70 FR 73437, December 12, 2005

A-122-838
Administrative Review
POR: 05/01/2003-04/30/2004
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MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

DATE: December 5, 2005

SUBJECT: Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Certain Softwood Lumber Products From Canada

Summary

This memorandum addresses issues briefed or otherwise commented upon in the above-referenced segment of this proceeding. Section I addresses the general issues briefed by interested parties. Section II addresses the company-specific issues briefed by interested parties. Below is a complete list of the issues in this review for which we have received comments from the parties:

I. General Issues

Comment 24: Lakeland's G&A Offsets

Comment 25: Lakeland's Interest Income

Comment 26: Clerical Error Allegations Specific to Canfor

Issues Specific to Tembec

Comment 27: Names of Tembec Companies

Comment 28: Byproduct Offset Adjustment Factor

Comment 29: Adjustment of Variable Wood Costs

Comment 30: G&A Expense Rate - Consolidated vs. Producer

Comment 31: Clerical Error Allegations Specific to Tembec

Issues Specific to Tolko

Comment 32: Log Purchases from Affiliated Parties

Comment 33: Clerical Error Allegations Specific to Tolko

Issues Specific to Weldwood

Comment 34: Allocation of Wood Costs

Comment 35: Clerical Error Allegation Specific to Weldwood

Issues Specific to West Fraser

Comment 36: Order is Not Valid for West Fraser and Should be Revoked

Issues Specific to Weyerhaeuser

Comment 37: Level of Trade for Weyerhaeuser's VMI sales

Comment 38: Assessment for Weyerhaeuser's Unaffiliated Importers of Record

Comment 39: Log Cost Allocation for British Columbia Coastal Operations

Comment 40: Calculation of Various G&A Expenses

Comment 41: Clerical Error Allegations Specific to Weyerhaeuser

Background

On June 7, 2005, the Department of Commerce (the Department) published the preliminary results of the antidumping duty administrative review of certain softwood lumber products from Canada.[1]

The period of review (POR) is May 1, 2003, through April 30, 2004. The respondents in this review are: Abitibi-Consolidated Inc. (Abitibi), Buchanan Lumber Sales, Inc. (Buchanan), Canfor Corporation (Canfor), Tembec Inc. (Tembec), Tolko Industries, Inc. (Tolko), Weldwood of Canada Limited (Weldwood), West Fraser Mills Ltd. (West Fraser), and Weyerhaeuser Company (Weyerhaeuser). We performed on-site verifications of the sales and cost information submitted on the record by Weldwood and the sales information submitted by Canfor. On May 31, 2005, we released reports on our findings at verification. We received case briefs and/or rebuttal briefs, respectively, from the petitioner,[2] the respondents, and other interested parties.[3] Abitibi and Tembec requested a public hearing, which was held on September 7, 2005.

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[1] *See Notice of Preliminary Results of Antidumping Duty Administrative Review and Postponement of Final Results: Certain Softwood Lumber Products From Canada*, 70 FR 33063 (June 7, 2005) (*Preliminary Results*).

[2] The petitioner in this case is the Coalition for Fair Lumber Imports Executive Committee. We note that during the review, submissions have been made interchangeably by the petitioner itself and by the Coalition for Fair Lumber Imports, a domestic interested party. For ease of reference, we will use the term "petitioner" to refer to submissions by either, although we recognize that the Coalition for Fair Lumber Imports is not the actual petitioner.

[3] In addition, case and/or rebuttal briefs were received from the British Columbia Lumber Trade Council (BCLTC), the Ontario Forest Industries Association, the Quebec Lumber Manufacturers Association, the Independent Lumber Remanufacturers Association, Leggett & Platt Ltd., Lignum Forest Products, Ltd., Millar Western Forest Products, Ltd., Riverside Forest Products, Ltd., TFL Forest Ltd., Central Cedar Ltd., Commonwealth Plywood Company, Ltd., Fontaine Inc., Olav Haavaldsrud Inc., Produits Forestiers P. Proulux Inc., Carrier Forest Products Ltd., Carrier Lumber Ltd., Cheslatta Forest Products Ltd., Galloway Lumber Co. Ltd., Pope & Talbot Inc., Sigurdson Bros. Logging Company Ltd., Stuart Lake Lumber Co. Ltd., Stuart Lake Marketing Corporation, Teal-Jones Group, Terminal Forest Products Ltd., West Chilcotin Forest Products Ltd., Wynndel Box & lumber Co. Ltd., and the Maritimes Lumber Bureau and the Maritime Companies.

DISCUSSION OF ISSUES

I. General Issues

Comment 1: Treatment of Sales Made on a Random-Lengths Basis

The petitioner contends that there is a glaring inconsistency between the Department's treatment of random-length sales[4] in the sales and cost analyses. For the sales analysis, the petitioner points out that the Department attempted to allocate the invoice prices of all random-length sales to arrive at prices for each of the various lengths that composed the sales. Where it was unable to allocate the invoice price, the Department used the unallocated price for the sale. For the cost analysis, however, the petitioner notes that the Department disregarded all random-length invoice prices in developing the net realizable values (NRVs) used to allocate the respondents' costs. The petitioner claims that it is unreasonable and illogical for the Department to use non-allocated invoice prices in its price comparisons while disregarding those same prices for developing the cost of production.

The petitioner argues that if the Department uses random-length prices in the sales analysis and continues to use a value-based cost allocation for the cost analysis, then it must be consistent by using all NRVs associated with random-length sales of control numbers for which no single-length sales were made during the POR (hereinafter, "petitioner's cost alternative"). Alternatively, the petitioner argues that the Department must allocate all random-length invoice prices.

Citing language from the *Preliminary Results*, the petitioner states that random-length invoice prices represent "an arbitrary reallocation which is not reflective of the underlying value of the individual products in the tally." Therefore, the petitioner argues that the use of non-allocated prices violates sections 772(a) and (b) and section 773(a)(1)(B)(i) of the Tariff Act of 1930 (the Act), as amended. As the petitioner further notes, the *Preliminary Results* stated that the Department used non-allocated prices as neutral facts available, pursuant to section 776(a) of the Act. The petitioner asserts that this does not represent neutral facts available because a reasonable alternative exists.

The petitioner suggests a methodology for allocating all random-length invoice prices. This methodology, the petitioner claims, would provide length-specific ratios based on contemporaneous comparisons of prices for identical products and, thus, a reasonable alternative to the Department's approach.

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[4] For this review, we are defining a random-length sale as any sale which contains multiple lengths, for which a blended (*i.e.*, average) price has been reported. Random-length sales are also known as "mixed-length" or "mixed-tally" sales.

In its rebuttal brief, Tembec expresses its agreement with the petitioner's contention that the Department's treatment of random-length sales in the cost and sales analyses is inconsistent. Tembec contends that the Department should achieve consistency by incorporating the petitioner's alternative proposals for random-length sales into either the sales or cost analysis.

Abitibi, Buchanan, Canfor, and Weyerhaeuser reject the petitioner's proposals to align the treatment of random-length sales for the sales and cost analyses. Abitibi contends that the allocation of random-length invoice prices and the NRV calculation serve completely different purposes. It argues that the price reallocation is for determining the price at which specific lengths of a product are sold, but that the NRV calculation is for determining the relative values of different products for allocating joint production costs. Furthermore, Abitibi claims that the petitioner's cost alternative would not result in parallel treatment between the sales and cost analyses. Contesting the petitioner's sales alternative, Abitibi argues that the POR-average ratio proposed by the petitioner neglects the issue of lumber price volatility, which Abitibi argues is the original reason for using a window period in the reallocation. Therefore, Abitibi requests that the Department reject the petitioner's proposals.

Buchanan and Weyerhaeuser contest the petitioner's claim that the Department disregarded all random-length sales in the NRV calculation. They point out that the NRV calculation takes place in two steps, and that all random-length and straight-length sales are included in the first step of the calculation. Both argue that it is appropriate to include only straight-length prices in the second step of the NRV calculation because the objective of this step is to analyze the effect of length on price. Countering the petitioner's sales alternative, Buchanan and Weyerhaeuser argue that the proposal would use hypothetically deconstructed prices to calculate ratios to deconstruct other prices. Both also argue that the petitioner's methodology is not product-specific. Furthermore, Weyerhaeuser argues that the petitioner's sales alternative fails to account for differences in time because it uses POR-averages. Finally, Buchanan claims that the petitioner has not demonstrated that the use of actual invoice prices distorts the margin calculation or that its methodology is more accurate than what the Department used for the *Preliminary Results*.

Canfor argues that the Department's treatment of random-length sales in the sales and cost analyses does not represent a "glaring inconsistency." For the value-based cost allocation, Canfor claims that the main point is to obtain allocators that are used for the entire POR, thereby making the use of POR-wide averages acceptable. For the sales analysis, however, Canfor contends that time is the paramount factor, thereby necessitating the use of the narrow time window around the date of the random-length sale. Canfor argues that the petitioner's sales alternative would move the price reallocation away from the time of sale, thereby removing any rationale for the reallocation.

Tolko notes that it supports the petitioner's cost alternative. However, Tolko asserts that the Department should not employ the petitioner's sales alternative if it rejects the petitioner's cost

alternative. Tolko argues that the petitioner's sales alternative is inconsistent with the decision memorandum[5] on random-length sales from the *First Review Final Results*.[6]

First, Tolko argues that the Department concluded that the two-week / four-week test for allocating prices was necessary for avoiding distortions caused by price volatility. Second, Tolko notes that the *Random Lengths Memo* stated that the Department was limiting the price allocations to circumstances in which the respondent sold an identical product in each of the lengths included in a random-length sale during the two-week / four-week window. Furthermore, as Tolko notes, the *Random Lengths Memo* stated that calculating a relative-price surrogate from other products would not be a more accurate methodology because the relative value of different products may not be the same. Tolko argues that this analysis runs counter to the petitioner's proposal to calculate price relationships by length without regard to the products themselves.

In addition, Tolko states that implementing the petitioner's sales alternative would result in ridiculous calculation results for Tolko. Tolko cites examples in which the proposed methodology causes the prices of certain lengths within a tally to increase in one market and decrease in the other. Furthermore, even in cases where the direction of the change is the same in both markets, Tolko notes that there are significant variations for certain lengths of products. Finally, citing to *U.S. Steel Group v. United States*,[7] Tolko posits that the petitioner's sales alternative would make it impossible for companies to monitor their prices in order to comply with U.S. antidumping law. Tolko argues that it could not determine the reallocation of prices because the reallocation would be calculated over the entire POR and would not depend on the species, grade, or type of product.

Department's Position:

We disagree with the petitioner. For the final results, we have not changed the treatment of random-length sales in either the sales or the cost calculations. The underlying issues related to random-length sales have not changed since the Department released the *Random Lengths Memo* during the first administrative review.[8] The petitioner argues that the Department has provided no

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[5] *See* Memorandum from Constance Handley, Program Manager, to Jeffrey May, Deputy Assistant Secretary for AD/CVD Enforcement, Group 1, Re: Treatment of Sales Made on a Random Length Basis for Determining Export Price, Constructed Value, and Normal Value, dated June 2, 2004 (*Random Lengths Memo*).

[6] *See Notice of Final Results of Antidumping Duty Administrative Review and Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products From Canada*, 69 FR 75921 (December 20, 2004) (*First Review Final Results*) and accompanying Issues and Decision Memorandum.

[7] *See U.S. Steel Group v. United States*, 177 F. Supp. 2d 1325, 1330-31 (Court of International Trade (CIT) 2001) (*U.S. Steel Group v. United States*).

[8] The Department has placed a public version of the *Random Lengths Memo* from the first administrative review on the record of the second administrative review. *See* Memorandum from Shane Subler, International Trade Compliance Analyst, to Constance Handley, Program Manager, Subject: Random Lengths Memo (continued)

justification for its differing treatment of random-length sales in the cost and sales analyses, and that none exists. At page 10 of the *Random Lengths Memo*, however, the Department stated, "Unlike in the value-based cost allocation, where we are trying to determine the net realizable value of each product to develop a POR average cost, for sales purposes the accuracy of the price for each individual sale is a key factor to consider." Therefore, in the *Random Lengths Memo*, the Department acknowledged that it must apply different considerations to the sales and cost analyses. We continue to find that our treatment of random-length sales in the sales and cost analyses is reasonable given the unique facts pertaining to random-length sales of softwood lumber.

We have analyzed the alternative methodologies proposed by the petitioner to ascertain whether either will lead to more accurate results than the methodology used by the Department in the *Preliminary Results* and the *First Review Final Results*. First, we find that the petitioner's sales alternative would not improve on the Department's methodology because it would lead to significant distortions. Controlling for price volatility in the reallocation of random-length sales prices is critical. At Comment 5 of the *First Review Final Results*, the Department stated that it limited the window period to four weeks because of "the need to limit the time period due to price volatility and the need to find a sufficient number of single-length sales to make the reallocation possible." The petitioner's adjustment ratios would be calculated over all of a respondent's sales during the POR. This would nullify the accuracy gained by using a four-week window period. Furthermore, as the Department noted on page 10 of the *Random Lengths Memo*, the relative values for different types of lumber products at any point in time are not necessarily the same. Therefore, in the *First Review Final Results*, the Department did not use surrogate relative prices to deconstruct the prices of random-length sales because of the distortions this would cause. Implementing the petitioner's sales alternative would cause these distortions because the adjustment ratios are not product-specific.

The Department's practice for administrative reviews is to match each individual U.S. sale to a monthly weighted-average NV in the margin calculation. No party has argued for changing this practice in this proceeding. Because the Department is using this methodology, the accuracy of the price allocation method is crucial to the margin calculation. Allocating the invoice prices of random-length sales without taking into account price volatility over time would result in prices that do not reflect the length-specific prices that underlie the random-length sales. For the allocation methodology to be as accurate as possible, some invoice prices for random-length sales cannot be allocated because there are no matching single-length sales for all items in the tally during the four-week period. Although this means that some non-allocated prices will be used in the margin calculation, it does not justify the introduction of new and substantial distortions as a means of achieving consistency between the sales and cost analyses.

For the cost analysis, we note that both straight-length and random-length sales are included in the first step of the NRV calculation. The second stage of the calculation includes only straight-

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(continued) from the First Administrative Review, dated December 5, 2005.

length sales because the objective of this step is to assess the impact of length on price. Therefore, the petitioner is incorrect in stating that the Department completely disregarded all random-length sales prices in the cost analysis.

Furthermore, we do not find that including random-length sales prices in the second stage of the NRV calculation as a means of achieving consistency is necessary. There is no reason why the treatment of random-length sales for the sales analysis should be consistent with the value-based cost allocation portion of our analysis, given that each analysis fulfills different functions. For the sales analysis, contemporaneity is essential to the accuracy of the calculation. For the value-based cost allocation, however, we are determining the average cost to produce the products under consideration during the POR. The calculated value-based costs are used to test home market sales during the entire review period, and, if necessary, to determine a constructed value for a given product for the review period. Therefore, contemporaneity is not as critical in the value-based cost allocation.

As we have explained at Comment 10 of this memorandum, the Department is continuing to use the value-based cost allocation method developed in the first administrative review of this proceeding. In that comment, we acknowledge that all proposed cost allocation methodologies are imperfect. However, we believe that the value-based cost allocation methodology represents a reasonable overall method for allocating costs for lumber products. In addition, we find that incorporating the petitioner's sales alternative would lead to distortions in the sales analysis. Therefore, we do not find that it is necessary to attempt to align the treatment of random-length sales between the sales and cost calculations because each calculation fulfills a different function. For the final results, we are making no changes to the value-based cost allocation. We are also continuing to reallocate random-length sales by matching within the four-week window period, as outlined in the *Preliminary Results*. When matching within the window period is not possible, we are continuing to use the non-allocated random-length price on the invoice.

Comment 2: Assessment Rate for Companies in the Maritime Provinces

In their case brief, the Maritime Lumber Bureau and the Maritime Companies (collectively, the Maritimes) argue that the Department erred in calculating the review-specific weighted-average assessment rate in the *Preliminary Results* because the deduction of CVD deposits from the entered value led to the calculation of an overstated assessment rate. The Maritimes, which are excluded from the CVD order, argue that applying the review-specific average assessment rate to Maritime entries without accounting for the difference between the entered value of the mandatory respondents' entries and the entered value of the entries from the Maritimes results in an over-assessment of duties.[9] They further contend that by failing to reflect the unique circumstances of the Maritimes in the review-specific average assessment rate calculation, the

[9] *See* case brief submitted by the Maritime Companies on July 25, 2005, at page 7.

Department wrongfully penalized Maritime imports by treating such imports as though Maritime lumber were subject to CVD duties contrary to the dictates of the CVD order.[10]

The Maritimes assert that the use of information that is known to be inaccurate and results in the calculation of an inaccurate rate is contrary to U.S. law because the Department's reviewing courts have held repeatedly that accuracy[11] is an "overarching principle of the antidumping statute."[12] Therefore, the Maritimes argue that the Department may not disregard the distortion that arises from applying the average assessment rate to softwood lumber from the Maritimes, and the resulting over-assessment of antidumping duties.[13]

Finally, the Maritimes assert that their assessment rate can be easily adjusted to reflect their circumstances. Specifically, this can be achieved by multiplying the total entered value reported by all mandatory respondents by one plus the 18.79 percent CVD deposit rate that was in effect during the POR. Then, the assessment rate for imports of Maritime softwood lumber can be calculated by dividing the combined total potentially uncollected dumping duties (TOTPUDD) for all mandatory respondents by the adjusted entered value. This separate assessment rate should then apply only to entries that are accompanied by an original Maritimes Lumber Bureau Certificate of Origin, which is a mandatory entry document that establishes the exclusion of Maritime-origin softwood lumber from the CVD order.

The petitioner argues that there is no reason for the Department to provide special treatment for the Maritimes because the Department selected the individually-examined respondents in a manner permitted by law, and the margins for each individually-examined respondents have been calculated as accurately as possible; therefore, the review-specific assessment rate is already calculated as accurately as possible.[14] The petitioner argues that a review-specific average rate is permitted and required by law, and that there is no legal authority to create a regionally specific rate based on factors that are irrelevant to the evidence that is on the record of this review.

According to the petitioner, the Maritimes have not alleged that the Department erred in selecting the respondents to be individually examined in this review, and have not alleged that the assessment rates calculated for those respondents were inaccurate.[15] Therefore, the petitioner

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[10] *See Id.* at 7-8.

[11] *See Id.* at 8; *see also Timken U.S. Corporation v. United States*, 318 F. Supp.2d 1271, 1279 (CIT 2004), citing *Fujian Machine & Equipment Import & Export Corporation v. United States*, 178 F. Supp. 2d 1305, 1322 (CIT 2001).

[12] *See Id.* at 9; *see also Union Camp Corporation v. United States*, 53 F.Supp 2d 1310, 1324 (CIT 1999).

[13] *See Id.*

[14] *See* petitioner's General Issues Rebuttal Brief, dated August 8, 2005, at 24.

[15] *See* case brief submitted by the Maritime Companies on July 25, 2005, at 25.

argues that the Maritimes can only allege that they want special treatment when there is no legal basis for it within this proceeding.

The petitioner also asserts that the Maritimes cannot identify any prior instances where the Department has calculated a special AD assessment rate for certain companies. Because the all-others rate is an average based on the examination of a limited number of producers and exporters, the petitioner states that this rate by definition has never been entirely accurate for any specific non-examined producers. The petitioner notes that the Maritimes' case brief cites to no cases where a review-specific average rate calculated from the accurate rates of individually-examined producers was held to be in error, and that the Department does not have the authority to go outside of the Act and break its prior practice in order to give special treatment to the Maritimes.

Finally, the petitioner argues that if the Department provides special treatment to the Maritimes, the Department must also recalculate the assessment rate for all companies who were not individually reviewed. The petitioner contends that on a weight-average basis, the entered values associated with U.S. sales made by the mandatory respondents were net of an *ad valorem* AD deposit of a different percentage rate. Therefore, the petitioner argues that if "the Department finds validity in the Maritimes' novel argument to calculate a Maritimes-specific rate, then the Department must also take account of this additional fact and calculate" a different assessment rate for all non-examined companies, including the Maritimes.[16]

Department's Position:

We agree with the Maritimes. The Department seeks to assess accurately an amount of duties corresponding to the degree of dumping reflected in the price paid by each importer. To accomplish this, the Department normally calculates an assessment rate in an administrative review by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise. *See* 19 CFR 351.212(b)(1). The Department thus ensures that when these importer-specific rates are applied to the corresponding entered values of the merchandise, the correct amount of the dumping duties is in fact collected. If however, an assessment rate is applied to entered values that differ significantly and systematically from the entered values used to calculate the rate itself (the denominator), as is the case here, the correct amount of duties will not be collected.

As indicated in the *Preliminary Results*, for the companies requesting a review, but not selected for individual examination, we have calculated a weighted-average assessment rate based on all importer-specific assessment rates of the examined companies (excluding any *de minimis* margins or margins determined entirely on adverse facts available). The weighted-average assessment rate is based on entered values that have been reduced by the amount of CVD deposits. When applied to entered values that are net of CVD deposits, these assessment rates result in an accurate

[16] *See Id.* at 27.

collection of antidumping duties owed. However, the entered values of merchandise from companies in the Maritimes are not reduced by CVD deposits, because the products from the Maritimes were excluded from the companion CVD order. Therefore, application of the weighted-average assessment rate to the entered value of merchandise from a company in the Maritimes, would, if not corrected, result in the significant over-collection of dumping duties.

We disagree with the petitioners that there is no legal basis for calculating a distinct assessment rate for companies in the Maritimes. The Act does not prescribe a specific assessment rate methodology.[17] Moreover, section 777A(c) cited by the petitioners refers to the methodology for selecting respondents and calculating the dumping margin. It does not specifically address the issue of assessment rates and the amount of duties applied to each importer. We have complied with the Act by calculating a single weighted-average dumping margin for all the non-reviewed companies. Our purpose then, is to ensure that the amount of duties collected is consistent with the single weighted-average dumping margin that we have calculated.

Further, we do not agree that calculating a Maritime-specific assessment rate obliges the Department to calculate a different assessment rate for other non-reviewed companies. This case is unique in that it is the only case in which products from a specific region or province of a country have been excluded from the companion CVD order. The exclusion from the CVD order, and the consequent significant and systematic impact on the entered values for merchandise from Maritime companies, uniquely situates the Maritimes among all other respondents covered by the AD order and the review-specific weighted average assessment rate.

Accordingly, for these final results, we have calculated a distinct assessment rate for companies in the Maritimes, by increasing the reported entered values of the mandatory respondents by the amount of CVD deposits. In order to receive this duty assessment rate, entries of products from the Maritimes must be accompanied by a Maritimes Lumber Bureau Certificate of Origin.

Comment 3: Treatment of Non-Dumped Sales

The Canadian Parties[18] argue that the Department's practice of offsetting non-dumped sales or "zeroing" is unlawful and may not be used in this review. Citing section 771(35)(A) of the Act, they assert subject merchandise is defined as "the class or kind of merchandise within the

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[17] S*ee Torrington Co. v. United States*, 44 F.3d 1572,1578 (Fed. Circ. 1995) (the statute does not specify particular divisor for calculating either assessment or cash deposit rates; but merely requires that the amount of dumping determined serve as the basis for both assessed duties and cash deposits of estimated duties).

