that show that its affiliated sales represented market prices and remains inconsistent with the record evidence as a whole. According to West Fraser, the unaffiliated sales on which the Department relied in support of its determination were tiny in comparison to the contrary record evidence of prices charged by other respondents, which showed a considerably higher market price that was fully consistent with the prices that it received from its affiliated customers.

West Fraser disagrees with the Department's statements in the draft determination that the Department's preference for determining whether affiliated transactions are at arm's length is to compare the average price of those transactions with the average price of the same respondent's sales to unaffiliated parties. West Fraser argues that such a preference does not mean that this methodology

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is reasonable in all circumstances, and it does not allow the Department to ignore other evidence. West Fraser cites Thai Pineapple Canning Industry Corp v. United States, 273 F. 3d 1077, 1085 (Fed Cir. 2001) (Thai Pineapple), which states that “it is possible for the application of a particular methodology to be unreasonable in a given case when a more accurate methodology is available and has been used in similar cases.”

West Fraser purports that the draft determination ignores the fact that at verification, West Fraser provided the Department with significant evidence that its affiliated sales were at arm’s-length prices. West Fraser argues that it satisfied the burden of showing that its sales to affiliates were at market prices and it was thus the Department’s responsibility to request any further evidence that it believed necessary. According to West Fraser, the Department’s continued finding that West Fraser’s sales of wood chips to affiliated parties were made at inflated prices is inconsistent with the fact that the Department specifically verified that a significant portion of those sales had been made at arm’s-length prices.

West Fraser believes that the draft determination does not address the fact that the Department’s methodology in this case results in two entirely different benchmarks being used as market prices for sales of wood chips in BC. Specifically, West Fraser asserts, a much higher benchmark was used for Canfor than was used for West Fraser. West Fraser contends that the record does not support the use of divergent benchmarks when the purpose is the same in both instances: to determine whether sales of wood chips to affiliated parties represent market prices.

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West Fraser argues that the Department's draft determination incorrectly states that the Department's normal practice is to use a respondent's own unaffiliated transactions as its market price benchmark in applying section 773(f)(2). In support of its allegation, West Fraser cites the preamble to the current regulations and asserts that the Department expressly rejected a proposal that it adopt an arm's-length test. See Antidumping Duties: Countervailing Duties; Final Rule, 62 FR 27296, 27362 (May 19, 1997) (Final Rule). West Fraser argues that nowhere in the preamble does the Department state that its normal practice is to use exclusively a respondent's own unaffiliated sales transactions for the affiliated transaction comparisons.

West Fraser argues that the Department does not correctly summarize the focus of inquiry under section 773(f)(2) of the Act. It asserts that the test is not whether West Fraser's unaffiliated pricing was at "market value," but rather whether its unaffiliated sales reflected market prices across the entire twelve-month POI and thus could be reasonably used as a benchmark.

Department's Position:

We agree, at least in part, with West Fraser that the fact that a transaction is commercial cannot necessarily, by itself, be the sole determining factor in deciding whether it represents a market price. Although the quantities involved here are small, they are not so minimal as to detract from their representativeness. Commerciality is a primary focus of determining whether prices are "usually reflected" in the market under consideration, but the overall focus is on how well a sale represents what would have occurred between two arm's-length parties. In West Fraser's case, not only were its sales of identical wood chips to unaffiliated parties in BC made in commercial quantities, they were also

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based on the actual normal experience of two different mills during various months of the POI. Taken collectively, the wood chip sales by West Fraser's two mills to unaffiliated parties during the POI represent the best evidence of an arm's-length price that West Fraser would have charged given its specific circumstances in the market under consideration (i.e., the province of BC). The Department need not provide a specific quantitative analysis of what constitutes a "sufficiently large number of transactions" to represent a market price. In the preamble to the current regulations, the Department stated its reluctance to establish any single quantitative test applicable to all situations and stated its intent to consider the specific circumstances of each case See Preamble to 19 CFR § 351.407, supra. The Department has satisfied itself that the quantities involved here did not affect the pricing of those sales, and the Department also satisfied itself that those quantities were sufficient in number or quantity sold to serve as a benchmark, i.e., more than "minimal."

West Fraser does not correctly summarize the focus of inquiry under section 773(f)(2) of the Act. It asserts that the test is not whether West Fraser's unaffiliated pricing was at "market value" but rather whether its unaffiliated sales reflect the entire POI. The language of this section reads: "the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration." Thus, the Department assesses whether sales are commercially representative, considering the terms of sale, quantity, timing, and other factors. However, the test is not as restrictive as West Fraser asserts, in that it does not address whether the transactions in question cover the entire POI.