[18] The Canadian parties making the argument are: the BCLTC; the Coast Forest Products Association, the Council of Forest Industries and their members; the Ontario Forest Industries Association and its members; the Ontario Lumber Manufacturers Association and its members; the Quebec Lumber Manufacturers Association and its members; the Abitbi Group companies, Buchanan Lumber Sales Inc and the Buchanan affiliated mills, exporters and importers; Canfor Corporation; Slocan Forest Products Ltd.; Tembec Inc.; Tolko Industries Ltd.; West Fraser Mills Ltd., Weldwood of Canada Ltd.; and Weyerhaeuser Company (collectively, Canadian Parties).

scope...of a review"[19] and contend that the definition of subject merchandise encompasses the merchandise as a whole, not only for positive values. In support, the Canadian Parties reference the World Trade Organization (WTO) Appellate Body's *WTO's Softwood Lumber Determination*,[20] where, while reviewing the antidumping order on this product, the Appellate Body stated that the Department must calculate a margin for a product as a whole when using an average-to-average comparison methodology in an investigation.

Moreover, the Canadian Parties assert that a review is an extension of the underlying investigation. Therefore, they conclude, the price comparison methodology applied in an administrative review, which, according to *Corus Staal II*[21] is similar to an investigation in terms of offsetting non-dumped sales, should also be found contrary to law. They also argue that the Department's methodology is inconsistent with section 771(35)(B) of the Act, which defines a weighted-average dumping margin as the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices of such exporter and producer. According to the Canadian Parties, the definition of aggregate means "taken as or considered from a total or whole." They contend that the Department does not take these points into consideration in its current methodology.

The Canadian Parties also contend that the Department violates the Act by failing to make a fair comparison between the export price or constructed export price and normal value.[22] Citing *Bowe Pasat*,[23] *Corus*,[24] and *WTO Carbon Steel from Japan,*[25] they argue that U.S. courts and the WTO Appellate Body have acknowledged the inherent bias involved with calculating a dumping margin as a result of not offsetting non-dumped sales.

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[19] *See* section 771(25) of the Act.

[20] *See United States - Final Determination On Softwood Lumber From Canada*, WT/DS264/AB/R., AB-2004-2, Report of the Appellate Body (August 11, 2004) (*WTO's Softwood Lumber Determination*).

[21] *See Corus Staal BV, et. al. v. United States*, 395 F.3d 1343 (Fed. Cir. 2005) (*Corus Staal II*).

[22] *See* sections 731 and 773 of the Act.

[23] *See Bowe Passat Reinigungs-Und Wascherietechnik GMBH v. United States*, 926 F. Supp. 1138, 1150 (CIT 1996) (*Bowe Passat*).

[24] *See Corus Staal BV v. Department of Commerce*, 259 F. Supp. 2d 1243, 1263 (CIT 2003) (*Corus*).

[25] *See United States - Sunset Review of Anti-Dumping Duties On Corrosion Resistant Carbon Steel Flat Products From Japan*, WT/DS244/AB/R, AB-2003-5 (*WTO Carbon Steel from Japan*) at paras. 134-35.

Finally, the Canadian Parties argue that the Department has an international obligation to stop its practice of setting negative margins to zero. Citing *Chevron,*[26] they assert that the Department should ascertain that Congress' purpose and intent in enacting the current antidumping laws was to bring the Department into conformity with its international obligations. As such, the Canadian Parties argue that under *Charming Betsy*[27] U.S. law cannot be construed to conflict with existing international legal obligations as defined by the WTO Appellate Body. They further note that the CAFC has used *Charming Betsy* to limit the Department's countervailing duty practice[28] and that *Charming Betsy* has also been recently applied by the NAFTA Panel in the softwood lumber antidumping order when the Department complied with the *WTO's Softwood Lumber Determination*.[29] The Canadian Parties contend that the WTO Appellate Body has also ruled that the setting negative margins to zero in administrative reviews has been found to run counter to the Antidumping Agreement and the Department should harmonize its statutes and methodologies with recent and future WTO determinations concerning the treatment of non-dumped sales.[30]

The petitioner counters that the Canadian Parties have continued to raise the same arguments as in the first POR. It argues that the CAFC and CIT have continuously upheld the Department's treatment of non-dumped sales as consistent with U.S. antidumping law.[31] The petitioner also cites the *WTO's Softwood Lumber Determination* and reiterates that the WTO Appellate Body ruling only covered the treatment of sales with negative margins in an investigation, using a weighted-average-to-weighted-average methodology for comparison purposes. As such, the petitioner argues that the Department's comparison methodology in this review, weighted-average-to-transaction, has no direct relation to the investigation and no bearing, despite the Canadian Parties' claims on how the Department treats non-dumped sales. Therefore, it argues that the Canadian Parties' arguments on the *Section 129 Determination* in this review are irrelevant.

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[26] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Pesquera Mares Australes Ltda. v. United States*, 266 F. 3d 1372, 1382 (Fed. Cir. 2001), *citing Mead v. United States*, 533 U.S. 218 (2001).

[27] *See Alexander Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (*Charming Betsy*).

[28] *See Alleghany Ludlum v. United States*, 367 F. 3d 1339, 1348 (Fed. Cir. 2004).

[29] *See Notice of Determination under Section 129 of the Uruguay Round Agreements Act - Antidumping Measures on Certain Softwood Lumber Products from Canada*, 70 FR 22636 (May 2, 2005) (*Section 129 Determination*).

[30] *See WTO Carbon Steel from Japan at para. 134.*

[31] *See*, *e.g.*, *Corus*, *Timken Co. v. United States*, 354 F 3d 1334, 1344 (Fed. Cir. 2004) (*Timken*), and *SNR Roulements v. United States,* 341 F. Supp 2d 1334 (CIT 2004).

The petitioner further argues that the Canadian Parties have not grasped the judicial decision-making process as shown in *Corus Staal*:[32]

> In sum, the WTO decision-making process operates apart from the decision-making process in this court. WTO decision-making starts with an international agreement, which may not match the domestic statute and which is interpreted pursuant to different principles. From there, the process follows an entirely separate implementation scheme. Had the Government appeared here saying it had lost in the WTO, with respect to the entire statutory framework, to the effect that it was reversing its position, even as to its past determination, then the court would have to consider what to do. This, however, has not happened, and the court is bound by circuit precedent upholding zeroing.[33]

The petitioner finally argues that the Canadian Parties' reference to the NAFTA Panel's decision is not relevant to this proceeding because, as in the *WTO's Softwood Lumber Determination*, the issue deals with the treatment of non-dumped sales in an investigation, not an administrative review. However, the petitioner notes that, in the NAFTA Panel remand, the Department followed its *Section 129 Determination* and did not provide an offset for non-dumped sales based on a transaction-to-transaction methodology.

Department's Position:

We agree with the petitioner and have continued not to provide an offset for non-dumped sales for the final results. As we have discussed in prior cases, this approach is consistent with our obligations under the Act.[34] Moreover, the Federal Circuit has affirmed the Department's methodology as a reasonable interpretation of the statute.[35]

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[32] *See Corus Staal v. United States*, 387 F. Supp. 2d 1291 (CIT 2005) (*Corus Staal*).

[33] *See Id*. at 1300.

[34] *See, e.g.*, *Notice of Final Results of Antidumping Duty Administrative Review: Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Brazil,* 70 FR 58683 (October 7, 2005); *First Review Final Results* at Comment 4; *Final Results of Administrative Antidumping Review: Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 69 FR 61649 (October 20, 2004) and accompanying Issues and Decision Memorandum at Comment 7; and *Notice of Final Results of Antidumping Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 69 FR 68309 (November 24, 2004) (*Steel Wire Rod from Canada*) and accompanying Issues and Decision Memorandum at Comment 8.

[35] *See Timken* at 1344. More recently, in *Corus Staal II,* the CAFC again held that the Department's interpretation of section 771(35) of the Act was permissible whether it be in the context of an administrative review or investigation.

With regard to the Canadian Parties' argument concerning the WTO's *Softwood Lumber Determination*, at the instruction of United States Trade Representative, the Department implemented the WTO report on May 2, 2005, pursuant to Section 129 of the Uruguay Round Agreements Act (URAA).[36] Under the *Section 129 Determination*, the implementation of the WTO report addressed the specific administrative determination that was the subject of the dispute before the WTO: the antidumping duty investigation of softwood lumber from Canada.[37] The Department further notes that the NAFTA Panel decision on softwood lumber cited by the Canadian Parties ordered the Department to modify its calculation in the original investigation in light of the publication of the *Section 129 Determination*. On July 11, 2005, the Department issued its remand redetermination, applying the same comparison methodology applied in the *Section 129 Determination*. The NAFTA Panel proceeding is ongoing, and the Department has requested that the Panel reconsider its decision. Accordingly, the Department has denied any offset to dumping based on export transactions that exceed normal value.

Comment 4: Review Should Be Terminated Because of the NAFTA ITC Decision

The British Columbia Lumber Trade Council (BCLTC) asserts that, with respect to this proceeding, the September 10, 2004, negative final determination of threat of material injury by the International Trade Commission (ITC), which was affirmed by a NAFTA Binational Panel on October 12, 2004 (*See ITC Files Response To Softwood Lumber Binational Panel Decision With Nafta Secretariat*, News Release 04-100 Inv. Nos. 701-TA-414 and 731-TA-928 (September 10, 2004)),[38] demonstrates that there is no lawful basis for the Department to impose antidumping duties on softwood lumber from Canada. BCLTC points out that if the Extraordinary Challenge Committee confirms the Binational Panel Decision, the Department should revoke the antidumping duty order, terminate this administrative review, and instruct CBP to refund in full all cash deposits of estimated antidumping duties made by respondents, with interest, as required by the statute.

Department's Position:

We disagree with the BCLTC. On December 20, 2004, the Department published in the *Federal Register*, the *Amendment to Antidumping and Countervailing Duty Orders on Certain Softwood Lumber Products from Canada*, (69 FR 75916) to reflect the ITC's determination on threat of injury under Section 129 of the URAA. The Department's implementation under domestic law of the ITC's Section 129 threat of injury determination represents an independent basis for

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[36] *See Section 129 Determination.*

[37] *See* 19 U.S.C. 3538.

[38] The U.S. International Trade Commission filed its response to the August 31, 2004, decision and order of the United States-Canada Binational Panel in Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928.

maintaining the orders which is unaffected by the NAFTA litigation concerning the ITC's original threat of injury determination.

Further, even if we accept, *arguendo,* that the orders should have been revoked when the ECC upheld the results of the NAFTA litigation concerning the ITC's original threat of injury determination in this case, section 516A(g)(5)(B) of the Act states that "entries of merchandise covered by {a NAFTA determination} shall be liquidated in accordance with the determination {of the Department} if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register ... of notice of a final binational panel, or of an extraordinary challenge committee, not in harmony with that determination" (emphasis added). On November 30, 2004, the Timken Notice of the final NAFTA Panel decision was published in the *Federal Register*. *Antidumping and Countervailing Duty Investigations of Certain Softwood Lumber Products from Canada: NAFTA Panel Decision*, 69 FR 69584 (November 30, 2004). The effective date of that notice was November 4, 2004. None of the entries covered by this review entered after that date. Thus, the results of this administrative review would not be affected by the ECC's decision.

Comment 5: Treatment of Countervailing Duties and Other Duty Deposits

The petitioner asserts that in this review the Department should adjust U.S. price (USP) by deducting any countervailing duty (CVD) or duty deposit imposed to offset a non-export subsidy (non-export-subsidy CVD) during the POR in accordance with section 772(c)(2)(A) of the Act. The petitioner contends that the Department erred in not making such an adjustment for the *First Review Final Results*.

The petitioner acknowledges that in *First Review Final Results*, the Department reaffirmed its longstanding interpretation that antidumping duties and CVDs "are not the same as ordinary customs duties" for purposes of USP adjustments. *See First Review Final Results* at Comment 1. However, the petitioner claims that the Department failed to explain how this interpretation is relevant to the construction of section 772(c)(2)(A) given that the statute does not use the term "ordinary customs duty," but instead refers to "United States import duty." The petitioner claims that it has previously demonstrated that section 772(c)(2)(A) was based on the Antidumping Act of 1921 (the 1921 Act), H.R. Conf. Rep.No. 67-79 at 12 (1921). The petitioner argues that the phrase "United States import duties" used in the 1921 Act was intended as a reference to "all United States import duties," and this demonstrates that the Department is incorrect in taking the position that section 772(c)(2)(A) refers only to "ordinary customs duties."

The petitioner claims that the Department fails to explain how the Act intended to define the phrase "United States import duties" when it takes the position that the phrase refers only "ordinary customs duties." The petitioner states that in the Department's view there are four categories of duties: antidumping duties (ADDs), countervailing duties to offset export subsidies (export-subsidy CVDs), non-export-subsidy CVDs, and "ordinary customs duties." The petitioner contends that at best the Department can only show that the phrase "United States

import duties" does not include ADDs and export-subsidy CVDs. According to the petitioner, even if this is accurate, the Department has still not demonstrated that "United States import duties" means only "ordinary customs duties," nor has it demonstrated that its treatment of ADDs and export-subsidy CVDs is the applicable model for its treatment of non-export-subsidy CVDs.

Moreover, the petitioner argues that the Department's position that "United States import duties" means only "ordinary customs duties" does not accord with past practice. The petitioner states that in *Fuel Ethanol from Brazil; Final Determination of Sales at Less Than Fair Value*, 51 FR 5572 (February 14, 1986) (*Ethanol from Brazil*), pursuant to section 772(c)(2)(A), the Department deducted "special tariffs" imposed by Congress to offset a tax subsidy. Thus, the petitioner asserts, in that decision the Department recognized the phrase "United States import duties" could be something other than "ordinary import duties." The petitioner argues that the Department has failed to address the inconsistency in the Department's practice which the petitioner claims to identify in its comparison of *Ethanol from Brazil* and the *First Review Final Results*. The petitioner argues that the Department was "retreating from its formulated statutory interpretation" when the Department argued in *First Review Final Results* that *Ethanol from Brazil* was irrelevant because the "special tariffs" were not "remedial tariffs under any trade law." The petitioner claims that while the Department made the argument that the special tariffs in *Ethanol from Brazil* were different from the non-export-subsidy CVDs because they were "non-remedial," the Department did not demonstrate that section 772(c)(2)(A) should be read as covering "United States import duties except remedial duties imposed under any trade remedy law." The petitioner insists that the Department in the *First Review Final Results* was unable to go beyond its assertion that "United States import duties" should be read only as "ordinary customs duties." The petitioner thus maintains that *Ethanol from Brazil* is relevant in that it demonstrates that the Department's current statutory interpretation is inconsistent with past practice. The petitioner argues that the Department has made no attempt to resolve this inconsistency and, therefore, the Department's current interpretation of how non-export-subsidy CVDs should be treated is unreasonable.

The petitioner takes issue with what it considers to be the Department's reliance on the treatment of export-subsidy CVDs under the statute as somehow dispositive of the treatment of non-export-subsidy CVDs. It states that the 1979 Congressional amendments incorporated in section 772(c)(2)(A) expressly exclude export-subsidy CVDs from the "United States import duties" for which USP adjustments are made. In addition, the 1979 amendments under section 772(c)(1)(C) require that the Department add any export-subsidy CVD to USP whether such export subsidy CVD is included in USP or not, and where the export-subsidy CVD is included, the amendment prohibits the deduction of the export-subsidy CVD. The petitioner contends that, based on these explicit exceptions for export-subsidy CVDs, any item not explicitly excluded should logically be included. The petitioner accuses the Department of turning the rationale of the Congressional amendments on its head in *First Review Final Results* when the Department argued that it "does not interpret the statute to require export-subsidy CVDs to be added to initial USP, only to negate this addition by their subsequent subtraction." The petitioner asserts that in light of the explicit prohibition on reducing initial USP by the amount of the export-subsidy CVD, the Department's

argument makes no sense. It contends that the only explanation for such an explicit statutory prohibition is that without the prohibition, export-subsidy CVDs included in USP would be deducted. Thus, the petitioner argues, given the lack of an explicit prohibition on the deduction of non-export-subsidy CVDs from USP, the Act requires that the non-export subsidies be deducted from initial USP.

The petitioner argues that the Department, in defending its position in *First Review Final Results*, quoted the *Senate Report*, S. Rep. No. 96-249 (1979) (*Senate Report*) out of context when the Department argued that the *Senate Report* stated that "no adjustment. . . is appropriate" with respect to non-export-subsidy CVDs imposed. The petitioner claims that the quotation is taken from a paragraph of the *Senate Report* in which the referenced adjustment involved export-subsidy CVD amounts. *See Senate Report* at 94. The petitioner claims that the discussion in this section involved the rationale for the upward adjustment to USP for export-subsidy CVDs based on the differential impact of export subsidies on USP. The petitioner argues that the quoted section did not consider the separate impact of the duty imposed. The petitioner claims that the Department incorrectly sought to justify its practice of not accounting for non-export-subsidy CVDs with this discussion of adjustments made for export subsidies.

The petitioner also disputes the Department's *First Review Final Results* position that no USP adjustment is made for non-export-subsidy CVDs because non-export subsidies lower prices in both markets and, thus, do not affect the dumping margin. The petitioner contends that non-export-subsidy CVDs influence the dumping margin because they impose an additional cost on sales in the U.S. – the duty – and the Department's dumping analysis must account for all costs. The petitioner argues, moreover, that the Department cannot justify its failure to account for all costs as avoiding a "double remedy" because, according to the petitioner, no such double remedy exists. The petitioner finds fault with the Department's argument that, if a CVD is paid on imports, the Department should not "boost" its ADD by deducting the CVD from USP. The petitioner contends that this position is legally wrong because AD and CVD proceedings are distinct from one another. The petitioner also asserts that if the Department believes that the USP used to calculate the AD margin cannot be exclusive of the CVD paid, then the Department should consider adding CVD to USP in situations where U.S. sales are made on an ex-factory basis (duty-unpaid). The petitioner argues that, in fact, the Act does not even contemplate such an addition to U.S. price for the amount of any non-export-subsidy CVD imposed where the term of sale is ex-factory (duty-unpaid).

In their joint rebuttal brief, a group of Canadian producers and producer associations (Canadian Parties)[39] agree with the Department's decision in *First Review Final Results* not to deduct CVDs. The Canadian Parties contend that the Department conclusively rejected the petitioner's position

[39] *See* Canadian Parties Joint Rebuttal Brief (submitted by Wilmer Cutler Pickering Hale and Dorr), (*Canadian Parties Rebuttal*) dated August 8, 2005, at pages 1-2 for a complete list of Canadian parties supporting the rebuttal. The Canadian parties to which we refer in this section are not the same as the Canadian parties identified in Comment 3, which discusses the treatment of non-dumped sales.

in this review in *First Review Final Results*. They state that just before the *First Review Final Results* were issued, the Department provided an even more detailed analysis of the issue in *Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium from France*, 69 FR 46501 (August 3, 2004) (*LEU from France*). The Canadian Parties cite a number of CIT decisions affirming the Department's position.[40] The Canadian Parties maintain that the conclusion that countervailing duties and countervailing duty deposits are not deducted in the dumping margin calculation is settled law and that the petitioner has not provided any new argument to counter this position.

From the plain text of section 772 of the Act and its legislative history, the Canadian Parties say, it is clear that there are no other adjustments to USP for CVDs other than to add export-subsidy CVDs. They counter the petitioner's assertion that the *Senate Report*[41] at 93-94 did not address the issue of non-export-subsidy CVDs, stating that the cited section of the report explicitly states that in the case of subsidies benefitting both home and export markets, "no adjustment is required." Moreover, the Canadian Parties say, as stated in *LEU from France,* a deduction for CVDs would also be inconsistent with the policy underlying section 772(c)(2)(B) of the Act, which prohibits reducing USP by the amount of any export tax imposed in the exporting country to offset a countervailable subsidy.

The Canadian Parties assert that nothing in the remaining language of section 772 contradicts the conclusion that Congress nowhere permitted the deduction of countervailing duties in the calculation of USP. They argue the term "import duties" as originally used in the 1921 Act and then adopted in the 1979 Trade Act was not defined. The Canadian Parties say that the Department's interpretation of the term "import duties" is based correctly on section 772 as a whole and has been upheld by the CIT. They also note that Congress has not acted to amend the law despite this consistent practice of not deducting non-export-subsidy CVDs from USP.

The Canadian Parties maintain that the petitioner's claims that the Department's interpretation of section 772(c)(2)(A) is unreasonable and is inconsistent with *Ethanol from Brazil* are fully addressed in *First Review Final Results* at Comment 1 and *LEU from France*.

Regarding petitioner's argument that deduction of CVDs is not double-counting because the law requires that CVDs be deducted from USP as a "cost," the Canadian Parties find that this position is based on circular reasoning in that the argument assumes the conclusion. The Canadian Parties argue that consistent with what both the Department and the courts have recognized, CVDs are

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[40] *See Canadian Parties Rebuttal* at 10, fn. 10, citing *U.S. Steel Group v. United States*, 15 F. Supp. 2d 892, 898-900 (CIT 1998); *AK Steel Corp. v. United States*, 988 F. Supp. 594, 608 (CIT 1997), *aff'd* 215 F. 3d 1342 (Fed. Cir. 1999); *PQ Corp. v. United States*, 652 F. Supp. 724, 737 (CIT 1987); *Federal-Mogul Corp. v. United States*, 813 F. Supp. 856, 872 (CIT 1993); *Hoogovens Staal v. United States*, 4 F. Supp. 2d 1213, 1220 (CIT 1998); and *Bethlehem Steel Corp. v. United States*, 27 F. Supp. 2d 201, 208 (CIT 1998).

[41] The Canadian Parties cite the report as Trade Agreements Act of 1979, Pub. L. N. 96-39, 93 Stat. 144 (1979), but it is the same as the *Senate Report* cited above.

not to be considered a cost within the meaning of 772(c)(A), in part because such an interpretation results in an unreasonable double-counting of any domestic subsidy. They argue that deducting a non-export subsidy CVD, which benefits both domestic and export merchandise equally, and not deducting the same amount from the home market price, creates an artificial dumping margin equal to the subsidy, which would be offset a second time with antidumping duties.

The Canadian Parties charge that the petitioner ignores the distinction between cash deposit of estimated CVD and the actual assessment of CVD. They argue, on one hand, that it would be unfair to deduct CVD deposit amounts which do not necessarily correspond to actual assessment rates as they are based on prior periods, and may be based on different calculation methodologies. The Canadian Parties assert that use of deposit rates which are established prior to judicial review would nullify parties' legal right to judicial review of such rates. On the other hand, they contend that deducting actual assessment rates is impractical as such rates will generally not be finalized (considering appeals) at the time the AD calculations are due.

Department's Position:

As noted by Canadian Parties, the Department considered this issue in *LEU from France* at Appendix I, "Proposed Treatment of Countervailing Duties as a Cost." There the Department undertook a comprehensive analysis and determined that, in calculating dumping margins, it would continue its well-established practice not to deduct CVDs from USP, because CVDs are neither "United States import duties" nor selling expenses within the meaning of the Act, and to make such a deduction effectively would collect the CVDs a second time. We find no basis for reaching a different conclusion in the present review from either *LEU from France* or the *First Review Final Results*.