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We disagree with West Fraser's assertion that the relative percentage of its unaffiliated sales makes those sales unrepresentative. The issue is not how significant West Fraser's unaffiliated sales are as compared to its affiliated sales. The issue under section 773(f)(2) of the Act is whether these sales are at prices "usually reflected" in the market under consideration. The test is commercial -- i.e., whether its unaffiliated sales are at arm's length, in number or quantities sufficient to serve as a benchmark. Thus, commercial sales that are not minimal in "number or quantity" are the standard. In fact, West Fraser seems to imply that if a company makes almost all of its sales to affiliated parties, then those sales should be considered representative regardless of the price at which they were made. Under such logic, a company could sell its by-products to affiliated parties at absurdly high prices and then claim that those sales are the most representative of its actual experience. This type of reasoning bears no relationship as to what actually constitutes a market price under section 773(f)(2), namely the price that would have been charged if a transaction had occurred between two unaffiliated parties. Clearly, it can be seen that the representativeness of a company's sales is not simply a quantitative function.

We also disagree with West Fraser's assertion that its sales do not provide a reasonable benchmark in comparison to "other evidence of BC market prices." During the course of this proceeding, West Fraser has continually implied that the experience of other respondent companies (i.e., Canfor) in the investigation, or of other companies in a completely different industry (i.e., West Fraser's affiliated pulp mills) somehow represent as good or better evidence than West Fraser's own experience. Again, West Fraser fails to understand the intent of the Department's arm's-length test: to

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determine the price that a respondent company would have paid or received on its affiliated party transactions had those transactions taken place on arm's-length terms. Given the unique nature of each company and its experiences in the market place in which it operates, what price could better satisfy this intent than a company's very own experience? This is why, in the hierarchy of tests for affiliated party transactions, the Department places such emphasis on a company's own commercial experience. Moreover, as we have indicated repeatedly in relation to this assertion, West Fraser's situation of having its own sales in BC is different from Canfor, which had no BC sales.

We find West Fraser's reference to Thai Pineapple to be inapposite; in that case, the Department was referring to different methods of allocating a respondent's production costs. It is the nature of cost allocation that many different methodologies are available and that some may be more accurate than others in different circumstances. Such a choice between different allocation methodologies cannot be compared to the arm's length test for by-product sales, in which the Department will compare the transfer price received by the respondent from affiliated parties to the price received from unaffiliated parties. In the arm's-length test, there is no choice between methodologies, but rather a prescribed test that has continually been used in all similar cases, and that follows a logical hierarchy of tests. As explained above, the aim is to find the best source by which to test arm's-length pricing.

We disagree with West Fraser's assertion that its sales are statistically insignificant. West Fraser's argument that its sales are a minuscule percentage of the overall market and its reference to Chevron seem to imply that these sales are an unrepresentative sample. The Department did not

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consider these sales on a sample basis, but instead considered the totality of West Fraser's sales of wood chips to all unaffiliated parties in BC during the entire POI.

West Fraser's comments contain no evidence demonstrating that the quantity of these sales affected their pricing, nor any indication that prices would have been different if the sales quantities had been larger. Moreover, contrary to West Fraser's assertions as to not having any responsibility to demonstrate that its affiliated sales prior to verification were not appropriate as a benchmark, West Fraser raises any overly narrow point. The commercial nature of these sales was an issue -- if West Fraser's assertions are true -- regardless of the test used, be it national, regional or local. If those sales were not commercial, West Fraser should have made such an assertion before verification, because those allegedly non-commercial sales would have affected the calculations regardless of which market test was used. West Fraser was arguing for use of a test other than a national test -- i.e., a regional or local test, and in any of the three contexts any non-commercial sales should have been excluded if they were proven to be so. West Fraser failed to present evidence, other than noting that the contract terms fixed prices and that there was market movement thereafter -- not an uncommon phenomenon, and certainly not proof that these were not bona fide arm's-length prices in the market.

With regard to the sales of wood chips from West Fraser's McBride mill, we continue to find that West Fraser has failed to present any convincing argument as to why those sales should not be used in our arm's-length analysis. The fact that these sales were made only during two months of the POI does not affect their usefulness. By considering the sales from the McBride mill and the sales from the Pacific Inland mill taken together, the Department has properly captured the totality of West

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Fraser's own experience over the entire POI. To start excluding some of those sales and including others, based simply on the month in which they occurred, would be arbitrary and would not further our goal of accuracy. Additionally, the fact that West Fraser itself did not negotiate the wood chip contract for the McBride mill says nothing about the representativeness of those sales. The fact is that the contract was still negotiated at arm's length between two unaffiliated parties, and represented their agreement as to market pricing. Moreover, West Fraser accepted the contract when it purchased the mill. Also, we note that West Fraser introduced no evidence that the terms or pricing systems of this contract were in any way aberrant from the market. Selling wood chips based on a contract is neither an unusual nor an infrequent occurrence in the lumber industry, and the sales of wood chips from the McBride mill under such a contract still represent the best evidence of the actual experience of that mill under its own unique set of market conditions.