In *LEU from France*, the Department reviewed the legislative history of section 772 with reference to the relevant provisions of the 1921 Act, and upheld its longstanding interpretation that ADDs and CVDs are not the same as ordinary customs duties. The Department reasoned that if "United States import duties" include CVDs, then it logically must include all CVDs and also ADDs, thus requiring their deduction from USP. Deducting for export-subsidy CVDs, the Department explained, would flatly contradict the statute and deducting ADDs would amount to a circular deduction of dumping margins in calculating dumping margins. Additionally, the Department noted that the terms of the 1979 amendments require that export-subsidy CVDs be added to initial USP, and explained that we do not interpret the statute to require export-subsidy CVDs to be added to initial USP, only to negate this addition by their subsequent subtraction. The Department noted the statute's silence with respect to domestic-subsidy CVDs, and explained that the logical complement to adding export-subsidy CVDs to USP is to make no adjustment for domestic-subsidy CVDs. In support of this position, the Department pointed to the *Senate Report*, which stated that, where the situation is the same, *i.e.*, where the subsidy benefits all merchandise sold in both markets (as is the case with domestic-subsidy CVDs), no adjustment to USP is

appropriate.[42] We agree with the Canadian Parties' position that the discussion in this section of the *Senate Report* supports our interpretation of the statute and Congressional intent regarding non-export-subsidy CVDs. While the petitioner is correct in arguing that this section of the report addresses the rationale behind the USP adjustment for export-subsidy CVDs, it also reveals Congressional thinking on non-export-subsidy CVDs. Specifically, the complete relevant portion of the *Senate Report* reads:

> The purpose of the amendment regarding additions to purchase price and exporter's sales price with respect to countervailing duties also being assessed because of an export subsidy is designed to clarify that **such adjustment is made only to the extent that the exported merchandise, and not the production of the foreign manufacturer or producer or other merchandise handled by the seller in the foreign country, benefits from the particular subsidy**. The principle behind adjustments to the price paid in these instances is to achieve comparability between the price{s} which are being compared. **Where the situation is the same, *e.g.*, both the merchandise examined for the purpose of determining "purchase price" and such or similar merchandise examined for the purpose of determining "foreign market value" benefit from the same subsidy, then no adjustment is appropriate**.[43]

In regard to the petitioner's contention that we have previously adjusted USP for "special tariffs," the Department noted in *LEU from France* that, in the 23 years that it has administered the AD law, it has never deducted ADDs or CVDs from initial USP in calculating dumping margins. The Department also explained that the "special tariffs" in *Ethanol from Brazil*, to which the petitioner refers, were neither CVDs nor remedial duties under any trade remedy law, and were not subject to an injury finding by the United States International Trade Commission (ITC). The petitioner's suggestion that the Department's position is unsupported by any specific language in section 772(c)(2)(A) that references an exception for "remedial duties under any trade law" is in no way persuasive. As the Canadian Parties note in their rebuttal, the plain language of the Act and our longstanding practice are both absolutely clear on the limited circumstances when CVDs figure in USP adjustment. The "special tariffs" deducted in *Ethanol from Brazil* clearly do not fall in the same category as the CVDs. Consequently, just as the Department found in *LEU from France*, we continue to find that *Ethanol from Brazil* is not relevant to the issue of whether CVDs should be subtracted from U.S. prices in calculating dumping margins and the petitioner's argument that the Department's treatment of the "special tariffs" in that case somehow reveals an inconsistency in our practice is misplaced.

In *LEU from France*, the Department also considered the issue in terms of the double-counting or "double remedy" that results from deducting CVDs from USP. There we stated that there is no

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[42] *See Senate Report* at 94.

[43] *Id*. at 94 (emphasis added).

need to adjust for domestic-subsidy CVDs because domestic subsidies—which lower prices in both the U.S. market and the domestic market of the exporting country equally—are assumed not to affect dumping margins. For support, the Department noted that the CIT has specifically upheld this rationale in *U.S. Steel Group v. United States*, 15 F. Supp. 892, 900 (CIT 1998), where the CIT explained that, since the Department has already corrected for any subsidies in the CVD order, deducting CVDs from USP would create a greater dumping margin in the form of a second remedy for the domestic industry.

Comment 6: Use of Length-Specific Prices

Weldwood and West Fraser reported straight-length prices for their random-length sales in both the Canadian and U.S. markets. Claiming that many of the reported straight-length prices are within .5 percent of the random-length price, the petitioner disputes the accuracy of both companies' reported prices. It requests that the Department employ facts available in place of the reported straight-length prices for Weldwood and West Fraser.[44]

Countering the petitioner's assertion, Weldwood argues that the Department thoroughly verified its reported length-specific prices. In addition, West Fraser states that its length-specific prices were verified as accurate and used to calculate its margin in the *First Review Final Results* and the same reporting method was used again in this review. Both Weldwood and West Fraser also contend that the petitioner's analysis is oversimplified and ignores the facts of the lumber market. Citing examples from their databases, Weldwood and West Fraser claim that length-specific prices will match random-length prices for some sales by coincidence because the random-length price is a weighted-average of the prices for individual lengths in the tally. Furthermore, Weldwood and West Fraser argue that the length-specific and random-length prices often match because different lengths of the same product may have identical prices and because the market does not differentiate length-specific prices for certain products. In addition, they state that the petitioner's arguments are especially inappropriate because the petitioner initially demanded that respondents submit length-specific prices. Finally, Weldwood and West Fraser argue that the petitioner's request to use facts available is outrageous because they both have provided accurately and timely information on their random-length sales.

Department's Position:

We agree with Weldwood and West Fraser. The Department's objective in this proceeding is to use prices that reflect as accurately as possible the length-specific prices of each length within a random-length sale. This is why the Department reallocated the invoice prices within random-length sales, where possible, for the *Preliminary Results*. When a respondent maintains length-specific price information in the normal course of business, the Department prefers to use this

[44] For a description of the petitioner's facts available request, which is proprietary, *see* the petitioner's case brief for Weldwood at page 3 and the petitioner's case brief for West Fraser at page 3.

information because it reflects the company's length-specific prices at the point in time at which the random-length sale was made.

Weldwood used information maintained in its sales system to calculate straight-length prices for the random-length tally sales using relative values.[45] This methodology is similar to that used by the Department in the first administrative review of this proceeding (and in the current review) to reallocate random-length prices for respondents that maintain no length-specific price information.

West Fraser reported length-specific background prices from its sales system.[46] As stated by West Fraser, we verified its reported length-specific prices for random-length sales in the *First Review Final Results* and found them to be accurate. There is no evidence on the record of this review to suggest that West Fraser deviated from its established reporting methodology.

In their rebuttal briefs, Weldwood and West Fraser explain why reallocated length-specific prices may match random-length prices and provide examples from their databases. It is not inconceivable that two lengths within a tally could have the same price, or that one or more lengths within the tally have a value equal to the blended price. Further, the data show that the majority of the lengths within each tally have prices which are unique. We have determined that the prices reported by Weldwood and West Fraser are at least as accurate as the results obtained by the Department when it reallocated the random-length prices of the other respondents. In fact, we believe they are more accurate because they rely on contemporaneous data maintained by the companies in the ordinary course of business.

We find no reason to reject either company's reported length-specific prices. While the petitioner has suggested that the Department apply facts available to Weldwood and West Fraser, it has failed to demonstrate that the companies' information is so incomplete that it cannot serve as a reliable basis for calculating a margin, or that it is otherwise unusable under section 782(e) of the Act. Therefore, we have continued to use Weldwood's and West Fraser's reported length-specific prices for the final results.

Comment 7: Name Changes

For the *Preliminary Results*, the Department included an opportunity for companies in the review to clarify their names by stating:

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[45] *See* Memorandum to the File from Shane Subler, International Trade Compliance Analyst, to Susan Kuhbach, Office Director, Office 1, Re: Verification of the Sales Response of Weldwood of Canada Limited in the Second Antidumping Duty Administrative Review of Certain Softwood Lumber Products from Canada (*Weldwood Verification Report*), dated May 31, 2005, at page 5.

[46] For a description of West Fraser's length-specific background prices, *see* West Fraser Section B & C Response at page B-26 (November 3, 2004).

> Please note that the names of the companies are listed above exactly as they will be included in instructions to CBP. Any alternate names, spellings, affiliated companies or divisions will not be considered or included in any instructions to CBP unless they are brought to the attention of the Department in a case brief. There will be no exceptions.

In response, the Department received case briefs from numerous listed companies requesting the Department correct or add additional spellings of the companies in the review and include affiliates with their names. Companies requesting corrected or additional names were: Central Cedar, Ltd.; Tembec; Vancouver Specialty Cedar Products; Commonwealth Plywood Company Ltd.; West Bay Forest Products & Manufacturing Ltd.; Fontaine Inc., J.A. and its affiliates Fontaine et Fils Inc., Bois Fontaine Inc., Gestion Natanis Inc., Les Placements Jean-Paul Fontaine Ltee.; Produits Forestiers P. Proulx Inc.; Pope and Talbot, Inc.; Sigurdson Bros. Logging Company Ltd.; Stuart Lake Marketing Inc.; C.E. Harrision & Son Ltd.; Delco Forest Products; North American Forest Products; Williams Brothers Limited; Elmsdale Lumber Company Ltd.; West-Wood Industries; Atlantic Warehousing Limited; Barrett Lumber Company; Jamestown Lumber Company Limited; N.F. Douglas Lumber Limited; Eacan Timber Limited; Scierie Chaleur; Sexton Lumber; Ridgewood Forest Products Ltd.; Brunswick Valley Lumber; Clair Industrial Dev. Corp. Ltd.; Harry Freeman & Son Ltd.; and TFL Forest Ltd.

Moreover, Abitibi, Buchanan, Canfor, Tembec, and West Fraser requested, in their case briefs, that the Department correct and/or edit names in their respective customs instructions. Olav Haavaldsrud Timber Company Limited (Olav Timber) also submitted a case brief requesting that the Department include names in the customs instructions that its customs brokers may have identified as the exporter of its merchandise during the POR.

Finally, on May 16, 2005, Kruger, Inc. (Kruger) submitted a letter to the Department requesting that the Department include Kruger's affiliates' names in the publication of the company review-specific average rate and subsequent customs instructions. Kruger states that its affiliates were put on the record of the review and cites to its July 14, 2004, letter,[47] where Kruger identified its affiliates and reported their production and export statistics for the POR. Kruger argues that it is the Department's practice of assigning the rates of the parent company to its affiliates, even if the affiliates are not initially named in the review.[48] Kruger asserts that it has complied with the Department's requests, and as a parent company, should be able to extend its company-review specific average rate to its affiliates, as other reviewed companies have in the previous and current reviews.

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[47] *See* letter from Kruger to the Department, dated July 15, 2004 (July 15, 2004, letter).

[48] *See* letter from Kruger to the Department, dated May 16, 2005, at 2.

Department's Position:

For the final results, we have inserted the correct spelling or alternative names for the companies listed above that submitted the proper or alternative spellings for their company names in the *Federal Register* notice and customs instructions. In addition, as per Abitibi's, Buchanan's, Canfor's, Tembec's, and West Fraser's individual requests, we will make the edits and add the additional names to the customs instructions. We also note that Kruger did identify its affiliates during the POR when it reported production and export data as per the Department's request. Therefore, pursuant to its request, the review-specific average rate for the POR has been extended to Kruger's named affiliates and we have included them in the cash deposit and liquidation instructions as well.

Finally, with respect to Olav Timber, section 751(a) of the Act requires that a review specifically be requested for exporters or producers of subject merchandise covered under the antidumping duty order. As stated above, the Department is only considering spelling, affiliate or division issues associated with a company at this time. The opportunity to request the Department to examine a particular exporter is during the anniversary month of an antidumping duty order, not after the preliminary results of an administrative review. Therefore, the Department is unable to include in the customs instructions Olav Timber's exporters that are not already in the review.

As the Department conducts subsequent reviews of the antidumping order on certain softwood lumber from Canada, the issue of company names as it relates to spellings and affiliates or divisions continues to be a problematic issue for the reviewed companies as well as the Department. The Department will consider comments on affiliation and alternative names in the context of the ongoing third administrative review, but starting with the fourth administrative review of certain softwood lumber from Canada, the Department will no longer permit parties to add company names to the record throughout the course of the proceeding. Instead, the Department intends to include language in the initiation notice stating that every producer/exporter being reviewed will have a specific time period in which to present edits or additions to its name. It is the Department's intention not to consider further edits or additions to the listed names after the stated time period, and to issue automatic liquidation instructions based on the names established as of that date.

Comment 8: Gains and Losses on the Closure and Sale or Disposal of a Production Facility

Abitibi, Weyerhaeuser and Canfor each closed a production facility or facilities. West Fraser and Weyerhaeuser sold production facilities. They provide the following arguments on the sale and/or disposal of their facilities:

1) At the end of fiscal year (*i.e.*, calendar) 2003, Abitibi recognized a loss associated with the indefinite idling of its Port Alfred newsprint mill. Abitibi argues that these closure costs should not be included in the calculation of its G&A expense, because such costs do not pertain to the production and sale of the foreign like product.

2) West Fraser realized a gain on the sale of its North Coast Timber saw mill. West Fraser argues that it should be allowed to include the gain as an offset to its reported G&A expenses.

3) Weyerhaeuser recognized closure costs associated with twelve facilities in fiscal year (*i.e.*, calendar) 2003 that it permanently shutdown. These facilities were eight wood products facilities, two paper facilities, one containerboard facility, and one packaging facility. Weyerhaeuser sold one mill during the POR. Weyerhaeuser also recognized integration and restructuring costs associated with the acquisition and consolidation of two companies (*i.e.*, Willamette and MacMillan Bloedel) into existing operations. Weyerhaeuser argues that both types of costs should be excluded from the calculation of its G&A expense for this review.

4) Finally, as of April 2004, Canfor incurred costs associated with the shut-down and closing of its Taylor mill planer operation. Canfor closed its Taylor mill sawmill operations during the first administrative review period, and these costs were included as part of G&A expense, although it was not an issue in the proceeding. Canfor argues that the closure costs should not be included for reporting purposes in this administrative review period, because these costs were formally reported as a separate line item in its 2004 financial statements, which will be used for G&A purposes in the next administrative review.

Abitibi argues that sections 773(b)(3)(A) and (B) of the Act define cost of production (COP) as only including the cost of materials and of fabrication or processing "employed in producing the foreign like product," plus "an amount for selling, general, and administrative expenses... *pertaining to production* and sales of the foreign like product by the exporter in question," emphasis added. Abitibi argues that the costs associated with the closure of the Port Alfred mill newsprint operation are related to Abitibi's newsprint business and, thus, are not related to producing the foreign like product, lumber. Abitibi asserts that the shutdown was implemented specifically as part of a strategy to enable Abitibi to improve productivity and to lower production costs for its newsprint division. Abitibi argues that these closure costs benefit only Abitibi's newsprint operations, because the closure would reduce its overall annual newsprint production costs.

Additionally, Abitibi argues that even though for accounting purposes it recognized the costs associated with the closure of the Port Alfred mill in 2003, the actual activities for the closure of the mill took place in 2004. Abitibi argues that it did not actually make cash payments to anyone or truly incur any losses due to write-offs for this closure until 2004. Thus, it argues that the Department should not consider these costs to be 2003 costs, and that it should not include them for this POR. Abitibi argues that the closure costs benefit both current and future production because the actual expenditures charged to the 2003 provision occurred over multiple years and the purpose of closing the Port Alfred mill was to enhance future newsprint production efficiency and lower future newsprint production costs. Abitibi contends that the expenses associated with closing part of a continuing line of business can be recovered through present and future production and sales of products within the continuing line of business, thus, the closure costs would not have to be recovered through increased sales prices of softwood lumber.

Abitibi asserts that the costs associated with the closing of the Port Alfred mill are similar in nature to the gain on the St. Felicien mill kraft paper pulp operation reported by Abitibi in the first administrative review of this proceeding. In the *First Review Final Results* at Comment 9, the Department did not allow the gain on the sale of the St. Felicien mill as an offset to Abitibi's G&A expenses calculation. Abitibi argues that both the sale of the kraft pulp mill in the first administrative review of this proceeding and shut down of the Port Alfred mill in this review involved separate and distinct business lines, thus any gain or loss should be attributed to this separate business line and not to general operations of Abitibi as a whole. Abitibi points out that the decision on the St. Felicien mill did not depend on where the gain was reported on its financial statement, *i.e.*, above the line in operating income, or below the line in non-operating income. Abitibi states that the Department has never regarded the respondent's classification of expenses as either extraordinary or operating to be a determining factor in whether or how a cost should be reported.[49]

Abitibi contends that the shutdown of a newsprint mill is not routine and not the type of transaction which manufacturing companies engage in as part of their normal operations. Abitibi points out that in the *First Review Final Results*, the Department agreed with the argument that the sales or permanent closures of a fully functioning plant were not part of the company's normal business operations, and are unrelated to the general operations of the company.[50]

Finally, Abitibi argues that if the Department includes the Port Alfred mill closure costs in Abitibi's G&A expenses, it must amortize those costs over current and future production, because the closure of that mill benefits both current and future production. Abitibi cites section 773(f)(1)(B) of the Act, which it asserts allows the Department no discretion to making such an adjustment when the costs benefit current and future production.

West Fraser claims that the Department's well established practice is that any gain or loss realized on the routine disposition of production assets related to the general operations of the company as a whole should be included in the G&A expense ratio calculation, and cites *Notice of Final Determination of Sales at Less than Fair Value: Bottle-Grade Polyethylene Terephthalate (PET) Resin From Indonesia*, 70 FR 13456 (March 21, 2005) (*PET Resin from Indonesia*) and accompanying Issues and Decision Memorandum at Comment 13, as support.

West Fraser argues that the Department may have thought that the gain resulted partly from the sale of land. West Fraser then acknowledges that the Department's practice is to exclude gains or losses on the sale of land, but it cites to its submissions where it states that the gain on the sale of the lumber mill did not include the sale of land. Additionally, West Fraser asserts that because it included the loss related to the write-down of the assets in question when calculating the G&A

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[49] *See Notice of Final Determination of Sales at Less Than Fair Value: Greenhouse Tomatoes from Canada*, 67 FR 8781 (February 26, 2002) (*Greenhouse Tomatoes from Canada*) and accompanying Issues and Decision Memorandum at Comment 2.

[50] *See First Review Final Results* at Comment 9.

expense ratio in the original LTFV investigation,[51] even-handedness requires that it should be allowed to include the gain on the sale of the assets in this review. West Fraser contends that the inclusion of those assets disadvantaged West Fraser in the *Original Investigation Final Determination* by increasing West Fraser's G&A expenses and, in turn, its dumping margin.

Weyerhaeuser argues that its integration and closure expenses should be excluded because they are extraordinary expenses resulting from the same process – the company's integration of newly acquired businesses. Weyerhaeuser claims that as a result of these acquisitions, it closed 12 mills in 2003, recognizing impairments of assets, severance, outplacement costs, and other closure costs. Weyerhaeuser asserts that the company's annual report indicates that the closures of acquired facilities were identified in the integration planning process, which shows that the integration and closure expenses are closely related.

Additionally, Weyerhaeuser argues that the cases cited by the petitioner involve the temporary closure of mills which is a different situation altogether from a permanent shutdown of a facility. Weyerhaeuser claims that the Department's practice is that the sale of a facility or plant does not relate to the general operations of a company. In support of its argument it cites the *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from India*, 69 FR 76916 (December 23, 2004) (*Shrimp from India*) and accompanying Issues and Decision Memorandum at Comment 16, and the *Final Results of the Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet and Strip from Korea*, 66 FR 57417 (November 15, 2001) (*PET Film, Sheet and Strip from Korea*) and accompanying Issues and Decision Memorandum at Comment 1.

Weyerhaeuser further claims that the Department's precedent establishes that the sale of a fully functioning plant is a significant transaction, and the resulting gain or loss is not part of the company's normal business operations.[52] Weyerhaeuser claims that the closing of a plant is analogous to selling a plant and should, therefore, be treated the same in calculating the G&A expenses. Furthermore, it notes that the amount of the loss is not the issue, rather it points out that the Department's practice makes it clear that it is the nature of the transaction, and not the amount of such costs, that dictates whether these costs should be included in the G&A calculation.

Weyerhaeuser states that the petitioner's argument that the closure costs should be included because the costs were reported on the financial statements above the operating income line is not supported by the facts or the law. Weyerhaeuser notes that its financial statements list the closure

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[51] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 FR 15539 (April 2, 2002) (*Original Investigation Final Determination*) and accompanying Issues and Decision Memorandum.

[52] *See Shrimp from India* at Comment 16; *see also Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates from Spain*, 70 FR 24506 (May 10, 2005) and accompanying Issues and Decision Memorandum at Comment 10.

and integration expenses separately from the amounts for cost of products sold and G&A expenses. According to Weyerhaeuser, this shows that the closure expenses are significant, non-recurring in nature, and unrelated to the general operations of the company. Weyerhaeuser argues that according to U.S. Generally Accepted Accounting Principles (GAAP), it is required to report closure costs above operating income even if the costs arise from an extraordinary event. Thus, the mere fact that this information appears above the line does not provide evidence that the costs are includable operating costs for antidumping purposes. Furthermore, Weyerhaeuser argues that the Department routinely excludes expenses recorded above operating income, such as cost of non-subject merchandise, while including expenses recorded below operating income, such as financial expenses. Accordingly, Weyerhaeuser states that an expense item's classification on a financial statement is a poor indicator of how it should be treated by the Department for antidumping purposes.

Finally, if the Department does not exclude the closure costs, Weyerhaeuser argues that the Department should include only the amortized net loss from Weyerhaeuser's restructuring activities at the parent-company level, and offset these costs at the consolidated level with the gains the company made on the sale of non-strategic timberland units located in the United States.

Canfor disagrees with the petitioner's assertion that Canfor's Taylor mill restructuring costs were included in the cost of goods sold (COGS) in the 2004 audited financial statements. Canfor argues that they were included in a separate line item in the 2004 audited financial statements, and not in the COGS. Canfor explains that it had originally recorded the Taylor mill restructuring costs in COGS, but then reclassified them as restructuring costs in its financial statements.

Canfor also explains that the costs were associated with the closure of the Taylor mill's planer operations, which occurred after manufacturing operations at the facility had ended. Canfor notes that it has treated the restructuring costs as G&A expenses for response purposes, which is consistent with how the Taylor mill's sawmill closure costs were treated in the *First Review Final Results*. By treating these costs consistently as G&A expenses, Canfor explains that these expenses would correctly be included in the G&A expense rate in the next administrative review, not in the current proceeding. For these reasons, Canfor argues that no change in the Department's treatment of these Taylor mill planer restructuring expenses is necessary.

In addition, Canfor complains that the Department did not explain why it excluded the gain on the sale of land in the *Preliminary Results*. Canfor argues, in any case, that the Department should nonetheless include the proceeds from a separate transaction involving the sale of land in the G&A expense rate calculation for the final results. Canfor explains that because the sale of land in question did not relate to any particular line of business, the gain on sale cannot be attributed to a particular product line. Thus, its revenues should be included as part of the G&A expense rate.

The petitioner argues that for Abitibi and Weyerhaeuser the closure and integration costs were reported both as an operating expense and separate from cost of sales on each respective company's 2003 audited financial statements. The petitioner contends that this classification shows that these expenses should be included as a component of G&A expenses. The petitioner

argues that the Financial Accounting Standards Board's (FASB) standard number 146 states that "costs associated with an exit or disposal activity, that does not involve a discontinued operation, shall be included in income from continuing operations before income taxes in the income statement of a business enterprise."[53] The petitioner notes that the FASB standard states that because neither an exit activity nor a disposal activity is both unusual and infrequent, the Board decided to prohibit those costs from being presented in the income statement net of income taxes or in any manner that implies that they are similar to an extraordinary item. Based on this information, petitioner contends that the closure of a mill, when the company continues with similar operations, should be considered part of the company's ordinary business activities and included in the G&A expense calculation.

The petitioner asserts that closure costs and integration costs are ordinary business activities and should be included in G&A expense. The petitioner contends that plant shut downs, and indefinite plant idlings, are part of a company's normal business activities and the expenses incurred in such closures are properly included in operating expenses and, as such, should be included in the company's G&A expense rate calculation. The petitioner cites several cases where the Department considered plant closures as part of the respondent's continuing operations and where the Department determined that idle capacity and severance costs were not extraordinary expenses but were considered part of G&A expenses.[54] The petitioner argues that the Department has deemed closure costs to pertain to the company as a whole, and rejected the argument of whether the idled assets are associated with the production of subject merchandise or non-subject merchandise.[55] The petitioner further argues that the sale of the mills represents an insignificant percentage of the Weyerhaeuser Company Limited (WCL) unit's total cost of sales, which confirms that the company properly recognized these expenses in its financial statements as associated with an ordinary business activity.

With respect to Abitibi, the petitioner explains that there were two differences between the "idling" of the Port Alfred mill in this review and the sale of the Kraft paper mill in the first administrative review of this proceeding. First, the petitioner notes that the gain from the sale of the Kraft paper mill was classified as income from discontinued operations on Abitibi's audited,

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[53] *See* Financial Accounting Standards Board, *Statement of Financial Accounting Standards*, No. 146, "Accounting for Costs Associated with Exit or Disposal Activities" (June 2002, available at www.fasb.ord/pdf/fas146.pdf).

[54] *See Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 65 FR 9243, 9250 (February 24, 2000) *(Carbon Steel Plate from Canada)*; *see also Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom*, 63 FR 40461, 40467-68 (July 29, 1998) (*Carbon Steel Products from the United Kingdom*); *see also Certain Steel Concrete Reinforcing Bars from Turkey*, 69 FR 64731 (November 8, 2004) (*Rebar from Turkey*) and accompanying Issues and Decision Memorandum at Comment 13.

[55] *See Final Determination of Sales at Less Than Fair Value: Certain Cold Rolled Carbon Steel Flat Products from Germany*, 67 FR 62116 (October 2, 2002) and accompanying Issues and Decision Memorandum at Comment 16.

consolidated financial statements. The petitioner states that this classification as discontinued operations means that the sale was irregular, infrequent in nature, and not part of Abitibi's ordinary business activities - as the Port Alfred mill closure costs were classified. Second, the petitioner contends that it was possible at the end of the POR for Abitibi to bring the Port Alfred mill back on line. On the other hand, the Kraft paper mill was sold to an outside party and Abitibi was then completely out of the kraft paper business. Finally, the petitioner asserts that the Department should not amortize the closure costs over future periods. Petitioner states that such treatment would not be consistent with either Canadian or U.S. GAAP, or with the company's normal books and records. The petitioner contends that claims that the plant closures benefit the future production of operations is an over-generalization that is not supported by case precedent.

With respect to West Fraser, the petitioner argues that the gain realized on the sale of West Fraser's mill should not be included as an offset to G&A expense. The petitioner argues that there is not substantial evidence on the record of this review that indicates that the sale of the lumber mill in question did not include the sale of land and, therefore, the Department should not reverse its preliminary decision to exclude the gain on sale of the lumber mill from the G&A expense ratio calculation. The petitioner contends West Fraser's April 11, 2005, supplemental Section D response, at Exhibit SD-12, indicates that the sale of the lumber mill included the land, as well as buildings and equipment. The petitioner claims that West Fraser could have submitted documentation to show exactly what types of assets were sold in the lumber mill sale and could have had that submission certified by a West Fraser official which would have changed the record in the case. The petitioner argues that the Department must conclude that at least part of the sale of the lumber mill included the sale of land and that it is logical that land would be part of a sale of this kind. The petitioner contends that there is no evidence on the record that West Fraser retained ownership of the land after the building and equipment were sold, nor is there evidence that a third party owned the land upon which the lumber mill stood.

As it argues for Abitibi and Weyerhaeuser, the petitioner alleges that the costs associated with restructuring of Canfor's planer operations at the Taylor mill related to manufacturing costs because they were included in the COGS component of Canfor's audited financial statements. The petitioner points out that Canfor has excluded the Taylor mill expenses under the reasoning that the same type of expenses were reported as G&A expenses in the prior administrative review. However, the petitioner refutes that explanation by stating that the Taylor mill costs incurred in April 2004 were not categorized as G&A expenses in the 2004 audited financial statements. The petitioner notes rather that those Taylor mill costs were included as manufacturing expenses in the 2004 audited financial statements. Therefore, the petitioner concludes that because the Taylor mill costs were indeed manufacturing costs and were incurred during the POR, those costs should be included in Canfor's costs of manufacturing (COM) for the POR.

Finally, the petitioner argues that the Department, consistent with its practice in other cases, should exclude the proceeds from the sale of land in the G&A expense rate calculation. In support of its claim, the petitioner points to *Certain Cold-Rolled Carbon Steel Flat Products from Korea*, 67 FR 62124 (October 3, 2002) (*Cold-Rolled Steel from Korea*) and accompanying Issues and Decision Memorandum at Comment 15, where the Department explained that it excludes

gains or losses on land sales because land is a non-depreciable asset, and thus no costs associated with land are included in the COP or CV.

Department's Position:

While our reasoning differs from that of the parties, we agree with Abitibi, Weyerhaeuser and Canfor that the costs associated with the closure of facilities and losses on the sale of production facilities should not be included in G&A expenses. We also agree with the petitioner that West Fraser's gain on its sale of a sawmill should be excluded, Canfor's gain on sale of land should be excluded, and Weyerhaeuser's integration costs should be included in G&A expenses.

It is the Department's practice to include gains or losses incurred on the routine disposition of fixed assets in the G&A expense ratio calculation.[56] The Department follows this practice because it is expected that a producer will periodically replace production equipment and, in doing so, will incur miscellaneous gains or losses. Replacing production equipment is a normal and necessary part of doing business.[57] The costs associated with assets currently being used in production are recognized, and become part of the product cost, through depreciation expenses. The Department includes such gains and losses from the routine disposal of assets in G&A expense rather than as a manufacturing expense, because the equipment, having been removed from the production process prior to the sale or disposal, is not an element of production when the disposal or sale takes place. It rather is simply a miscellaneous asset awaiting disposal. The gains or losses on the routine disposal or sale of assets of this type relate to the general operations of the company as a whole because they result from activities that occurred to support on-going production operations. In short, it is a cost of doing business. The Department's approach for these types of gains and losses is to allocate them over the entire operations of the producer.[58]

We disagree with Abitibi that the question is whether the closed or sold facility pertains to the merchandise under review. Once a facility is sold or shut-down, by definition it no longer relates to the ongoing or remaining production, and it becomes either an asset owned by another party or an asset awaiting sale or disposal. Prior to the sale or shut-down, the cost of the facility would be allocated to the products produced at that facility in the form of depreciation expenses. Post shut-down or sale, the associated cost no longer is a direct or indirect production cost. The question is whether such costs are appropriate for inclusion in G&A expenses and relate to the company as a whole. The policy of not basing our decision on whether the facility in question produced the

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[56] *See PET Resin from Indonesia* at Comment 13.

[57] For example, the sale of an old machine that was replaced by a new machine, discarding of existing machines due to modernization, and replacement of equipment for changes in technology are considered routine. In all these cases, the producer's facility continues to produce the product after the change is made and the facility remains an asset of the respondent.

[58] *See First Review Final Results* at Comment 9 and *PET Resin from Indonesia* at Comment 13; *see also Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 FR 24329, 24356 (May 6, 1999) (*Hot-Rolled Steel From Japan*) at Comment 28.

merchandise under review or merchandise not under review is consistent with our treatment of such costs in past cases.[59]

As discussed above, these respondents either sold or shut down entire production facilities during the POR.[60] These respondents are in the business of producing and selling commercial goods to customers: they are not the business of manufacturing and selling entire production facilities. From a cost perspective, it would not be reasonable to assign the gain or loss on the disposition of a facility to the per-unit cost of manufacturing of the products that are still being produced at the respondent's other facilities, because the facility in question now has nothing to do with producing the respondent's products. The question, again, is whether the shut-down and sale, or the outright sale, of a production facility supports the general operations of the company. The reason for including financial and G&A expenses in COP or CV is that companies incur various costs and expenses, apart from those associated with production operations, to maintain and generally support the company. The CIT has upheld this treatment of general expenses by the Department as reasonable and supported by substantial evidence on the record.[61] The court in *U.S. Steel Group* at 1155 stated "G&A expenses are those expenses which relate to the activities of the company as a whole rather than to production process." The court further stated, "Commerce's decision that offsets to G&A expenses should also be related to the company's general operations - comprised of all general activities associated with the company's core business, including production of the subject merchandise – is a reasonable application of the statute."

Moreover, we disagree with the petitioner that the permanent closure or sale of a production operation is routine and the type of transaction that should be picked up as part of G&A expense. The sale of an entire production facility is a significant transaction, both in form and value, and the resulting gain or loss generates non-recurring income or losses that are not part of a company's normal business operations, and are unrelated to the general operation of the company.[62] The sale of an entire production facility does not support a company's general operations, rather it is a sale

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[59] *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from the United Kingdom*, 67 FR 3146 (January 23, 2002) (*Stainless Steel Bar from the United Kingdom*) and accompanying Issues and Decision Memorandum at Comment 4; *see also Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From Germany Final Results of Antidumping Duty Administrative Reviews and Revocations of Orders in Part*, 65 FR 49219 (August 11, 2000) and accompanying Issues and Decision Memorandum at Comment 64.

[60] The sale of an entire production facility differs from the sale of a piece of equipment, or even large pieces of equipment. We consider an entire facility to be one that is capable of producing a product. It encompasses many pieces of production equipment, the buildings, land and fixtures. Sales of these facilities are transactions that change the organization and structure of the company and its operations.

[61] *See U.S. Steel Group a Unit of USX Corporation, USS/Kobe Steel Co., and Koppel Steel Corp. v. United States*, 998 F.Supp 1151 (CIT February 25, 1998) (*U.S. Steel Group*) (citing *Rautaruukki Oy v. United States*, 1995 WL 170399, Slip Op. No. 95-56 (CIT March 31, 1995)).

[62] *See First Review Final Results* at Comment 9.

or removal of certain production facilities themselves. It represents a strategic decision on the part of management to no longer employ the company's capital in a particular production activity. These are transactions that significantly change the operations of the company. If the task before the Department is to determine a particular producer's cost to manufacture a given product (including the costs associated with financing and supporting the producer's general operations) it is not reasonable to include gains or losses on the sale of an entire production facility as a product cost.

While the Department has included such gains and losses in the past, in more recent cases, we have changed our practice and excluded the gains and losses associated with plant closures and sales. *See First Review Final Results* at Comment 9, where we excluded from the G&A expense calculation a gain on the sale of a kraft paper mill; *Chlorinated Isocyanurates from Spain* at Comment 11, where we excluded from the G&A expense calculation plant shutdown costs and the related gain on the sale of the manufacturing facility; *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate Products from Korea*, 64 FR 73196 (December 29, 1999) (*Steel Plate From Korea*) and accompanying Issues and Decision Memorandum at Comment 14, where we excluded from the G&A expense calculation plant closure costs and the related gain on the sale of a manufacturing facility and adjoining land; and *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Brazil*, 69 FR 76910 (December 23, 2004) (*Shrimp from Brazil*) and accompanying Issues and Decision Memorandum at Comment 7, where we excluded from the G&A expense calculation a gain on the sale of the company's shrimp farm operations.

The permanent shut-down and sale of a production facility are directly related. Typically, prior to selling a production facility, companies incur costs to shut-down the facility and ready it for sale. Costs may even be incurred in readying a facility for sale when a facility is sold outright and will continue to be operated by the new owner. Sometimes the shut-down and sale occur in the same accounting period; sometimes they do not. When both occur within the same accounting period, the shut-down costs are typically matched with the gain or loss on the sale of the production facility and the net is reported. When they do not occur in the same accounting year, companies normally report the costs immediately through an accrual, but report the gain in the subsequent year when the sale takes place. In such a case, if the Department included the shut-down costs as a component of the per-unit costs, not only would it result in a significant increase to the per-unit cost, but it would not reflect the offsetting revenues from the subsequent sale. Conversely, if the subsequent sale occurs in the POR the true cost to the company in supporting its operations would be understated. Because the two events are directly related, they should be treated consistently for antidumping purposes, regardless of when the shut-down occurred in relation to the sale.

West Fraser argues that the Department somehow captured costs associated with the closure in earlier proceedings, and argues that for this proceeding we should pick up the entire gain in the current period, without matching it to the related costs from earlier periods. We note that the record is not clear with respect to whether the claimed loss related to the shut-down of the lumber mill in question was included in the G&A ratio calculation in the *Original Investigation Final*

Determination as West Fraser asserts. Regardless of West Fraser's assertion about recognizing these costs in prior periods, and assuming that including the closure costs and associated gain is proper, it would be inappropriate to attempt to correct mismatching in past segments by introducing further distortions in this segment. As noted above, the Department does not consider it appropriate to include gains or losses on the sale of an entire facility in calculating G&A, even if we could capture both the closure costs and the gain or loss on sale in the same accounting period.

The shut-down and sale of a facility, or the sale of a facility that continues to operate, is different in significant ways from other types of transactions that the Department encounters. For example, while infrequent in occurrence, the sale of a production facility is not unusual and, thus, cannot be considered an extraordinary item as Weyerhaeuser suggests.[63] Nor is it similar to restructuring costs, which usually include labor costs and the cost of re-orientation of equipment at facilities. In the case of restructuring costs, the facilities in question continue to exist and to produce products for the respondent. Restructuring costs represent costs associated with improving or making more efficient the continuing operations.[64] The sale of an entire production facility is different from the write-down of asset values of continuing operations, because an asset write-down (or impairment) represents the recognition of the loss of asset value when the carrying amount of the asset exceeds the undiscounted future cash flows expected from the asset.[65] In the case of write-down costs, the facilities in question continue to exist and to produce products for the respondent. Finally, sales of entire production facilities are distinguishable from idle assets (*i.e.*, production assets held for future purposes), because idle assets are still owned by the company, can be brought online quickly to fulfill a preplanned function, and represent extra capacity held by the company. As such, idle assets are considered an overhead burden like any such excess capacity.[66] Therefore, for purposes of the final results of this administrative review, we have excluded gains and losses incurred for the permanent closure or sale of entire production facilities.

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[63] *See Notice of Final Results of Antidumping Administrative Review of Stainless Steel Bar from France*, 70 FR 46482 (August 10, 2005) (*Stainless Steel Bar from France*) and accompanying Issues and Decision Memorandum at Comment 1, where the Department defined how it treats extraordinary items.

[64] *See Stainless Steel Bar from France* at Comment 3; *see also Stainless Steel Bar from the United Kingdom* at Comment 3.

[65] *See Stainless Steel Bar from France* at Comment 1.

[66] *See Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review*, 68 FR 41303 (July 11, 2003) (*Mushrooms from India 2003 Final*) and accompanying Issues and Decision Memorandum at Comment 10; *see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Brazil*, 67 FR 62134 (October 3, 2002) (*Cold-Rolled Steel from Brazil*) and accompanying Issues and Decision Memorandum at Comment 22.

Abitibi

We disagree with the petitioner's argument that because the Port Alfred mill was only indefinitely idled at the end of 2003 and could have been brought back in production, any costs accrued for the idling relate to the company as a whole and should be included in Abitibi's G&A costs. According to information provided in the submissions and in its 2003 annual report, Abitibi idled its Port Alfred Mill to reduce capacity and cut costs in its newsprint business segment. We learned from Abitibi's 2004 Annual Report that subsequent to the POR, the Port Alfred Mill was permanently closed. The Department cannot ignore record evidence that significant facts changed subsequent to the period of investigation or review. In the *Final Results of the Administrative Review of Stainless Steel Bar for India*, 68 FR 47543 (August 11, 2003) and accompanying Issues and Decision Memorandum at Comment 12, the Department considered events occurring subsequent to the POR and determined that part of the respondent's interest expense was waived by the creditors after the end of the POR. The Department, when considering all of the information on the record, agreed to exclude that interest from the financial expense ratio calculation based on those subsequent events. In that case the Department stated that it makes decisions on a case by case basis using the distinct information on the record of each particular case. Based on the information on the record of this proceeding obtained from Abitibi's 2004 Annual Report, we treated the Port Alfred Mill as a permanent closure for this review. As explained above, the Department is excluding net gains and losses incurred for the permanent closure or sale of production facilities. Therefore, we have determined not to include any of the closure costs related to Abitibi's Port Alfred Mill in our calculation of G&A.

We disagree with the petitioner's assertion that because the closure costs were included in the operating cost section of Abitibi's income statement they must be included in Abitibi's reported costs for dumping purposes. According to Canadian and U.S. GAAP, the closure costs should be classified as an operating expense in Abitibi's financials statements because they continue to have operations in this line of business. However, because these costs relate to the closing of a production facility, Abitibi's product costs would be distorted if they were included as a general expense. As stated below for Canfor and Weyerhaeuser, we believe that the placement of an income or expense item on the financial statements should not be the determining factor of whether the amount should be included or excluded from the reported cost. Section 773(f)(1)(A) of the Act directs the Department to consider not only how a particular item of income or expense is recorded on the company's financial statement, but also the nature of the item and whether the results reasonably reflect the costs associated with the production and sale of the merchandise. In this case, we have determined that the closure costs in general do not reasonably reflect the costs associated with the production of the merchandise under consideration and have not included them in the calculation of Abitibi's G&A expense ratio.

West Fraser

We have determined not to include the gain on the sale of the North Coast Timber lumber mill in the G&A expense ratio, but not simply because land is involved in the sale. While the Department has excluded the gain on the sale of land held as an investment in past cases, the issue

here is the sale of an entire production operation. The circumstances of each sale dictate how the Department will treat the sale in its calculation for each respondent. Accordingly, the treatment of this sale is not driven solely by the fact that the sale of land is included in the transaction.

We agree with the petitioner that the May 12, 2005, letter from West Fraser's counsel claiming that the sale of the North Coast Timber lumber mill includes buildings and equipment but not land is unsupported. The letter is not certified by a West Fraser official, as required for the submission of factual information under 19 CFR 351.303(g)(1). Further, in Exhibit 12 of its supplemental Section D response, West Fraser describes the gain in question as resulting from the "sale on non-operating Prince Rupert Sawmill (land, building, and equipment)." It is reasonable that the sale of a sawmill that includes buildings and equipment would also include the land upon which the buildings stood. Implicit in West Fraser's argument is that the sale of buildings and equipment is a less significant transaction and more routine than the sale of an entire sawmill and, therefore, a resulting gain would appropriately be included in the G&A ratio calculation. However, Exhibit 12 describes the sale of an entire sawmill, *i.e.*, an entire production facility, which is significant in form as well as value. Therefore, we have not based our decision on whether land was involved in the sale but rather because of our policy to exclude net gains and losses on the sale of production facilities. Thus, for the final determination we have continued to exclude the gain on the sale of the North Coast Timber lumber mill from the G&A ratio calculation for the reasons discussed above.

Weyerhaeuser

We disagree with Weyerhaeuser that the Department should treat its closure and integration costs identically because they both arise from Weyerhaeuser's acquisitions of new businesses. First, we note that the company itself treated these expenses differently on the books, because closure and integration expenses were recorded as separate line items on Weyerhaeuser's audited financial statements, and these expenses were further detailed in two separate footnotes.[67] Second, as a result of the acquisitions Weyerhaeuser not only incurred integration and closure costs, but also sold at a gain a number of non-strategic timberland units, and the proceeds from these sales were used for debt repayment, reducing the company's interest expense.[68]

Fundamentally, however, we do not believe that these transactions should be treated identically by the Department just because they all arise from Weyerhaeuser's acquisitions of new businesses. Rather, the Department considers the nature of every income and expense item separately regardless of the event that caused it. Closure expenses are costs incurred to take facilities permanently out of production and, as stated in our position above, because the closed facility is no longer involved in production, the closure costs should not be assigned to the cost of

[67] *See* Weyerhaeuser's September 29, 2004, Section A response at Exhibit A-15, Weyerhaeuser's 2003 Annual Report, at n.16 and 17.

[68] *See* Weyerhaeuser's December 6, 2004, Section D response at Exhibit D-9.

manufacturing of products which are still produced. Integration and restructuring expenses, on the other hand, are not related to the disposition of assets or closing of the facilities, but are costs incurred in the normal course of business to incorporate the newly acquired businesses into the company and to streamline the company's continuing operations. Thus, integration and restructuring expenses are costs related to the company's general operations and, as such, should be included in the cost of production.

We disagree with the petitioner's argument that the closing costs and the loss on the sale of the mill should be included in the reported cost because they were recorded "above the line" for the amount of operating income in Weyerhaeuser's audited financial statements. We also disagree with the petitioner's assertion that the sale of the mill represents an insignificant percentage of WCL's total cost of sales, which confirms that the company properly recognized these expenses as associated with an ordinary business activity. We note that no matter how a particular item of income or expense is recorded on the company's financial statement, or how significant it is, the Department considers the nature of the item in determining whether it should be included or excluded from the costs. There are numerous examples of situations where income and expense items normally recorded above the net income line on the financial statements are treated differently for antidumping purposes (*e.g.*, costs of products purchased for resale and cost of non-subject products recorded above the net income line are normally excluded from the reported costs). Therefore, we believe that the placement of an income or expense item on the financial statements should not be the determining factor of whether the amount should be included or excluded from the reported cost.

We disagree with Weyerhaeuser's suggestion that if the Department decides to include the integration costs, then only the amortized portion of the total expense should be included. Section 773(f)(1)(A) of the Act directs the Department to rely on the records of the producer if such records are kept in accordance with GAAP and reasonably reflect the costs associated with production and sale of the merchandise. Normally, in accordance with GAAP, if the costs incurred benefit future periods, a company may capitalize such costs and amortize them over the period benefitted. However, in its audited financial statements Weyerhaeuser did not capitalize integration expenses, but recorded them as a current period expense.[69] We note that nothing on the record suggests that treatment of the integration costs as a period expense by Weyerhaeuser is unreasonable. Therefore, for the final results, we included in the G&A expense the entire amount of the integration costs as recorded in the company's financial statements.

Canfor

For the same reasons described above for Weyerhaeuser, we disagree with petitioner's argument that the closing costs and the expenses related to the sale of Canfor's planer mill should be included in the reported cost because, as the petitioner argues, they were recorded as part of COM

[69] *See* Weyerhaeuser's September 29, 2004, Section A response at Exhibit A-15.

in Canfor's audited financial statements. Moreover, we note that these expenses were not included in COM, but rather listed as a separate line item in Canfor's financial statements.

Regarding the issue of Canfor's gain on the sale of land, we believe that circumstances of this particular transaction are similar to the disposal of a production facility and, therefore, have continued to exclude it for the final results. In addition, we noted similar treatment in *Cold-Rolled Steel from Korea*. However, due to the proprietary nature of this transaction, please refer to our cost calculation memorandum for a more detailed description of the land sale transaction.[70]

Comment 9: Exchange Rate Gains and Losses

The Canadian Parties[71] argue that the way the Department treated foreign exchange rate gains and losses in the *Preliminary Results* was contrary to law and lacks any basis in the Act. In addition, the Canadian Parties claim that the cap which the Department applied to the net foreign exchange rate gains is inconsistent with the Department's policy regarding the treatment of foreign exchange gains and losses.

The Canadian Parties contend that the Department has erroneously applied its policy for interest income as an offset to financial expenses to its treatment of net foreign exchange gains in the dumping analysis. According to the Canadian Parties, section 773(b)(3) of the Act specifies that the cost of production shall include the cost of materials and cost of fabrication or other processing of any kind employed in producing the foreign like product, and also an amount for selling, general, and administrative expenses . . . pertaining to production and sales of the foreign like product by the exporter in question. The Canadian Parties explain that each component of a company's overall foreign exchange gain or loss relates directly to an activity that is required by statute to be part of COP, including cost of manufacturing, sales, and/or the operations of the company as a whole. Therefore, the Canadian Parties claim that the foreign exchange rate gains and losses are not a distinct element of cost, but instead relate to and are the result of the ongoing operations of any company that conducts its business in multiple currencies.