Ministerial Error Allegations

G. *Comment 7: Abitibi's Ministerial Error Allegation*

The petitioner notes that Abitibi reported its by-product revenue as a negative amount. Therefore, to deduct the revenue earned from sales of trim blocks from total by-product revenue, as was the Department's stated intention, it is necessary to add the trim block revenue to the by-product revenue variable.

The Department's Position:

We agree with the petitioner and have made the necessary changes to the computer program.

H. *Comment 8: Slocan's Ministerial Error Allegation*

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Slocan states that the cost recalculation language in its program differs from that of the other respondents. According to Slocan, in its program, the NRV for each species/grade/dimension combination was not divided by the total NRV for the species, but rather by the NRV for the same species/grade/dimension combination, resulting in an allocation percentage of 100 for every product.

The Department's Position:

We agree with Slocan and have made the requested changes to the computer program.

I. Comment 9: Tembec's Ministerial Error Allegation

Tembec claims that a programming error exists in the Department's calculations of Tembec's credit expense with respect to U.S.-dollar denominated sales. At verification, Tembec brought to the Department's attention a mistaken currency conversion in which Tembec converted to Canadian dollars the reported credit expense on U.S.-dollar denominated sales. In attempting to correct the error, Tembec argues that the Department erroneously multiplied the credit value by 1.5, the POI-average exchange rate, when it should have divided. Tembec requests that the Department correct this error by dividing by 1.5 the reported credit value on U.S.-dollar denominated sales.

The Department's Position:

As an initial matter, we note that this ministerial error allegation is not the same ministerial error allegation before the Panel. The Department holds to its position that the "error" alleged by Tembec in its brief before the Panel is not an error, and to revise the credit expense in the manner proposed by Tembec would only create an error where none currently exists. Tembec has not commented on the Department's position *vis a vis* this allegation.

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With regard to this new allegation, as noted by Tembec, the Department's analysis memorandum for Tembec did indeed discuss the fact that the Department corrected Tembec's mistaken currency conversion. What Tembec does not mention is that in making the correction, the Department divided the reported credit value by 1.5. That is precisely what Tembec is asking that the Department do now. After correctly dividing the reported credit value by 1.5 for the Final Determination that was published on April 2, 2002, on April 8 and 9, 2002, Tembec and the petitioner both filed allegations alleging that the Department had made a clerical error when it divided the credit expense by 1.5.

Perhaps due to the fact that both Tembec and the petitioner agreed that the Department's correction was wrong, we allowed ourselves to be convinced that we had erred. In other words, as a result of Tembec's insistence that we had made a ministerial error, we revised our original correction of Tembec's error and multiplied the credit value by a factor of 1.5 for U.S. dollar-denominated sales in both the U.S. and Canadian market datasets. This was the "correction" suggested by both Tembec and the petitioner. According to these latest comments, Tembec admits that the Department's original correction of Tembec's error was appropriate, that Tembec's subsequent ministerial error allegations have been wrong, and that Tembec now requests that the Department revert to its original calculation. Accordingly, we have recalculated Tembec's credit expense to reflect the original calculation from the Final Determination.

J. *Comment 10: Weyerhaeuser's Ministerial Error Allegation*

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Weyerhaeuser argues that the recalculated variable overhead was not properly assigned to all observations due to a pre-existing variable overhead field in the home market database. To fix this problem, Weyerhaeuser suggests dropping the variable VCOMH from the home market database.

The Department's Position:

We agree with the Weyerhaeuser and have made the requested changes to the computer program.

FINAL REDETERMINATION

In accordance with the remand order, we have recalculated the antidumping duty margins for all of the respondent companies. We have also recalculated the “All Others” rate. The recalculated 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>Amended Final Margin (percent)</u>	<u>Remand Margin (percent)</u>
Abitibi-Consolidated, Inc.	12.44	11.85
Canfor Corporation	5.96	5.74
Slocan Forest Products, Inc.	7.71	8.77
Tembec, Inc.	10.21	6.66
West Fraser Mills Ltd.	2.18	2.22
Weyerhaeuser Company	12.39	12.36
All Others	8.43	8.07

James J. Jochum
Assistant Secretary
for Import Administration

Date

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Exhibit 1