The Canadian Parties point out that the Department's new policy with respect to foreign exchange gains and losses, established in *Certain Preserved Mushrooms From India: Preliminary Results of Antidumping Duty Administrative Review*, 68 FR 11045 (March 7, 2003) (*Mushrooms from India 2003 Preliminary*), recognizes that the net gain or loss must be included in full as part of COP, because such gains or losses are real costs or gains to the company. In addition, the

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[70] *See* Memorandum to the File from Gina Lee, Accountant, to Neal Halper, Director, Office of Accounting, Re: Cost of Production and Constructed Value Calculation Adjustments for the Final Results, dated December 5, 2005 (*Canfor Final Results Cost Memo*).

[71] The Canadian parties making this argument are the BCLTC, Abitibi, Canfor, and West Fraser (collectively, Canadian Parties). The Canadian Parties identified in this section are not the same as those identified in Comment 3, which discusses the treatment of non-dumped sales, and in Comment 5, which discusses the treatment of countervailing duties and other duty deposits.

Canadian Parties assert that this new policy was continued in the first administrative review of this proceeding.[72] The Canadian Parties argue that the Department's approach in the *Preliminary Results* was inconsistent with the existing policy and the rationale behind it. The Department had previously explained that the overall net gain or loss reflects how well the entity as a whole was able to manage its foreign currency exposure in any one currency. However, the Canadian Parties argue that if the Department treats foreign exchange gains differently from foreign exchange losses, as it did in the *Preliminary Results*, then it will not capture how well the entity was able to manage its foreign currency exposure. The Canadian Parties claim that there is no basis for the Department's asymmetric treatment of foreign exchange rate gains and losses, whereby the losses are always included in full, but the gains are included only to the extent that they offset something unrelated – financial expenses.

The Canadian Parties explain that all of the respondent companies which experienced large net exchange rate gains in the POR are companies which incurred most of their costs in Canada (*i.e.*, Canadian dollars), but made a large portion of their sales in other countries (*i.e.*, U.S. dollars or other foreign currencies). The Canadian Parties assert that this mismatch exposes the companies to exchange rate risks when the Canadian dollar appreciates against the U.S. dollar. In order to lessen their risks, the companies attempt to balance their holdings in foreign currency, through hedging activities. The Canadian Parties claim that if the Department ignores the full net exchange gain, then it is charging the companies for the full cost of the exchange rate movement that they were hedging against. The Canadian Parties conclude that because foreign exchange gains and losses relate directly to the company's core business of production and sale of merchandise, and not to any separate business line or activity, and are a necessary adjustment, they should be fully included in computing COP and CV.

However, in the event that the Department continues to apply the cap to net foreign exchange gains, the Canadian Parties suggest an alternative cap. The Canadian Parties note that the Act does not recognize a distinction between financial expenses and G&A expenses.[73] As the Act does not separate these two general expense categories, the Canadian Parties contend that the cap applied to the net foreign exchange gains should be the total of these two cost categories. The Canadian Parties further note that most companies do not treat foreign exchange gains and losses as "financial" expenses for financial statement purposes. Therefore, the Canadian Parties conclude that if the Department continues to apply a cap to the companies' net foreign exchange gains then the cap should be the total of the G&A and financial expenses.

The petitioner asserts that the Department's determination that financial expenses cannot be negative is entirely appropriate, in accordance with the Department's case precedence and the antidumping law. The petitioner notes that the Department routinely caps the offset to financial expenses for short-term interest income at the level of financial expenses. The petitioner claims

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[72] *See First Review Final Results at* Comment 24.

[73] *See* section 773(b)(3) of the Act.

that Canadian Parties err in claiming that foreign exchange gains and losses should not be treated the same as interest income as they are fundamentally different. The petitioner points out that the net foreign exchange gains at issue relate to long-term debt denominated in foreign currencies (principally U.S. dollars). Accordingly, the petitioner argues that the gains at issue are directly and irrevocably linked to the same long-term debt which gives rise to interest expenses. Therefore, according to the petitioner, such gains associated with the debt are similar in substance to the short-term interest income which is allowed to reduce the companies' net financial expenses to zero. In terms of the underlying activities, the petitioner believes that there is no basis to Canadian Parties' claim that foreign exchange gains and losses pertain to companies' production and sale of merchandise.

The petitioner insists that the Canadian Parties misapprehend the Department's reasoning for capping the offset to financial expenses. The petitioner clarifies that the reason the Department caps the offset to financial expenses is not due to the Department considering short-term interest income to be the result of unrelated investment activity of the company. Rather, the petitioner points out that the Department caps the offset to financial expenses to ensure that the cost elements (*i.e.*, expenses) can never be negative. The petitioner argues that by setting the financial expenses to zero, the Department is not imposing a "cost" of any sort on the respondent companies. Because the calculations and comparisons done by the Department in its sales-below-cost test are done in the domestic currency, the petitioner argues that there are no costs imposed on the Canadian Parties for the purposes of that test during periods of foreign currency appreciation. Finally, the petitioner contends that the Canadian Parties' argument that the cap on the companies' net foreign exchange gains should be set at the level of overall general expenses (including financial expenses and G&A expenses) is off-base and should be rejected. The petitioner asserts that Department has consistently treated financial expenses as being distinct from G&A expenses and that the Department's longstanding practice has been to analyze the two types of expenses separately. The petitioner emphasizes that foreign exchange gains and losses are more akin to financial expenses than to G&A expenses because they are the result of translating foreign-denominated debt into Canadian dollars. Therefore, the petitioner concludes that the Department should continue to cap the offset to the respondent companies' financial expenses as it has done in the *Preliminary Results*.

Department's Position:

We disagree with the Canadian Parties that their foreign exchange gains and losses are realized mainly because of their production and sale of merchandise. Rather, such gains and losses result from the cash management decisions of a company that expose it to foreign exchange gains and losses. To pay for purchases immediately or carry them as an account payable; to make sales on a credit *(i.e.*, accounts receivable) or require immediate payment; to borrow in a foreign currency or home currency; to enter into foreign currency contracts, etc., - are all financing decisions which occur apart from the company's manufacturing and sales activities.

For example, when a company purchases inputs using a foreign currency, the company can, at the time of purchase, pay in cash immediately based on the prevailing exchange rates between its

domestic currency and the foreign currency, thus avoiding any exposure to exchange rate gains or losses. We note that even if the company finances the purchase, the value of the raw materials is recorded at the equivalent domestic currency value on the date of sale, and not at the subsequent value when the payable is settled. If the company decides to pay for the purchase at a later date (*i.e.*, set it up as an account payable, which is in effect buying on credit), the change in the exchange rate from the date of purchase to the date of payment of the account payable creates a foreign exchange gain or loss. As such, it is not the purchase transaction that creates the foreign exchange gain or loss; it is the decision by the company to delay cash payment and finance the purchase.

The same reasoning applies to export sales transactions which are denominated in a foreign currency. A company could demand payment immediately or extend credit (*i.e.*, set up accounts receivable from customers). In the latter case, the seller could purchase currency contracts to hedge its exposure to large balances of foreign denominated accounts receivable. In other words, the company can enter into a second financing decision to protect itself from the risks of the initial financing decision. Therefore, a company's decision to extend credit to its customers and expose itself to foreign currency fluctuations is a cash management decision. Accordingly, we consider a company's overall foreign exchange gain or loss to be a part of the company's overall net financing expense.

As the Canadian Parties note, under our current practice established in *Mushrooms from India 2003 Preliminary*, we normally include in the financial expense ratio calculation all foreign exchange gains and losses from the consolidated financial statements of the respondent's highest-level parent company.[74] This approach takes into account how well the entity as a whole manages its foreign currency exposure. First, companies in the business of producing and selling merchandise are generally not in the business of speculating with foreign currencies. As such, they engage in these activities in order to minimize the risk of holding foreign-denominated monetary assets and liabilities. Companies often engage in a variety of activities from an enterprise-wide perspective to hedge exposure. Therefore, companies try to maintain a balanced holding of foreign-denominated assets and liabilities in any one currency so as to offset any foreign exchange losses with foreign exchange gains (*i.e.*, hedging their foreign currency exposure on a company-wide basis, not for specific accounts). Regarding the petitioner's argument that the gains at issue are directly linked to the same long-term debt which gives rise to interest expenses and, therefore, are similar in substance to short-term interest income, we find that their assertion addresses only part of the companies' overall foreign exchange picture. Including only certain components that result from the company's coordinated efforts to manage its foreign currency exposure does not reflect the financial results of the enterprise's foreign exchange management efforts adequately. Thus, we do not believe that it is possible to separate the foreign exchange gains and losses into component parts.

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[74] *See First Review Final Results* at Comment 24.

Sections 773(b)(3) and 773(e) of the Act identify the specific components of cost that the Department is to measure. When calculating COP and CV (*i.e.*, the cost of materials and fabrication, plus an amount for selling, general and administrative expenses) there is usually a general expense associated with financing operations, which is what we intend to capture as part of the financial expense. As a result, we include a cost of borrowing as determined by various factors such as management's decisions involving the amount of debt held and the management of cash funds.[75] If income is generated as part of those activities, we allow a company to offset the financing expense up to the amount of the financial expenses incurred. In cases where a company's financial income has exceeded its financial expenses, we have recognized that the company's cost of borrowing is zero and do not include an amount for financial costs. We note that neither the *First Review Final Results* nor *Mushrooms from India 2003 Preliminary* addressed a net foreign exchange gain. Further, if a company has enough financial income to cover its financial expenses, then it will not have a resulting cost for financing and the financing cost used for COP and CV will be zero. It would, however, be inappropriate for the company to reduce other components of the COP by the net financing income. Moreover, while certain types of income can legitimately be used to offset an expense, they can be used to do so only to the extent that there are costs to offset.

The CIT upheld this position in *Cinsa, S.A. de C.V. v. United States*, 966 F. Supp. 1230, 1239-1240 (CIT 1997). The court stated, "The Court finds that expenses by their nature cannot produce a negative effect on the COP. Expenses, as a component of costs, cannot become a profit by the nature of their designation . . . Based on sound accounting and economic principles, the Court declines to accept a finding of negative costs when calculating COP." The Court explained that financial expenses, as a component of COP, are discrete expense accounts and as such, cannot be applied to offsets to any other expense account. For these reasons, for the final results, we have included the net foreign exchange gains in the interest expense rate computation, recognizing that the financial expense component was zero.

Comment 10: Value-Based Cost Methodology

Abitibi, Tembec, and the petitioner argue that the Department should abandon the price-based cost allocation method, and rely on the respondent's costs as maintained in their normal books and records. These parties argue that the softwood lumber companies throughout North America account for joint products at the sawmill by allocating costs over volume (*i.e.*, per MBF) in their normal books and records. They argue that although the Department has struggled to make an NRV method work, it has created a complex system that is extremely burdensome on all parties, undermines the very purpose of the antidumping law, and instead of solving problems, substitutes even worse flaws than those it attempts to remedy.

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[75] *See Silicomanganese from Brazil: Final Results of Antidumping Duty Administrative Review*, 69 FR 13813 (March 24, 2004) and accompanying Issues and Decision Memorandum at Comment 14.

Abitibi, Tembec and the petitioner argue that section 773(f)(1)(A) of the Act states that costs shall normally be calculated based on the records of the producer, 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. Furthermore, they argue that section 773(f)(1)(A) states the Department shall consider all available evidence on the proper allocation of costs, if such allocations have been historically used by the producer. They argue that all of the respondents in this case have historically used, and continue to use, a volume-based cost allocation for their joint products. Tembec and Abitibi argue that their records are audited, are maintained in accordance with Canadian GAAP, reasonably reflect the costs associated with the product, and provide a method approved by cost accounting literature. The petitioner argues that for all of the respondents, MBF costs are reliable for purposes of the statute. Abitibi and the petitioner argue that in order to comply with the statute, the Department must employ the actual costs recorded in the Canadian Parties' normal books and records unless it makes an affirmative finding that such recorded costs do not reasonably reflect the costs of producing the subject merchandise, and, if the Department were to make such a determination that the Canadian Parties' recorded costs are unreasonable, it must employ a surrogate cost allocation methodology that does not itself generate distorted or unreasonable costs. They maintain that neither of these conditions are satisfied in this case.

The petitioner argues that the Department misconstrues the constraints imposed by the law. It argues that the Act does not require the Department to employ the single most accurate cost allocation methodology among the many options, but rather requires the Department to determine whether the costs recorded in the respondent's normal books and records reasonably reflect the actual costs of producing the subject merchandise, and, if so, to employ those costs. The petitioner maintains that the burden of proof lies with those parties proposing to employ costs (or cost allocation methodologies) other than those recorded in a respondent's normal books and records and that burden has not been met.

Tembec argues that the antidumping statute is not punitive, but remedial.[76] Further, it argues that in order to be remedial, rather than punitive, the method used in enforcing those orders must be designed to eliminate dumping going forward by encouraging foreign producers to sell in the U.S. market at prices that are not less than fair value (LTFV). It contends that this purpose is frustrated when the Department employs a methodology that is so complex that a foreign producer cannot reasonably ascertain the price above which it must sell in the United States to eliminate dumping. Tembec argues that the NRV method makes it impossible for foreign producers to insure that U.S. sales are not at LTFV, because the COP is contingent on highly variable selling prices, including selling prices to the United States, over an entire review period. It claims that when the relative prices of two products change during the POR, the costs assigned to them under the NRV method could change radically, even though there was no change in the actual costs incurred to make those products. Because a company cannot determine its costs as reallocated under the NRV method until after the POR is over, Tembec argues that respondents cannot determine with any

[76] *See NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995).

degree of certainty the price at which they must sell lumber in the United States to avoid dumping. Tembec argues that the volume-based allocations used in the industry's records are stable and predictable because those costs are based directly on actual costs recorded in the company's records, and a company that wants to discipline its selling prices to avoid dumping can monitor and manage costs and prices. By contrast, the NRV reallocation method is based on factors that are external to production costs and completely unpredictable.

Tembec notes that as long as a company keeps USP above Canadian prices, it would not be dumping. Tembec argues, however, that the NRV methodology creates incentives under certain circumstances to lower U.S. prices (USP). It notes that should a company lack above-cost home market sales for a particular product, it could under the NRV method, convert some of its below-cost sales to above-cost sales by reducing its USP for that product. It further notes that even if it were to drop USP below the Canadian prices, the resulting dumping margin on those sales might be lower than the margin generated by a similar match or constructed value. By contrast, Tembec argues that when costs are allocated by volume consistent with the company's records, the dumping methodology consistently creates an incentive to sell in the United States at the highest price that the market will bear.

Tembec notes that when the Department originally adopted the NRV method it attempted to keep the method as simple as possible, by limiting it to home market sales, and by limiting the allocation to differences in grade. Tembec argues that in response to the decision of the NAFTA Panel reviewing the *Original Investigation Final Determination*, the Department has had to extend its NRV method to cover dimensions and has tried to create a workable cost allocation method. Tembec notes that respondents are now required to submit five data sets and three complex computer programs, which required further adjustments throughout the review in response to numerous methodological problems. Thus, according to Tembec, the Department has created "an impossibly complex monster with an insatiable appetite for data" that is less accurate than the original books and records of the respondents. Tembec argues that the NRV methodology is so complex and variable that slight changes in methodology make large differences in the dumping margin. It argues that changes, such as extending the NRV method to differences in dimension or the inclusion of different combinations of prices (U.S. prices, home market prices, and foreign prices), make substantial differences in cost allocations. Because of these and many other problems, Tembec argues that the NRV method is an unreliable tool for calculating dumping margins and should be replaced by a return to the costs per the books and records of the producers.

Tembec and the petitioner argue that the value allocation methodology is flawed because of the circularity of the analysis, whereby prices are used to determine the product-specific costs which in turn are either compared to those same product-specific prices or are used to determine prices. Tembec notes that based on the Court of Appeals for the Federal Circuit's holding in *Ipsco Inc. V. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992), such value-based cost allocations that rely on a product's selling prices create an unreasonable circular methodology whereby the selling price of the product is used as a factor in determining the cost of production, which in turn becomes the basis for measuring the fairness of the selling prices. Tembec cites *Thai Pineapple*

Public Co. v. United States, 187 F.3d 1361 (Fed. Cir. 1999) (*Pineapple from Thailand*) in arguing that any such value-based cost allocation methodology should "not {be} based on the selling price or output value" of the products.

Abitibi and the petitioner argue that the Department's rationale for its value-based cost allocations in the *Original Investigation Final Determination* is no longer applicable. Abitibi notes that there are special challenges posed in computing production costs for products manufactured in a joint production process, and that the Department has never adopted a policy of using value-based cost allocations in all cases involving joint products. In fact, Abitibi argues that the Department has resisted the use of value-based cost allocation methodologies in numerous cases, involving products as diverse as different grades of pipe,[77] different sizes of mushrooms,[78] different grades and sizes of fresh salmon,[79] and greenhouse tomatoes;[80] while employing value-based costing in only a few cases.[81]

Abitibi argues that in the *Original Investigation Final Determination*, the Department sought to harmonize these various decisions by drawing a distinction between joint products produced from a homogenous input (like mushrooms, salmon, and tomatoes) and joint products produced from physically different inputs (like pineapple juice and pineapple core). Abitibi notes that the Department asserted that lumber fell into the latter category because the Department was using value-based cost allocations only to account for differences in grade, and different parts of different logs had different grade characteristics. The Department determined that because grade is inherent in the log, this distinguished cases such as mushrooms, tomatoes, and salmon, where differences in size or grade did not result from extracting pre-existing differences in the raw material input, but rather errors in the production process.

Abitibi and the petitioner argue that the problem that the Department now faces is that a NAFTA Panel has rejected the Department's attempt to limit the value-based allocation to grade, and required its extension to dimension (thickness, width, and length). As a result, Abitibi and the petitioner argue, the distinction the Department sought to draw between lumber on the one hand, and tomatoes, mushrooms, and salmon, on the other hand, can no longer be sustained. Thickness, width, and length are not "preexisting" in the log and "extracted" through processing. Thus, Abitibi and the petitioner argue that the Department's rationale for employing value-based cost

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[77] *See IPSCO Inc. v. United States*, 965 F.2d 1056 (Fed. Cir. 1992).

[78] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from India*, 63 FR 72246, 72248, 72254 (December 31, 1998) (*Mushrooms from India 1998*).

[79] *See Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon From Chile*, 63 FR 31411, 31413 (June 9, 1998) (*Salmon from Chile 1998*).

[80] *See Greenhouse Tomatoes from Canada* at Comments 5 and 6.

[81] *See, e.g.*, *Pineapple from Thailand* and *Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from Taiwan*, 61 FR 14064, 14072 (March 29, 1996) (*PVA from Taiwan*).

allocations in the first place – its extraction theory – can no longer justify the full value-based cost allocations the NAFTA Panel has ruled must be employed if the Department uses value-based costs.

Abitibi and the petitioner argue that substitution of value-allocated joint costs for the average joint costs recorded in Canadian Parties' records is highly problematic, because the value-allocated methodology does not eliminate distortions, but instead introduces new and different distortions. Thus, Abitibi and the petitioner argue, the value allocation methodology does not yield less distorted costs than the Canadian Parties' reported actual costs.

Abitibi and the petitioner argue that the Department's methodology computes annual average NRVs, assigning costs based on annual average relative values. Abitibi and the petitioner argue that in the lumber industry, prices are highly volatile, with both absolute and relative prices varying greatly. The petitioner argues that there is no record evidence indicating that the value differences between various types of dimension lumber are discrete and consistent. The petitioner maintains that without such evidence, the Department has no basis for asserting that a value allocation methodology yields less distorted costs than the Canadian Parties' reported actual costs.

Abitibi notes that in the *Original Investigation Final Determination*, the Department ignored this problem because it focused just on grade differences among products that were otherwise identical. Abitibi notes that such products do tend to have relatively stable prices precisely because they are alike in all respects except grade. Abitibi argues that the real problem arises because relative prices fluctuate the most among dissimilar products. Abitibi argues that changes in relative prices occur, not only between high volume products in the same grade groups, but even among several high volume products in completely different grade groups, *e.g.*, machine stress rated, stud, structural, finger-jointed stud, and finger-jointed structural. Abitibi's plotting of the monthly percentage differences between each selected product and the annual average NRVs shows significant volatility. Abitibi argues that this simple analysis of its own lumber prices shows that overall price levels were not stable over the POR, and more importantly that even the relative prices between grade groups fluctuated greatly over short periods of time. Abitibi argues that this degree of instability, where individual products' average prices frequently cross each other, indicates the degree to which relative prices change, and the degree to which the Department's NRV method distorts the dumping analysis.

Abitibi argues that the Department's NRV methodology distorts the AD margin because it captures not simply the relative price differences among products, but also price differences between different markets, and impermissibly ties the computation of NV to the computation of export prices and constructed export prices. Additionally, Abitibi argues that the NRV cost allocation methodology distorts the antidumping duty margin because it mixes mill-specific costs with company-wide NRVs, instead of allocating company-wide woodlands and sawmill costs on the basis of company-wide NRVs, as the Department did in the *Original Investigation Final Determination*. This, it argues, mismatches the results for each sawmill by allocating costs on the basis of company-wide averages instead of the value of each sawmill's output.

Finally, Abitibi argues that the NRV method distorts the AD margin because the Department has excluded prices for sales made in mixed-length tallies from its NRV calculations, while at the same time continuing to use at least some of these prices in its price-to-price comparisons. Abitibi argues that, as a result, the values used do not capture all sales. For all of these reasons, Abitibi argues that to eliminate these distortions, the Department should compute woodlands and sawmill costs using the average cost methodology consistent with Abitibi's books and records.

Buchanan, Canfor, Slocan, Tolko, Weldwood, West Fraser, Weyerhaeuser, and the BCLTC (collectively, the value allocation respondents) argue that assigning an average cost to joint products of different values does not reasonably reflect the costs associated with the production and sale of those products. These parties argue that although section 773f(1)(A) of the Act shows a preference for using a company's books and records, the Act also requires that a producer's records reasonably reflect the costs associated with the production and sale of the merchandise. They also argue that it is well established that using average joint costs in an antidumping analysis of joint products of different values, such as different grades and sizes of lumber, would lead to unreasonable results.

The value allocation respondents argue that the Department has twice determined that it would be unreasonable to use average joint costs in an antidumping determination involving softwood lumber in both the *Original Investigation Final Determination* and in the *First Review Final Results*. The value allocation respondents argue that the NAFTA panel that reviewed the LTFV determination reached similar conclusions. After extensive briefing by all parties, the panel held that it was unreasonable to use volume based methodology to allocate joint costs among products of different dimensions, as well as products of different grades.[82] The value allocation respondents argue that the panel recognized that assigning the same joint costs to products of different grades or sizes creates the illusion that producers consistently suffer large losses on sales of less valuable grades or sizes of lumber, but make extraordinary profits on sales of more valuable grades or sizes.

The value allocation respondents argue that the Coalition, Abitibi and Tembec offer no reasons why the use of an average cost methodology would be reasonable for this segment of the proceeding. They argue that the facts have not changed in the way in which lumber is produced and sold that would call the prior decisions into doubt or make the logic of these decisions any less compelling.

The value allocation respondents rebut the Coalition and Abitibi's claim that because the NAFTA panel rejected the Department's attempt to limit the NRV methodology to attributes that preexist in a log, the rationale for using that methodology no longer applies. The value allocation respondents argue that the rationale for using a NRV methodology is that a volume based

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[82] *See In The Matter of Certain Softwood Lumber Products From Canada*, USA-CDA-2002-1904-02. at 50 (July 17, 2003) (*NAFTA Panel Decision*).

allocation of joint costs leads to unreasonable results such as the conclusion that a producer suffers large losses on its sales of lower priced products.

The value allocation respondents argue that rather than attempting to show why a volume based allocation of joint costs somehow would be reasonable, the Coalition, Abitibi and Tembec allege various problems with the Department's NRV methodology. The value allocation respondents rebut Tembec's claim that the NRV methodology makes it impossible for Canadian producers to monitor their costs and sales to prevent dumping. They argue that, in fact, Canadian producers can, and do, monitor their costs and sales using the Department's NRV methodology. Additionally, they rebut Tembec's claim that the NRV methodology is not administrable. They argue that all of the Canadian producers investigated in this review were able to provide the information requested by the Department, and the Department was able to process the data. Therefore the value allocation respondents argue that the value-based allocation methodology is both workable and reasonable.

The value allocation respondents also rebut the Coalition and Abitibi's claim that the NRV methodology is unreasonable because of fluctuations in lumber prices. Citing the Joint Reply Brief of Canadian Complainants to the NAFTA panel, they argue that the sales files submitted by each of the Canadian producers show the existence of meaningful and often significant price differences among different lumber products over time. They argue that by not taking these differences into account in its cost allocation methodology in the *Original Investigation Final Determination*, the Department unnecessarily introduced distortions into its dumping calculations, rendering its methodology unreasonable. Thus, they argue that returning to a value-based methodology in the final results would be unacceptable.

In addition, the value allocation respondents argue that by using average annual prices, the Department's NRV methodology mitigates the effect of any short term price fluctuations. Further, they rebut the Coalition and Tembec's claim that the NRV methodology is unreasonable because it is based on the selling price of the finished product and is therefore circular. The value allocation respondents argue that the Department's methodology does not use Canadian prices to set Canadian prices, but uses the Canadian producer's world-wide prices for allocating joint product costs for purposes of determining whether home market sales were made below costs. Moreover, even to the limited extent that value allocated joint costs are used to derive constructed value Canadian prices, the Department's use of world-wide prices in allocating those costs, combined with the fact that the post-split off costs are not value allocated, significantly mitigates any potential circularity.

Finally, the value allocation respondents rebut Abitibi's claim that the NRV methodology distorts the dumping margin analysis because it includes U.S. prices. The respondent parties argue that to ignore the U.S. prices of lumber products in the value-based cost allocation would result in an inconsistent allocation because only Canadian and third-country prices for products sold in those markets would be used to allocate costs of all merchandise produced for all markets. Thus, they state that Department rejected this argument in the *First Review Final Results*, finding that "{t}o ignore the U.S. prices of lumber products in the value-based cost allocation ... would result in an

inconsistent allocation because only Canadian and third-country prices for products sold in those markets would be used to allocate costs of all merchandise produced for all markets."

Department's Position:

We disagree with the petitioner, Abitibi, and Tembec, with respect to their position that for this review the Department should abandon the NRV allocation method used for the *Preliminary Results*. None of these parties has proposed an alternative that reasonably addresses either the problems identified with the NRV method or the problems identified with a straight volume-based method (*i.e.*, MBF). We note that all of the issues raised by the interested parties in this review are the same issues raised and addressed in the *First Review Final Results*.

In the *Original Investigation Final Determination* at Comment 4, we stated:

> Due to the diversity of the industry, the range of wood grades found in any given log, the numerous permutations of physical characteristics, and the fact that lumber production is the result of a joint production process, the cost allocation issues raised by this case are among the most complex the Department has ever considered. The respondents themselves do not agree on the appropriate method to use to allocate costs to lumber products.

In the *Original Investigation Final Determination*, we adopted a limited value allocation methodology. We limited the value allocation to wood grades, because wood grades were the only physical characteristic that exhibited aspects of a joint product.[83] We further limited ourselves to home market sales when determining the NRVs. We believed at the time of the *Original Investigation Final Determination* that this methodology resulted in a reasonable allocation which addressed all of the argued joint-product issues. However, the NAFTA Panel instructed the Department to re-allocate joint production costs using a value-based cost allocation methodology which took into account dimensional differences between different jointly produced products. In our *First Remand Determination, In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination* (July 17, 2003) (*First Remand Determination*), we complied with the Panel's decision, but stated that, while "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."[84]

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[83] All other physical characteristics (dimension, drying, planning, etc.) are a direct result of management making a decision to create that characteristic. A standard joint product situation is one in which multiple products result simultaneously from a single process, and each product from the joint is an inevitable result of the joint process. Different wood grades are the only physical characteristic that is inevitable in lumber production. Moreover, the evidence on the record did not show any clear price pattern existed between the relative values of the majority of dimensional differences, unlike the evidence for grades differences.

[84] *See First Remand Determination* at 14.

For the first administrative review of this proceeding, we set out to make a good faith effort to develop a sound cost allocation method for lumber production. In that review, the Department solicited comments from the parties on several threshold questions concerning cost.[85] The letter covered among others the following topics: 1) the level in the company where the allocation should be made; 2) what costs should be allocated based on value and to which products; 3) the scope and source of price data; 4) the period of time price data should reflect; 5) price fluctuations; 6) periodic or infrequent sales; 7) scope and non-scope merchandise; 8) allocation of the costs incurred at the timber units; and 9) accounting for dimensional differences.

We agree that there are significant issues with both volume and value-based methodologies, and we have sought to develop a methodology that results in a reasonable cost of production. In the first review of this proceeding, we considered other methodologies, in addition to analyzing the two alternative methods. Specifically, we considered possible ways to address certain distortions such as problems caused by volatile prices and circularity (*i.e.*, circularity is using the same prices, including below-cost home market sales, to calculate the COP for lumber products which in turn is used to determine whether home market sales are below cost).[86] For example, to address the problems caused by volatile prices, one could calculate costs over shorter periods of time, *e.g.*, monthly costs. However, this would have required at least twelve value allocation programs and monthly price data for non-subject products and subject products sold only in third countries.

In addition, to avoid the circularity distortion, one could go outside the POR for historical prices that represent the actual historical value differences between grades or dimensions, as we did in *Pineapple from Thailand*. However, using information outside of the POR presents other problems, including the contemporaneity issue, questions pertaining to the relevance of non-POR transactions, the historical prices reflecting prices that were subject to the Softwood Lumber Agreement, the volatility of lumber prices, and new products that would require surrogates. Further, all of the respondents in the first review of this proceeding commented that the POR prices were the appropriate source for the NRVs. In this current review, there has been no new evidence put forth that would make us change our original decision.

With respect to distortions caused by using U.S. prices in the NRV cost allocation methodology, we determined in the *First Review Final Results* that the NRV for all jointly produced products sold in all markets was required in order to appropriately allocate the total joint costs. Because

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[85] *See First Review Final Results* at Comment 3.

[86] While we agree with the Federal Circuit court's decision in *Ipsco* that the use of selling prices to allocate costs creates a circular methodology, we note that the circumstances in this proceeding differ. In this proceeding, the volatility of lumber prices and the softwood lumber agreement in place prior to the investigation render prior period prices unrepresentative of current period prices. However, circularity is mitigated in the lumber proceeding because of how the allocation is made. In the lumber proceedings, we are not using prices to allocate costs between merchandise alleged to be dumped and merchandise that has not, but rather we are using prices to allocate between the relative values of merchandise under consideration only. No party to this proceeding has alleged that only specific lumber products have been dumped.

the theory behind an NRV cost allocation method is to allocate costs relative to the revenue generating power identifiable with each individual product, all products and all sales need to be included in the allocation.

In conclusion, we realize that all of the proposed methods are imperfect. While the use of a volume-based cost allocation was not argued before the NAFTA Panel, the issues raised in the instant proceeding, and in the first review of this proceeding, by Tembec, Abitibi, and the petitioner are the same concerns raised by the Department in the LTFV investigation of this proceeding, and are in large part the same facts that drove us to adopt the use of a limited value-based method. However, we decided in the *First Review Final Results* that it would be appropriate to continue to use a NRV method, allowing for both grade and dimensional differences and there is no new evidence that would make us change our decision from the *First Review Final Results*. Therefore, we will continue to use the value-based allocation methodology for this review.[87]

We note further that we have applied the value-based methodology to all respondents because the same general cost allocation issues are applicable to all respondents.[88] We will continue to entertain further arguments and proposed remedies for future reviews of this order.

Comment 11: Antidumping and Countervailing Duty Defense Fees in General and Administrative Expenses

It is the Department's practice for purposes of its calculations not to treat legal expenses related to an AD proceeding as direct selling expenses.[89] This policy was upheld by the CIT in *Daewoo Electronics Co., Ltd v United States*, 712 F. Supp. 931, 947 (CIT. 1989) ("*Daewoo*"). The CIT further refined its view in *Zenith Electronics Corp. v United States*, 770 F.Supp 648, 651 (CIT 1991) (*Zenith*), where the CIT stated, "The fundamental reason for not allowing the use of legal expenses which are related to AD proceedings is that the expenses of a party's participation in

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[87] Rather than restating the Department's entire analysis from the first administrative review, we have placed a copy of the Issues and Decision Memorandum from the *First Review Final Results* on the record of this proceeding. *See* Memorandum to the File from Shane Subler, International Trade Compliance Analyst, to Constance Handley, Program Manager, Subject: Issues and Decision Memorandum from the Final Results of the First Administrative Review, dated December 5, 2005.

[88] If individual respondents incorporated different cost accounting systems that took different approaches in addressing the particular accounting issues for the industry, and the Department found that each individual respondent's books and records result in a reasonable calculation of cost, the Department may allow for different accounting methods across multiple respondents.

[89] *See Certain Steel Pipes and Tubes From Japan; Final Determination of Sales at Less Than Fair Value*, 48 FR 1206, 1208 (January 11, 1983) (*Steel Pipes and Tubes from Japan LTFV*), and *Color Television Receivers, Except for Video Monitors, From Taiwan; Final Results of Antidumping Duty Administrative Review*, 51 FR 46895, 46901 (December 29, 1986) (*Color Television Receivers, Except for Video Monitors from Taiwan Final Results*).

legal proceedings provided by law should not become an element in the decision of those selfsame proceedings. On this point, Commerce's position is affirmed."

The petitioner acknowledges that the Department has since modified its practice also to exclude AD legal expenses from G&A expenses.[90] However, the petitioner argues that consultants are not legal representation and, therefore, payments to consultants should be included in the reported G&A costs.

According to the petitioner, other than AD legal expenses, the Department's practice is to include all legal expenses in reported G&A costs.[91] The petitioner argues that because legal expenses incurred with respect to CVD proceedings are not AD legal expenses, such legal expenses should be included in the reported G&A costs. The petitioner contends that AD and CVD are distinct and separate proceedings, and therefore, there is no reason to exclude legal expenses related to CVD proceedings from G&A expense. The petitioner maintains that the focus of the AD investigation is whether the manufacturer/exporter is selling a product in the United States at less than fair value, while the focus of a CVD investigation is whether the government of a country (or any public entity within a country) is directly or indirectly providing a countervailable subsidy in support of manufacture, production, or export of subject merchandise. The petitioner states that CVD proceedings are not the "selfsame" proceedings as AD proceedings as specified in *Zenith*.

The petitioner further argues that the Department should include payments made to industry trade associations in each company's G&A rate calculation. It maintains that the respondents have the responsibility to establish that the amounts paid to associations constitute AD legal expenses. Furthermore, the petitioner argues that the company's declarations that the trade associations' activities are exclusively related to AD and CVD proceedings are unsubstantiated because trade associations engage in many activities including lobbying, publicity campaigns, press releases, negotiations, etc. which are not related to AD proceedings. It notes that the respondents gave conflicting information to the Department on the record of this proceeding regarding expenses incurred for settlement negotiations by the various trade associations.

The respondents contend that the AD and CVD proceedings in this case have overlapped significantly, and that the respondents have incurred considerable expenses related to issues common to both proceedings, including the injury case and subsequent appeals and proceedings which cannot be distinguished. According to respondents, the extent to which certain respondents have or have not distinguished between AD and CVD-related expenses is more a reflection of the

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[90] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Granite Products from Italy*, 53 FR 27187, 27196 (July 19, 1988) (*Granite Products from Italy*), and *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada: Final Results of Antidumping Duty Administrative Reviews*, 63 FR 12725, 12731 (March 16, 1998) (*Corrosion-Resistant Carbon from Canada Final Results*).

[91] *See Titanium Sponge From Japan: Final Determination of Sales at Less Than Fair Value*, 49 FR 38687, 38689 (October 1, 1984) (*Titanium Sponge from Japan Final Determination*).

manner in which respondents and their lawyers and consultants maintain this information, and does not reflect any deficiency in the respondents' responses to the Department's inquires.

The respondents argue that the Department should exclude the payments to associations for AD and CVD cases from the G&A expense calculations in the final results. The respondents contend that the Department's treatment of these expenses in the *Preliminary Results* penalizes respondents for defending their interest in AD and CVD cases through a business or trade association. The respondents argue that the legal fees and related expenses incurred by companies both individually and collectively though their trade associations, are an inevitable consequence of the AD and CVD cases and would not have been incurred but for the cases. Thus, they are not G&A expenses that pertain to the production and sale of subject merchandise. According to the respondents, the Department and the CIT have recognized that the inclusion of legal fees in a dumping calculation "would effectively discriminate against those respondents who seek legal counsel in proceeding before the Department."[92]

The respondents maintain that the BCLTC and the Canadian Lumber Trade Alliance were established solely for the purpose of collectively defending against the AD and CVD cases. The respondents contend that other associations have broader purposes, but the record evidence establishes that the specific association assessments respondents claimed as deductions from G&A were for legal fees and related charges tied directly to the collective defense of the AD and CVD cases. According to the respondents, the Ontario Lumber Manufacturer's Association and the Quebec Forest Industry Counsel members provided additional, detailed evidence that tied the excluded assessments to legal fees incurred as a direct result of the AD/CVD proceedings.

The respondents claim that the Department excluded the fees paid to associations in the first administrative review and should do so again in this review. According to the respondents, each respondent stated that the association assessments were a result of the AD and CVD orders and did not relate to the general operations of the respondent companies. The respondents argue that the principle that expenses arising from an AD order are excluded from G&A expense calculations applies equally to expenses arising from a CVD order. According to respondents, the Department did not request them to report AD-related and CVD-related expenses separately, and has no basis on which to differentiate the two as the petitioner urges. Respondents maintain that section 773(b)(3)(B) of the Act specifies that the cost of production shall be "based on actual data pertaining to production and sales of the foreign like product by the exporter in question." Respondents argue that these AD- and CVD-related expenses would not have been incurred but for the AD and CVD orders and that the expenses relate exclusively to the legal proceedings and not to the production and sales of subject merchandise.

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[92] *See Color Television Receivers From the Republic of Korea; Final Results of Administrative Review of Antidumping Duty Order,* 58 FR 50333 (September 27, 1993) (*Color Television Receivers from the Republic of Korea Final Results*).

Department's Position:

We agree with respondents that all legal and consulting fees incurred as a direct result of AD and CVD proceedings should be excluded from the G&A expense computation, including those fees paid to associations used to defend the AD and CVD proceedings.

In accordance with section 773(b)(3)(B) of the Act, the cost of production shall include "an amount for selling, general and administrative expense based on actual data pertaining to production and sales of the foreign like product by the exporter in question." Legal fees are a normal business expense that benefit the company as a whole. While legal expenses in general are normally included in the G&A expenses of a company, the Department has established a regular practice of excluding the AD legal defense fees from the G&A rate calculation.[93] The fundamental reason for not including legal expenses incurred in participating in AD proceedings is that the expenses of a party's participation in legal proceedings should not become an element in the decision of those proceedings.[94]

The *Zenith* decision, however, only addresses whether AD legal fees should be excluded from the dumping analysis. It does not address whether to exclude AD consulting fees or defense fees related to other trade disputes (*e.g.*, CVD proceedings, trade dispute settlements, etc.). In addition, the arguments in the cases cited by both the petitioner and the respondents centered around whether AD legal fees should be included or excluded from the reported costs. In none of these cases is there a discussion of whether AD consulting fees or legal expenses related to a CVD proceeding should be included or excluded from the G&A rate calculation.[95] As such, we disagree with the petitioner that case precedent supports including AD-related consulting fees and CVD defense fees in the G&A rate computation.

We disagree with the petitioner that fees paid to consultants in an AD proceeding should be treated differently than fees paid to lawyers. While the particular service provided by each may differ, costs are incurred for both as a result of being involved in an AD proceeding. Thus, the same rationale applies to AD consulting fees, that expenses incurred in participating in AD proceedings should not become an element in the decision of those proceedings. Therefore, we have excluded both the fees paid to lawyers and fees paid to consultants related to the companies' AD defense from G&A expenses for the final results of this review.

We also disagree with the petitioner that CVD-related consulting and legal fees should be included in the G&A expense rate computation. While AD and CVD proceedings are separate

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[93] *See Corrosion-Resistant Carbon from Canada Final Results*, 63 FR 12731.

[94] *See Zenith*, 770 F. Supp. 648.

[95] *See Steel Pipes and Tubes from Japan LTFV, 48 FR 1206, Color Television Receivers, Except for Video Monitors from Taiwan Final Results*, 51 FR 46895 and *Titanium Sponge from Japan Final Determination*, 49 FR at 38689.

and distinct, they are both associated with trade remedy proceedings. The analysis of the extent to which companies are engaging in unfair trade (*i.e.*, dumping) should be performed without regard to fees paid for participation in the proceedings, regardless of whether it relates to AD, CVD, or another type of trade action. If it were not for the proceedings, these defense costs would not have been incurred. To include the defense costs in the calculation would in effect penalize the respondents for participating in the proceedings, the cost of which does not bear upon the analysis of whether they are selling at dumped prices. Therefore, we have excluded both AD- and CVD-related defense costs from G&A expense for the final results of this review.

Certain respondents made various declarations and provided support for their claim that the fees paid to associations were related to AD and CVD proceedings. For the *Preliminary Results*, we included all payments to associations for AD/CVD cases in each respondent's G&A expense calculation. However, for the final results we have excluded the fees paid to associations used to defend the respondents in AD/CVD proceedings consistent with our past practice.[96] We find that there is no difference between the fees billed directly by a company's counsel and consultants and those AD/CVD defense fees paid to associations. Therefore, we have excluded both the AD/CVD fees billed directly by a company's counsel and consultants, and those paid to associations from G&A expense for the final results of this review.

The respondents have distinguished between the fees paid to associations in defense of AD/CVD proceedings and those paid to associations for marketing and trade promotion. For example, information on the record indicates that the BCLTC and the Canadian Lumber Trade Alliance were established solely in the interest of collectively participating in the AD and CVD cases, while the Ontario Lumber Manufacturer's Association and the Quebec Forest Industry Counsel charged a separate assessment for legal fees associated with participation in AD/CVD proceedings. Therefore, for the final results we have excluded the payments made to associations used in the defense of AD/CVD proceedings from G&A expenses and included all other association fees.

Lastly, because Weyerhaeuser failed to explain the purpose of the Ontario Forest Industry Association and Ontario Lumber Manufacturer's Association, it is not clear that the fees paid relate to AD/CVD proceedings. Thus, we have included the fees paid to those two associations in the G&A rate calculation.

Comment 12: Wood Chips Byproduct Revenue

As part of the Department's calculation of COM, the agency allows an offset to lumber cost for byproducts, *i.e.*, wood chips that can be sold by the company. If wood chips were sold to an affiliate, the Department will conduct an analysis consistent with section 773(f)(2) of the Act testing the value recorded for the byproduct. If the wood chips were sold to a division within the same corporation, the Department's analysis might differ, depending on the facts before it.

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[96] *See First Review Final Results* at Comment 29.

Abitibi and Weyerhaeuser argue that in the *Preliminary Results*, the Department incorrectly adjusted the transfer price of wood chips between Abtibi's and Weyerhaeuser's British Columbia (BC) sawmills and their respective BC pulp mills. Abitibi asserts that the transfer price of wood chips used by Abitibi in its normal books and records reasonably reflects the price of wood chips in BC. Thus, Abitibi argues that the Department does not have the statutory authority to depart from its reported transfer prices. However, Abitibi contends that to the extent the Department determines that it must revalue Abitibi's BC wood chip revenues, it must compare Abitibi's transfer prices to market prices that reflect BC wood chip prices over the entire POR. Abitibi contends that its sales of wood chips to unaffiliated parties, which were compared to transfer price in the *Preliminary Results*, were concentrated in the beginning of the POR when the market price of wood chips was at its lowest point during the POR. Abitibi asserts that in the interior of BC, the prices of wood chips are tied to the price of pulp and fluctuate greatly. Therefore, Abitibi argues, its average unaffiliated wood chip price does not represent market price over the entire POR. Abitibi also argues that its sales of wood chips to unaffiliated parties in BC were made on a distress basis and not under the terms of an annual contract.

Weyerhaeuser argues that the Softwood Lumber Business (SWL) Canada's internal transfers of wood chips were made at arm's length prices. Weyerhaeuser further states that SWL Canada did not sell chips to unaffiliated parties in BC, and no other Weyerhaeuser business unit sold the same species of chips to unaffiliated parties. Weyerhaeuser argues that the Department should not make an adjustment based on British Columbia Coastal's (BCC) cedar chip sales because they do not fairly reflect the market price for SWL Canada's SPF chips, which are generally more valuable than cedar and hem-fir chips sold by BCC. Weyerhaeuser claims that a comparison of SPF chips sold by one business unit to chips of another species sold by a different business unit is without support and contradicts the Department's own decision not to compare prices across species of lumber in this case.

Weyerhaeuser claims that because the Department did not adjust the byproduct offset amounts for SWL Canada's internal transfers in other provinces, thus confirming that these transfer prices were made at arm's length prices, there is no reason to conclude that SWL Canada's affiliated sales of chips in BC were made at preferential prices. Weyerhaeuser and Abitibi conclude that, if the Department continues to adjust Weyerhaeuser's and Abitibi's claimed BC byproduct offsets for the final results, the adjustments should be based on the publicly available market prices on the record and not on what was used in the *Preliminary Results*.

Canfor argues that affiliated wood chip revenues for The Pas should not be decreased. Canfor explains that a small quantity of The Pas' wood chips was sold to an unaffiliated party, and that the average price received on sales to the affiliate was higher than that for the unaffiliated party. Canfor asserts that while the Department relies on section 773(f)(2) of the Act as justification for reducing the prices of chips sold to an affiliate, that section states that a transaction between affiliates may be disregarded if its value does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. Canfor asserts that there is nothing on the record to indicate that the price paid by The Pas' affiliate did not fairly reflect the usual price in the market under consideration. Canfor contends that a single sale, to a

single unaffiliated party, is inadequate to demonstrate that the sales to The Pas' affiliate were not at market prices. Canfor asserts that given the uniqueness of the sale to the unaffiliated customer, it is likely the one sale was outside the ordinary course of trade. Canfor notes that the Department did not seek information in supplemental questionnaires to determine whether the amount that it used as a benchmark reflected the usual prices in the market. Given this, Canfor asserts, the Department has no basis for concluding that The Pas' prices to its affiliate were below market prices.

Abitibi, Canfor, and Tembec argue that in the *Preliminary Results* of this review, the Department did not act in an even-handed manner because it only adjusted wood chip transfer prices downward to market prices in some provinces but not upward to market prices in other provinces. Tembec refers to the Memorandum from Sheikh M. Hannan, Senior Accountant, to Neal M. Halper, Director, Office of Accounting, Re: Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results at page 1 and Attachments 2 and 3 (May 31, 2005) for Tembec Inc. Tembec argues this one-sided approach results in a byproduct offset that is not reflective of the wood chip market value and will only increase the dumping margin. Abitibi points out that section 773(f)(2) of the Act permits the Department to disregard transactions between affiliated persons regarding any element of value required to be considered if the amount representing that element does not fairly reflect the amount usually reflected in sales of the merchandise under consideration in the market under consideration. Tembec states that the Department's preliminary results methodology violates the even-handedness requirement under the Antidumping Agreement (ADA), as illuminated by the WTO Appellate Body in the *US-Steel Products from Japan Appellate Body Report*. Abitibi and Tembec allege that the Department has recognized that both above-market and below-market transfer prices are to be disregarded when they differ from market prices. Specifically, Abitibi and Tembec cite to the Department's decision in the first review of this case, where the Department acknowledged that the even-handed requirement set forth by the WTO Appellate Body applied to its conduct here and made explicit its intention to apply the transaction disregarded test "{i}n accordance with the precepts outlined in *United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan, WTO Appellate Body*, WT/DS184/AB/R, July 24 2001 (*US-Steel Products from Japan Appellate Body Report*) stating that the United States should apply even-handed tests."[97]

Tembec argues that the NAFTA panel noted after the first remand redetermination, that wood chips and other byproducts have no identifiable costs and it is, therefore, meaningless to talk about profit in this context. Tembec asserts that the Department has not articulated a coherent rationale for refusing to adjust the price of wood chips upward to market. Tembec cites to *In the Matter of Certain Softwood Lumber Products From Canada: Final Affirmative Antidumping Duty Determination, Decision of the Panel*, File No. USA-CDA-2002-1904-02 (March 5, 2004), at 24. Tembec acknowledges that although the Panel upheld the Department decision on this issue, it appeared confused by the Department's arguments and never addressed the even-handedness issue. Tembec points out that recently the WTO Appellate Body held the even-handedness requirement applies to the Department's discretion in determining whether to accept or reject

[97] *See First Review Final Results* at Comment 7.

sales prices for byproducts transferred internally as reasonably reflecting the costs associated with the production and sale of the product under consideration as required under Article 2.2.1.1 of the ADA. Tembec argues that the Department may not exclude from its byproduct offset calculations only those internal transfer prices that exceed sale prices to unaffiliated parties because to do so, would systematically reduce byproduct values and increase COP in violation of the even-handedness requirement.[98]

Canfor, Abitibi, and Tembec conclude that if the Department adjusts chip prices to affiliates or divisions downwards when they exceed the prices paid to unaffiliated purchasers, it must also adjust chip prices to affiliates or divisions upwards when they are less than the prices paid to unaffiliated purchasers. Specifically, Tembec and Abitibi assert that for the final results, the Department should apply its methodologies in an even-handed manner and apply the statute consistently, and therefore, should revalue Tembec's internally transferred wood chips and Abitibi's affiliated party Quebec sales upward to market price when the transfer price is lower than the average arm's length price.[99]

Abitibi contends that in prior segments of this proceeding, the Department has relied upon section 773(f)(2) of the Act to value the sale of wood chips to affiliated legal entities. According to Abitibi, however, with regard to the inter-divisional transfers of wood chips, the Department has stated that the transactions disregarded provision did not apply, and the Department did not adjust the inter-divisional transfers of wood chips to the market price when the market price was higher than the transfer price. Abitibi points out that in the first review, the Department stated that the respondents' internal accounting values for wood chips were the best evidence of the company's determination of its costs for chips, exclusive of profit. Abitibi asserts that the Department stated that when market price is higher than transfer price, the difference between the prices reflected something analogous to profit on the market price.[100] Abitibi argues that wood chips are byproducts, and by definition, there is no cost of production, revenue, or profit associated with byproducts, and all cost and profits are attributed to the main product, lumber. Abitibi contends that byproduct inventory, if there is one, is usually reported at selling prices rather than cost amounts. For this reason, according to Abitibi, profit cannot exist for byproducts. Finally, Abitibi argues that the notion of profit in an arm's-length sale of byproducts renders false the notion that

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[98] According to Tembec, the WTO Appellate Body held that any byproduct methodology adopted pursuant to Article 2.2.1.1 must be applied in an even-handed manner. *See United States - Final Dumping Determination on Softwood Lumber from Canada, Report of the Appellate Body*, WT/DS264/AB/R (August 11, 2004) at paragraphs 161 to 163. Tembec acknowledges that the Appellate Body never reached the issue of whether the Department's treatment of Tembec's internally transferred chips satisfied the even-handedness test because that issue involved resolving factual issues, which the Appellate Body declined to reach.

[99] Tembec states that it is the Department's practice to revalue the price of inputs purchased from affiliated parties upwards to reflect market value when the affiliated price of the input is lower than the arm's length price of the input, pursuant to section 773(f)(2) of the Act. In support of this statement, Tembec cites the *Notice of Final Determination of Sales at Less Than Fair Value: IQF Red Raspberry from Chile*, 667 FR 35790 (May 21, 2002) and accompanying Issues and Decision Memorandum at Comment 3.

[100] *See First Review Final Results* at Comment 7.

the Department is applying its policy of adjusting inter-divisional transfer prices in an even-handed manner, as the only adjustment permitted is lowering byproduct revenue when transfer price exceeds market price. Abitibi and Weyerhaeuser contend that despite these distinctions in treatment between affiliated party sales and inter-divisional transfers, the Department in the *Preliminary Results* did not segregate or distinguish its analysis of affiliated party sales from inter-divisional transfers. Therefore, Abitibi contends that the Department should adjust the inter-divisional transfer price in Quebec upward when it is lower than the market price.

The petitioner argues that the Department should not resort to comparing Abitibi's unaffiliated wood chip sales and Weyerhaeuser's transfer prices to publicly available data of wood chip market prices. The petitioner contends that it is not unusual for market prices to fluctuate, and this does not call into question their validity. Also, the petitioner argues that there is no evidence of any seasonality, hyperinflation, or other external factors that might have affected the wood chip market in BC in that time period. The petitioner argues that Abitibi made a commercially significant amount of sales for a number of months during the POR to allow the Department to make a fair comparison. The petitioner argues that in the *First Review Final Results*, the Department relied on Abitibi's unaffiliated wood chip sales, based on essentially the same facts. The petitioner asserts that for Weyerhaeuser actual company-specific unaffiliated prices are available and there is no evidence the company-specific prices are not reliable. The petitioner further argues that during the POR, BCC's unaffiliated prices represented wood chips produced not only from cedar logs, but from other species as well, such as hem-fir. The petitioner maintains that because Weyerhaeuser provided no evidence about the company's unaffiliated wood chip prices for species other than cedar, there is no reason to conclude that they would not be equivalent to unaffiliated SPF wood chip prices in the province of BC during the POR. The petitioner maintains that the Department should follow its decision made in the investigation and the first review of this case to compare wood chip prices on a province-specific basis, and not based on areas within the province as suggested by Weyerhaeuser.

The petitioner argues that record evidence demonstrates that The Pas' affiliated chip sales did not reflect market value. The petitioner contends that pursuant to section 773(f)(2) of the Act, the Department appropriately adjusted The Pas' reported affiliated byproduct revenue. The petitioner also asserts that Canfor has provided no evidence that its unaffiliated price was not reflective of market value nor outside the ordinary course of trade. The petitioner notes that in the *First Review Final Results* at Comment 7, the Department explained that the issue is not how significant a respondent's unaffiliated sales are as compared to its affiliated sales, but whether the price that the respondent receives from selling wood chips to unaffiliated parties on a regional basis reasonably represented a price derived from a commercially viable sale.

The petitioner states that section 773(f)(2) of the Act, the transactions disregarded rule, is appropriate to value wood chip sales to affiliated legal entities. The petitioner contends that the transactions disregarded rule does not require the Department to adjust the affiliated wood chip prices upward when the affiliated prices are below the average unaffiliated market price. The petitioner asserts that this provision in the law permits the Department to disregard transactions between affiliated persons regarding any element of value, if the amount representing that element

does not fairly reflect the amount usually reflected in the sales of merchandise under consideration. The petitioner contends that the transactions disregarded rule is intended to allow the Department to test the prices a respondent pays, or in this case the revenues received, from an affiliated party to determine that those transactions were at arm's length. The petitioner asserts that in transactions with affiliated parties, a respondent has the ability to manipulate the price and, thus, increase its offset (which reduces its costs). Therefore, the petitioner contends, if the affiliated wood chip prices are higher than the unaffiliated prices, the Department must adjust the affiliated prices downward to prevent manipulation of the offset amount. According to the petitioner, however, where the prices received from unaffiliated parties are higher than the affiliated prices for a byproduct, the Department has no reason to reduce the affiliated prices because there is no evidence that the affiliated prices have been manipulated to increase the offset to costs.

The petitioner claims that respondents' reliance on *US-Steel Products from Japan Appellate Body Report* is misplaced. The petitioner asserts that the Appellate Body was attempting to determine which downstream sales of the foreign like product should be disregarded as outside the ordinary course of trade in calculating a respondent's margin. The petitioner argues that in the current case, we are comparing byproduct revenue not the sales prices of the foreign like product and, therefore, the Appellate Body's ruling is not applicable.

The petitioner contends that for the *Preliminary Results*, the Department appropriately adjusted Abitibi's, Tembec's, and Weyerhaeuser's byproduct revenue for internal sales of wood chips, and the Department should continue to make these adjustments for the final results. According to the petitioner, the Department made similar adjustments in the first administrative review of this case and has fully explained the rationale for doing so. In support of this statement, the petitioner cites the *First Review Final Results* at Comment 7. The petitioner states that with regard to byproducts transferred between divisions of the same legal entity, it is the Department's practice to value transactions using the cost of the input transferred, and it may accept the company's internal valuations provided they are exclusive of profit. According to the petitioner, when the internal price is above the market, it is considered to be an unreliable proxy for cost because cost cannot be above the market, and accordingly the internal sales price is adjusted downward. Conversely, the petitioner asserts, when the internal price is below the market, it is considered a reliable cost proxy given the existence of profit in the market price, and no adjustment to the internal sales price is necessary. The petitioner states that in the *First Review Final Results*, the Department determined that if the average inter-divisional price is above the average market price, it is deemed to include profit, conversely, if the average inter-divisional price is below market it is deemed to exclude profit and, thus, represent cost.[101]

The petitioner claims that Weyerhaeuser's own company-specific data shows that these internal transfer prices are unreasonable. The petitioner points out that the facts in the current review regarding Abitibi's wood chips prices in Quebec are identical to those presented in the *First*

[101] *See First Review Final Results* at Comment 7.

Review Final Results, where the Department did not adjust the transfer price or the affiliated price upwards to the market price. The petitioner argues that in the current review, Abitibi's inter-divisional wood chip price in Quebec is lower than the average unaffiliated price and, therefore, does not include a profit and should not be increased to the market price to include the profit on wood chip sales.

With respect to Canfor, the petitioner argues that the Department should revise Canfor's byproduct revenues to remove Slocan byproduct sales data from Canfor's costs in the Canfor sub-period 1 costs. The petitioner notes that in lumber, for byproduct chip sales, the Department compares each company's affiliated per-unit chip prices to unaffiliated chip prices on a province-specific basis, and when affiliated chip prices exceed the unaffiliated market price, the Department disregards the affiliated price and replaces it with an unaffiliated price. The petitioner analyzes Canfor's per-unit chip prices for affiliated and unaffiliated transactions with and without Slocan's data. The petitioner noted that its analysis of affiliated and unaffiliated prices excluded Canfor's reported information for "Trades" transactions, because such amounts relate to barter transactions.

Canfor asserts that its byproduct revenue should not be revised to remove Slocan data from Canfor sub-period 1 costs because to do so would treat Canfor as two separate companies, ignore some of Canfor's external sales, and overlook the nature of Canfor's chip contracts with affiliates, which are based on market prices. Canfor argues that the Department has no basis for recalculating Canfor's prices by removing chip sales involving the legacy Slocan mills. Canfor notes that in April 2004, the legacy Slocan mills were as much a part of Canfor as were the legacy Canfor mills. Canfor contends that there is no reason why external sales "Accounted for Internally" should be excluded from average chip prices.

Department's Position:

In this case, we analyzed transactions for all respondents in a byproduct revenue-wood chip prices memorandum.[102] In accordance with section 773(f)(2) of the Act, we test transactions made with affiliated parties to ensure that such transactions do not reflect preferential prices. Our practice with regard to section 773(f)(2) is to use the higher of transfer price or market price for cost elements.[103] Since wood chips are an offset to costs the exact opposite is true. Thus, we use the *lower* of transfer price or market price in the byproduct scenario. For transactions with affiliated parties, a respondent has the ability to manipulate prices by decreasing its reported costs or by increasing its offset to costs. For this reason, we use the higher of transfer price or market price for cost elements and the lower of transfer price or market price for cost offsets. As such, we

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[102] *See* Memorandum from Nancy Decker, Accountant, to The File, Subject: Byproduct Revenue - Wood Chip Prices (December 5, 2005); *see also* Memorandum from Sheikh Hannan and Michael Harrison, Accountants, to Neal Halper, Director, Office of Accounting, Re: Tembec and Abitibi Cost Calculations (December 5, 2005) (*Tembec and Abitibi Cost Memos*).

[103] *See Steel Wire Rod from Canada* at Comment 3.

analyzed the wood chip transactions for each respondent, determining, in accordance with section 773(f)(2), on a regional basis whether the transactions with affiliates occurred at arm's-length prices. Where little discernible difference existed between the transfer prices with affiliates and market prices, we made no adjustment. If the transactions with affiliates were meaningfully above the market price on a regional basis, we adjusted the affiliated transfer prices to the lower market price because the affiliated transaction values reflected preferential treatment based upon the comparison with the market value.

In determining a market price, the Department has established a preference for using a respondent's own purchases (or in the case of byproducts, its own sales) from (to) unaffiliated suppliers provided such transactions are significant and fairly reflect an arm's-length transaction for the input in question.[104] Absent evidence that the input purchased (or sold, in the case of byproducts) from unaffiliated suppliers is not comparable to that purchased from its affiliates, or evidence of unusual circumstances surrounding such unaffiliated purchases, we deem a respondent's own unaffiliated purchases (or sales, in the case of byproducts) to be our first preference for a market price. In determining whether transaction prices between non-affiliates are a fair reflection of market values, we do not necessarily consider the quantity of unaffiliated purchases in relation to total purchases of the same input to be a disqualifying factor in considering those purchases a market price. On the contrary, the Department's arm's-length test is qualitative in nature, not quantitative, in that it seeks to find the market value that best represents the company's own experience in the specific markets in which it operates, based on transactions in which it received compensation for its products from unaffiliated purchasers. The Department is required by section 773(f)(2) of the Act to determine whether these sales are made at prices "usually reflected" in the market. The test is whether such sales serving as the market price benchmark occurred in commercial quantities. Therefore, we consider that the use of a respondent's unaffiliated sales prices for the identical product, made in commercial quantities, to be a reasonable benchmark test for arm's-length transactions.

Abitibi

We disagree that Abitibi's sales of wood chips in BC to an unaffiliated company were made under abnormal conditions. For example, Abitibi states that its Mackenzie sales were abnormal because it normally sells its wood chips to its affiliated newsprint plant, but this plant was temporarily shutdown or had a slowdown during the POR. We do not consider the slowdown or temporary shutdown of a newsprint plant an abnormal occurrence, because it is common for plants to have maintenance shutdowns, industrial accidents, and shutdowns due to other external factors. Moreover, there is no clear connection as to why the temporary shutdown or slowdown of Abibibi's newsprint plant would force the Mackenzie mill to not deal at market prices with the unaffiliated purchasers of wood chips.

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[104] *See Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium From France*, 70 FR 54359 (September 14, 2005) and accompanying Issues and Decision Memorandum at Comment 3; *see also First Review Final Results* at Comment 7 (where the Department determined that the use of unaffiliated sales was a sensible benchmark test to reflect arm's-length transactions).

For Abitibi, the question is whether the price which Abitibi received from selling wood chips in BC reasonably represents a market price over the entire POR. The evidence on the record shows that Abitibi's sales to unaffiliated parties in BC did not occur throughout the entire POR. We analyzed the sawmill sales data, and chip sales data from the British Columbia Ministry of Forests "Comparative Value Pricing" for the twelve months ended September 30, 2003, March 31, 2004, and June 30, 2004, placed on the record in Abitibi's December 3, 2004, Section D response in Exhibit 26. We also analyzed BC and Eastern Canada chip sales price data from "Chips and Logs: North American Conifer Chip Prices," *Yardstick*, December 2003, May 2004, and June 2004, placed on the record April 21, 2005, in Abitibi's supplemental Section D response in Exhibit 15. Pursuant to our analysis of the chip sales data, we have determined that the price of wood chips steadily increased throughout the POR. Since Abitibi's sales of wood chips to its unaffiliated BC customer occurred only at the beginning of the POR, we do not consider it reasonable to be used to test the arm's-length nature of the wood chip sales over the entire POR in BC.

For the final results, we have used the average price of wood chips sold by other respondents in this review to unaffiliated companies in BC to establish a representative POR market price of wood chips in BC for Abitibi. We used this average as the representative market price because the price of wood chips received by the other respondents in the proceeding represents the best measure of the market in the specific province during the time period under review. Furthermore, the wood chip prices of the other respondents cannot be selective or manipulated to obtain an advantage for any of the parties. The Department analyzed unaffiliated party sales of wood chips in BC exclusive of Abitibi's sales of chips to unaffiliated parties because Abitibi's unaffiliated party sales only occurred in the beginning of the POR. To include these in the market price analysis would result in an inappropriate comparison. That is, we would be comparing an average market price that includes disproportionately more sales from the beginning of the POR to affiliated party sales prices that occurred throughout the POR. Therefore, we did not include Abitibi's sales to unaffiliated parties in BC in the calculation of the average price of wood chips sold in this review. We found that the affiliated wood chips prices were greater than the market price. Therefore, we adjusted Abitibi's affiliated wood chip prices in BC to the market price of wood chips sold by other respondents in this review to unaffiliated companies in BC.

With respect to companies that are legally and operationally divisions of one entity, and not individually incorporated affiliates (*i.e.*, Tembec, Weyerhaeuser, Canfor, and Slocan), the Department's practice is to value transactions using the actual cost of the input transferred between divisions.[105] As we explained in the *First Review Final Results*, we apply the same methodology to inter-divisional transfers of wood chip byproducts as we do to inter-divisional transfers of direct production inputs. Because the byproduct offset is part of the Department's cost calculations, we need to value these inter-divisional transactions at the company's actual cost of producing the wood chips. However, byproducts, by their nature, have no separately

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[105] *See Final Results of Antidumping Duty Administrative Review: Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea*, 62 FR 18404, 18430 (April 15, 1997).

identifiable cost associated with their production. Thus, in valuing a byproduct, in this case wood chips, the challenge faced by the Department is to find an "actual" value for these wood chips to offset the costs of producing lumber. The issue before the Department in the investigation and in the *First Review Final Results* was the same as it is in this review. In both segments, we analyzed the wood chip sales transactions between sawmills and internal divisions, and we had no alternative but to compare these values with arm's-length transactions to determine if the inter-divisional values fell within a reasonable range of prices (given the possibility that an arm's-length value might be higher, in order to collect back the equivalent of a profit on the sale of the wood chips outside of the company as a whole).[106] Where little discernible difference existed between the transfer prices between divisions and market prices between unaffiliates, we made no adjustment.

In *Cost Accounting: Processing, Evaluating, and Using Cost Data*, Third Edition, by Morse and Roth, 1986,[107] the authors give an example of how gain (or profit) on the sale of byproducts can occur. In this example, byproducts are recorded in inventory at their expected net realizable value (*i.e.*, expected selling price less handling or processing costs, if any). If the byproducts end up being sold for more then their expected selling price, a gain on the sale of byproduct inventory (or a profit) occurs.

Where transaction values with other divisions exceeded the market price on a regional basis, we have not considered the inter-divisional transfer price to be a reasonable surrogate for cost, because, theoretically, cost should not exceed market price. Market price, on the other hand, can exceed cost, given the standard relationship between cost and market value, and the existence of profit. This concept exists for cost offsets, as well as for the cost of direct production inputs, even though profit does not follow easily in the context of byproducts. Therefore, we adjusted the inter-divisional transfer prices to market price in situations where the transfer price exceeded the market price.

In situations where the transaction values with other divisions were lower than the market price, on a regional basis, we considered the difference to be the equivalent of a profit on these byproduct transactions, and determined, just as we did in the investigation and the first review, that these transaction values were a reasonable approximation of cost to use for purposes of the byproduct offset. Section 773(f)(1)(A) of the Act directs the Department to use a company's actual costs as recorded in its normal books and records, provided the records are kept in accordance with the GAAP of the exporting country and reasonably reflect the costs associated the production and sale of the merchandise under investigation. A company does not have to, and often does not, include profit to itself in inter-divisional transfer prices. Accordingly, although the appropriate term for this difference in values might not be deemed to be profit, it is the equivalent

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[106] *See Original LTFV Investigation Final Determination* at Comment 11 and *First Review Final Results* at Comment 7.

[107] S*ee* Memorandum from Nancy M. Decker, Accountant, to The File, Subject: Excerpt from Textbook Regarding Accounting Treatment of Byproducts, dated December 5, 2005.

of profit in the context of a cost analysis. Thus, the Department's general presumption with respect to inter-divisional byproduct transactions, such as those between Tembec's sawmills and pulp-mills, is to presume that the valuation of a byproduct appearing in the books and records, which when valued lower, within reason, than unaffiliated market prices, is the appropriate value to use in its cost calculations, unless contrary evidence exists on the record to question the reasonableness of this figure. Contrary evidence might include a grossly abnormal difference between market value and transfer price that could not be reasonably interpreted as the equivalent of profit. No such discrepancy exists in this case for the transaction at issue.

Tembec

While we have compared arm's length transactions to internal transfer prices to assess their reasonableness, we disagree with Tembec that we applied the arm's length test, in accordance with section 773(f)(2) of the Act, in this review and in the first review to internally transferred wood chips. Rather, we used the arm's length value as a surrogate, because information does not (and by its nature cannot) exist on the actual cost of producing wood chips.

Tembec argues that the Department is required by law to dismiss these lower valued byproduct values and use the higher-valued market prices. Such a claim is not supported by any statutory provision or case precedent. In fact, both the NAFTA Panel in *Certain Softwood Lumber Products from Canada*, USA-CDA-2002-1904-02 (March 5, 2004) at 23 (affirming the Department's First Remand Redetermination) and the WTO Panel in *United States-Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (August 11, 2004) at paragraphs 7.323-7.324, stated that the Department's analysis in valuing the byproduct revenue offset was in accordance with the Act and the United States' obligations under the AD Agreement. Although neither of these decisions is precedential, or binding on this proceeding, we strongly disagree with Tembec's claim that the NAFTA Panel was "confused" by the facts or that the WTO Panel agreed in any manner with Tembec's position. The Department's methodology was found to be in accordance with law in the investigation and continues to be so in this second review. Accordingly, the Department has utilized these inter-divisional byproduct values from Tembec's books and records in its calculations where the transfer price was, within reason, lower than market price. Where the transfer price was higher than market price, we have used market price.

The even-handedness statement by the WTO Appellate Body in *US-Steel Products from Japan Appellate Body Report* involved applying the arm's length test to sales. The arm's length test on sales is performed in accordance with 19 CFR 351.403. In the case of byproducts, we are applying sections 773(f)(1)(A) and 773(f)(2) of the Act, which are related to cost of production and are not concerned with the arm's length value of sales. Abitibi and Tembec argued that in the first review the Department acknowledged that the even-handedness requirement applied to its conduct on wood chips and made explicit its intention to do so. We note that in the first review, in referring to the *US-Steel Products from Japan Appellate Body Report*, we were alluding to situations where there is little discernible difference between transfer price and market price in inter-divisional transactions. As explained above, in cases where there was little discernible

difference, we made no adjustment. For these final results, we have analyzed the respondents' sales of wood chips to other divisions separately from sales to affiliated companies, and with respect to inter-divisional transfers, we looked to market price to determine the reasonableness of the byproduct values, as explained above.

Weyerhaeuser

With respect to Weyerhaeuser's claim that SWL Canada's internal transfers of chips to the company's divisions are different from the sales to affiliated legal entities, the Department, as explained above, normally values internal transfers between divisions of the same company at cost. However, because byproducts, such as wood chips, do not have separately identifiable costs, it is necessary for us to test the reasonableness of the cost value Weyerhaeuser assigned to wood chips by comparing the amount charged between divisions to an arm's length price for wood chips. Because there were no unaffiliated sales of wood chips by SWL Canada in BC, we used the average price of wood chips sold by other respondents in this review to unaffiliated companies in BC. As a result, we found that the average price of wood chips sold by SWL Canada to other divisions was comparable to the average price of wood chips sold to unaffiliated parties by other respondents, and, accordingly, we made no adjustment to Weyerhaeuser's reported byproduct offset for the final results.

In the *Original Investigation Final Determination* and the *First Review Final Results*, the Department analyzed Weyerhaeuser's affiliated party sales of wood chips in BC without considering BCC's sales of chips to unaffiliated parties, because the Department recognized that the inclusion of BCC's unaffiliated party sales of the red cedar species in the market price analysis resulted in an inappropriate comparison. That is, we would be comparing a market price that includes red cedar, to affiliated party prices that did not. While we agree with petitioner that the prices for wood chips sales to unaffiliated parties by BCC in BC include species other than red cedar, we note that the record does not contain enough detail to enable the Department to reasonably segregate the prices for red cedar and other wood chips. Therefore, consistent with our decision in the *Original Investigation Final Determination* and the *First Review Final Results*, for the final results of the current administrative review, we excluded BCC's sales of wood chips to unaffiliated parties from our analysis.

Canfor / The Pas / Slocan

For the *Preliminary Results*, we analyzed chip sales for The Pas separately from those of Slocan and Canfor based on how their data was reported. However, this approach is inconsistent with our treatment in the *First Review Final Results*, in which we analyzed Canfor's and The Pas' chip sales on a combined level. In that review, as we are doing here, we collapsed the Canfor entities and treated them as one combined entity for antidumping purposes. Thus, we performed our chip analysis using the same approach (*i.e.*, one combined entity) for this review. As for Slocan, we note that it had chip sales only in the one month of the POR in which it was merged with Canfor. To be consistent with our analyses of other respondent entities (*e.g.*, Tembec's mills), for the final results, we used the chip prices for the combined entities (*i.e.*, Canfor, The Pas, and Slocan) to

analyze Canfor's affiliated chip sales.[108] As a result, we found that the average price of wood chips sold by the combined entities to affiliates was comparable to the average price of wood chips sold to unaffiliated parties by the combined entities, and, accordingly, we have made no adjustment to Canfor's (including The Pas and Slocan) reported byproduct offset for the final results.

We note that we were unable to analyze the chip sales separately for Canfor and Slocan in sub-period 1, and for the combined companies in sub-period 2, because the data was unavailable in the necessary format.

As for petitioner's argument regarding Canfor's trade sales, there is no basis for concluding, as the petitioner has, that "trade sales" are barter transactions, that they are included in Canfor's unaffiliated wood chip sales prices, and that they have tainted the values such that they cannot be used to establish market value. Even if these trade sales were barter transactions, we would include them as we did for Tembec in the *First Review Final Results*.[109] Accordingly, we have continued to include the trade sales in Canfor's affiliated wood chip analysis for the final results.

II. Company-Specific Issues

Issues Specific to Abitibi

Comment 13: Specify that the Abitibi Group Deposit Rate in This Review Also Extends to Produits Forestiers Saguenay Inc.

Abitibi states that in the *Federal Register* notice and the customs instructions Produits Forestiers Saguenay Inc. (PFS) should be included in the Abitibi Group, consistent with the Department's determination in *Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products from Canada*, 70 FR 30084 (May 25, 2005).

The petitioner did not comment on this issue.

Department's Position:

We agree with Abitibi and have included PFS in the Abitibi Group in the *Federal Register* notice. We will instruct CBP to apply the Abitibi Group's cash deposit rate to PFS. We have also added PFS to the draft liquidation instructions.

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[108] *See* Memorandum to the File from Sheikh Hannan, Senior Accountant, to Neal Halper, Director, Office of Accounting, Re: Tembec's Cost of Production and Constructed Value Calculation Adjustments for the Final Results, dated December 5, 2005.

[109] *See First Review Final Results* at Comment 7 (stating, "Tembec entered into these types of transactions with unaffiliated parties, and it stands to reason that these transactions were consummated at arm's-length. Simply because Tembec received merchandise instead of cash does not mean that a fair value exchange was not made.").

Comment 14: Clerical Error Allegation Specific to Abitibi

The petitioner asserts that when calculating Abitibi's total cost of production, the Department inadvertently used the variable TOTCOM instead of RTOTMCOM (the revised total cost of manufacturing which contains Abitibi's adjusted byproduct offset).

Abitibi agrees with the petitioner that a programming error excluded the implementation of the wood chip revenue adjustment; however, it maintains that the adjustment itself was inappropriate. *See* Comment 12 above.

Department's Position:

We agree with the petitioner. We have revised Abitibi's total cost of production to include the revised total cost of manufacturing which contains Abitibi's adjusted byproduct offset.

Issues Specific to Buchanan

Comment 15: Freight Expense Allocation Methodology

During the POR, Buchanan reported various movement expenses using the transaction-specific amounts as recorded in its normal books and records. It then reported an affiliate-specific variance to ensure that it had captured all expenses.

The petitioner argues that Buchanan has not demonstrated that actual transaction-specific reporting for its freight expenses is not feasible. The petitioner also states that the freight expense allocation methodology employed by Buchanan is inaccurate and distortive, and that the Department's ability to check the freight amounts has been hampered by Buchanan's failure to provide meaningful destination information. At a minimum, the petitioner contends that Buchanan could have reported the variances on a weekly or monthly basis. According to the petitioner, for the final results, Buchanan's allocation methodology should be rejected in favor of a methodology that more accurately allocates expenses and does not cause inaccuracy or distortion.

Buchanan states that it has satisfied the regulatory requirement to report movement expenses on the most specific basis possible, based on the company's normal books and records. Buchanan challenges the petitioner's argument that a weekly or monthly mill-specific variance is feasible and would be more accurate. Instead, Buchanan maintains that such a variance would not be feasible and would be less accurate than the current methodology because reporting on a weekly or monthly basis would have resulted in the company reporting numerous variances, which would then have to be manually reconciled to each mill's books and records to ensure completeness, and then Buchanan would have to assign the correct variance to its home market and U.S. sales databases. Buchanan argues that this methodology, in accordance with 19 CFR 351.401(g)(3), is not feasible, creates unjustified complexity, and could cause distortions. In short, Buchanan argues that its current reporting methodology, which was accepted and verified by the Department

in the previous review, is not inaccurate or distortive, and that all sales in all channels are accounted for, and that the transaction-specific amounts reported to the Department are accurate.

Department's Position:

We disagree with the petitioner and have continued to use the freight amounts employed in the *Preliminary Results* of this review. Record evidence indicates that Buchanan reported freight expenses in the most specific method that was feasible based on its accounting records, in accordance with 19 CFR 351.401(g)(3). As its starting point, Buchanan used the transaction-specific information which it kept in its normal books and records. While this information did not reflect the final actual transaction-specific freight expenses, Buchanan used a variance to ensure that all expenses were captured. During the course of this review, the Department requested information pertaining to Buchanan's freight expense calculation in numerous questionnaires. Buchanan provided the Department with detailed explanations of the issues in question.[110] Based on Buchanan's descriptions of its sales system, we find that it would have been extremely burdensome for the respondent to report actual transaction-specific freight expenses.

While the petitioner has requested that the Department use a different methodology, it has not pointed to any specific information on the record that would allow us to do so. It is not uncommon for respondents to have to allocate some of their expenses. The variance methodology devised by Buchanan to report actual cost is similar to the methodology used by respondents with standard cost systems, to report actual costs. Therefore, we believe this methodology to be reasonable and have no reason to alter Buchanan's reported freight expenses.

Comment 16: Buchanan's Draft Liquidation Instructions

Buchanan states that the Department should change the draft liquidation instructions to list all Buchanan's affiliated importers.

The petitioner did not comment on the draft liquidation instructions for Buchanan.

Department's Position:

We agree with Buchanan, and have changed the instructions to list all of Buchanan's affiliated importers. *See* Memorandum from Salim Bhabhrawala, International Trade Compliance Analyst, to Constance Handley, Program Manager, Re: Buchanan's Final Results Calculation Memorandum for the Antidumping Duty Order Review of Certain Softwood Lumber Products from Canada, dated December 5, 2005.

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[110] *See* Buchanan's March 15, 2005, Supplemental Section B Response at Supp B-17 - B18; *see also* Buchanan's March 16, 2005, Supplemental Response at Supp C-18.

Comment 17: Clerical Error Allegation Specific to Buchanan

The petitioner notes that when calculating the final results for Buchanan, the Department should use the most recently submitted cost file.

Buchanan did not comment on the cost file.

Department's Position:

We agree with the petitioner, and in calculating these final results have utilized the most recently submitted cost file.

Issues Specific to Canfor

Comment 18: Deposit Rate for Canfor

On April 1, 2004, the last month of the POR, Slocan Forest Products Ltd. (Slocan) and its subsidiaries were amalgamated within Canadian Forest Products Ltd. (Canfor). For the purposes of the *Preliminary Results*, the Department calculated three separate margins for Canfor: one each for Canfor and Slocan individually for the eleven months of the POR prior to the April 1, 2004, amalgamation, and a third for the post-amalgamation successor-in-interest, Canfor, for April 2004. The cash deposit rate established in the *Preliminary Results* is a weighted-average of the three calculated margins.

In its case brief, Canfor argues that the cash deposit rate for the new entity, after the amalgamation of Slocan and Canfor, should be based exclusively on the rate calculated for the post-amalgamation entity, Canfor (April 2004), because the Department treated post-amalgamation Canfor as a distinct entity by calculating a separate margin. Canfor argues that this decision made in the *Preliminary Results* demonstrates that the Department concluded that the pricing behavior of pre-amalgamation Slocan and Canfor should not be combined with the behavior of the successor-in-interest entity. Canfor argues that the Department's "reorganization of Canfor's reported data to isolate a single month of the POR is explicable only if the Department concluded that the post-merger Canfor was a different entity from the pre-merger entities."[111] Accordingly, Canfor argues that the deposit rate for future Canfor entries in these final results should be the rate calculated for the post-amalgamation period (April 2004).

In its rebuttal brief, the petitioner argues that the Department correctly calculated Canfor's deposit rate because the rate for the merged Canfor-Slocan entity is based on just one month of the POR. The petitioner argues that sales made by Canfor prior to the creation of its current form cannot simply be ignored because doing so would make the sales and pricing activity in the other eleven months of the POR irrelevant. Therefore, for the final results, the petitioner argues that the

[111] *See* Canfor's case brief, dated July 26, 2005, at pages 22-23.

Department should adhere to the margin calculation methodology it correctly employed in the *Preliminary Results* for a cash deposit rate on future entries made by Canfor.[112]

Department's Position:

Due to the fact that the deposit rate for the post-merger Canfor entity was calculated using only one month's sales data, coupled with the volatility of the lumber market, (as shown by the data submitted by the reviewed respondents), we believe that the margin calculated for this short time-period may not be an accurate indicator of Canfor's future behavior. In this case, we have a full year's worth of data from the two companies to which the post-merger Canfor is a successor-in-interest.[113] This data covers periods of high and low prices during all seasons and, therefore, we believe it is a more accurate indicator of future behavior than the data from a single month.

In addition, the Department's verification of Canfor revealed that, although Slocan and Canfor were amalgamated on April 1, 2004, combining the operations was an ongoing process through December 2004. The Department's verification report notes:

> Following April 1, 2004, Canfor began the process of amalgamating Slocan operations into Canfor. In the beginning, both companies continued as usual. In early June, the company decided to move its headquarters to a Canfor site in Vancouver and a operations system was selected by the end of July. Legacy Slocan facilities were fully integrated with the operations system at the end of December 2004.[114]

Because the combining of the two operations was a gradual process, we cannot be certain that the deposit rate calculated for just the final month of the POR would be a complete and accurate reflection of the post-merger company's sales, pricing, and cost activity. However, because it is unclear as to when and to what extent operations began to be affected by the change in management which occurred at the time of amalgamation, we have continued to calculate the margin using three separate programs, including one for the amalgamated companies covering only the final month of the POR. For the final results, we have adhered to the margin calculation methodology employed in the *Preliminary Results*.

Comment 19: Additional Company Names As Importers of Record

Canfor asserts that the Department should include Canfor Wood Products Marketing Ltd., Bois Daaquam Ltd., Winton Sales, and an additional importer in its liquidation instructions to CBP. Canfor notes that these are not new company names, but rather variations on the names of

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[112] *See* Petitioner rebuttal brief, dated August 9, 2005, at pages 14-15.

[113] *See* Section A Response from Canfor, dated September 28, 2004.

[114] *See* Verification of the Sales Response of Canfor Corporation, dated May 31, 2004, at page 5.

companies that the Department has already reviewed. Further, Canfor states that these companies names are included in documentation on the record.

The petitioner did not comment on this issue.

Department's Position:

We agree with Canfor. We have revised the liquidation instructions accordingly.

Comment 20: Canfor's Cost Reconciliation

The petitioner claims that Canfor did not provide a complete reconciliation of its COGS from the financial statements to the total COGS related to lumber operations. The petitioner asserts that this information is critical to the Department's understanding of Canfor's submitted costs because it would identify the items that were included in Canfor's financial statements, and excluded from Canfor's cost submission. The petitioner alleges that Canfor failed to adequately explain the full reconciling difference. The petitioner notes that the essential unreconciled difference was from Canfor Wood Products Marketing's (CWPM) POR COGS. The petitioner points out that freight and duty was one of the main reported reconciling amounts between CWPM's COGS and the internal lumber sales figure, but Canfor's financial statements show that freight and duty was not included in CWPM's COGS. The petitioner also claims that this reconciliation should be straightforward. However, it claims that Canfor purposefully submitted a reconciliation that included many extraneous items to confuse the record and convolute the reconciliation exercise. Because of this, the petitioner argues that the Department should revise Canfor's submitted costs to include the unreconciled difference between the company's financial statement COGS and its reported costs. The petitioner cites *Shrimp from Brazil* at Comment 17 in support of its contention.

Canfor asserts that all relevant expenses have been included in its reported costs. Canfor states that despite the petitioner's claim, CWPM's POR COGS includes freight and duty expenses. Canfor claims, however, that there is no reason that the CWPM's COGS should tie to the internal lumber sales figure in a straightforward manner, because these two figures measure very different things.

Canfor states further that its reconciliation is fully supported by the record. Canfor explains that in preparing its reconciliation it first had to reconcile total mill costs (including internal sales) to the COGS because internal sales are not included in revenue recorded in the financial statements. In addition, Canfor claims that there were additional reconciling items, including some double-counted items and some freight and duty expenses which it provided on the record, that reconcile the two figures. Canfor states that aside from providing a reconciliation from its mill statements to the financial statements, on a sample basis it also provided the complete income statement support and general ledger detail for one mill. Canfor asserts that this income statement and general ledger show how the information flows from the mill statement to the submitted costs.

Department's Position:

We agree with Canfor. We reviewed the reconciliation of Canfor's audited financial statements to its reported costs, noting the descriptions of the differences between the two. As the petitioner has pointed out, one of the major reconciling line items relates to freight expenses for CWPM, Canfor's sales company. After reviewing the financial statements, it is clear that Canfor changed its presentation of these movement and selling costs at the end of the POR, starting with the first quarter of 2004. This is apparent from the financial statement footnotes, which disclose the change in presentation. It is also apparent that the movement and selling costs were presented in the COGS section of the income statement.[115] In addition, we note that Canfor explained that CWPM's COGS are recorded on a delivered basis when shipped to an external customer through an inventory site. Canfor explained on the record that because of this it was necessary to remove those selling and movement costs in the reconciliation.[116] Therefore, contrary to the petitioner's claim, this is an appropriate reconciliation item.

We are not persuaded by the petitioner's argument that the reconciliation is unusable simply because it is complex. The nature of the cost reconciliation is that it can be done in many different ways to prove the same result: that the reported costs are properly derived from the costs included in the financial statements. Based on our review of record evidence, we find that the reconciliation methods used by Canfor with respect to its reported costs were not unreasonable. Therefore, this case is not consistent with the facts we reviewed in *Shrimp from Brazil*, where there was an unidentified reconciliation difference. As a result, we are not revising Canfor's reported costs for these reconciliation items for the final results.

Comment 21: Canfor's G&A Offsets

The petitioner asserts that Canfor has failed to demonstrate that certain of its offsets (for which Canfor claims proprietary treatment) to G&A expenses are appropriate. Regarding the first G&A item, the petitioner claims that the Department's longstanding practice has been to exclude investment income from COP. Therefore, the petitioner contends that the Department should disallow the first offset in question.

Regarding the second G&A item, the petitioner claims that the Department's practice is to exclude income or expense items related to prior periods from COP. The petitioner points to *Certain Steel Concrete Reinforcing Bars from Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination Not To Revoke in Part*, 69 FR 64731 (November 8, 2004) and accompanying Issues and Decision Memorandum at Comment 20 (describing that the Department's practice in calculating the G&A expense rate is to include only

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[115] *See* Canfor's September 28, 2004, Section A response, Exhibit 21, Canfor 1Q 2004 Quarterly Statement, n. 2.

[116] *See* Canfor's May 23, 2005, supplemental Section D response, Attachment 1, page 4.

expense and income items that relate to the current period). Therefore, the petitioner maintains that the Department should not allow the second offset in question.

Canfor claims that it has provided all requested information regarding these two G&A expense offset items. Regarding the first item, Canfor states that the petitioner's assertion is sheer conjecture, with no evidence to support it. Regarding the second item, Canfor insists that the record does not support the petitioner's claim that the item was from a prior period. In addition, Canfor states that even if the G&A item were created in a prior period, it would not necessarily be excluded based on that fact alone.

Department's Position:

After reviewing the record for the two items identified by the petitioner, we note that the first item appears to relate to investment activity. Our established practice is to exclude income or expenses related to investments.[117] Therefore, we have disallowed this investment income item from Canfor's G&A expenses offsets.

Regarding the second item, we note that it appears to relate to Canfor's financial expenses. We do not find that the record supports the petitioner's allegation that this item is from a prior period. However, we believe that it would be appropriate to move this income item to financial expenses. Therefore, for our final results, we have excluded this financial income from Canfor's G&A expense rate computation and have instead included it in the calculation of Canfor's financial expense rate. Due to the proprietary nature of the two items in question, please refer to our cost calculation memorandum for further discussion.[118]

Comment 22: Inclusion of Purchase Costs for Commingled Lumber

The petitioner contends that the acquisition prices of third-party lumber which Canfor resold from commingled inventories should be included in Canfor's weight-averaged costs for the final results. Because Canfor made sales from commingled inventories, the petitioner asserts that it is impossible for the Department to adhere to the statutory requirement that sales of purchased finished merchandise be excluded from the margin calculation. The petitioner argues that the methodology used by the Department in the *Preliminary Results* to remove the estimated portion of the sales that was not produced by the respondents does not eliminate any sales from Canfor's sales database. Instead, asserts the petitioner, the methodology reduces sales quantities based on the lumber purchased from third parties and thereby merely reduces the impact commingled sales have on the margin calculation.

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[117] *See Notice of Final Results of Antidumping Duty Administrative Review: Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe From Brazil*, 70 FR 7243 (February 11, 2005) and accompanying Issues and Decision Memorandum at Comment 8; *see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Taiwan*, 67 FR 62104 (October 3, 2002) and accompanying Issues and Decision Memorandum at Comment 6.

[118] *See* the *Canfor Final Results Cost Memo*.

The petitioner quotes *Certain Pasta from Italy: Final Results of Antidumping Duty Administrative Review*, 61 FR 30326 (June 14, 1996) (*Certain Pasta from Italy 1996*) which stated that section 771(16) of the Act "prohibits the Department from using sales of merchandise produced by persons other than the respondents {producers} in the calculation of normal value." The petitioner asserts that where sales of purchased lumber are included in the determination of normal value and U.S. sales prices, the purchase price should be included in the weighted-average costs of production. The petitioner points to *Certain Pasta from Italy 1996* as an example of a similar situation where third-party merchandise was commingled in U.S. inventories and the Department used the respondent's acquisition prices of the third-party merchandise in determining the respondent's overall weighted-average costs.

The petitioner states that the Department requires respondent companies with multiple production facilities which produce subject merchandise to report a weighted-average cost of production for the multiple facilities. The petitioner asserts that the same rule should apply in situations of third-party commingled inventories.

The petitioner recognizes that the Department declined to include Canfor's third-party lumber acquisition costs in Canfor's cost of production in the previous administrative review.[119] However, the petitioner contends that the Department's rationale at that time did not acknowledge that prices used in Canfor's margin calculation included the effects of third-party lumber.

The petitioner cites section 773(f)(1)(A) of the Act, which states that "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 production and sale of the merchandise." The petitioner contends that the term "normally" implies flexibility in the Department's calculation methodologies. Furthermore, the petitioner states that the term "exporter or producer" allows the inclusion of costs other than the producer's costs. Finally, the petitioner argues that the term "the merchandise" in this context includes the prices for Canfor's product, and the prices for the third-party product included in Canfor's U.S. and home market sales data.

Canfor did not comment on the weighting out methodology for commingled inventories.

Department's Position:

Consistent with our methodology in the *Preliminary Results* and in the previous administrative review (*see First Review Final Results at* Comment 8), we have not included the acquisition costs of third-party lumber resold by Canfor in its costs of production for the final results. The Act explicitly calls for the use of the production costs of the subject merchandise in the antidumping calculation. Specifically, section 771(16)(A) of the Act defines the foreign like product as "{t}he 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." Also, section

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[119] *See First Review Final Results* at Comment 8 (where the Department found that the use of acquisition costs in the calculation of the cost of production is not prescribed by law).

771(16)(B)(i) of the Act, refers to merchandise "produced in the same country and by the same person as the subject merchandise." Furthermore, section 771(28) of the Act states that an exporter or producer "means the exporter of the subject merchandise, the producer of the subject merchandise, or both where appropriate." Finally, for purposes of section 773 (the normal value calculation), section 771(28) states, the term "exporter or producer" includes "both the exporter of the subject merchandise and the producer of the same subject merchandise to the extent necessary to accurately calculate the total amount incurred and realized for costs, expenses, and profits in connection with production and sale of that merchandise." Thus, the use of acquisition costs, rather than production costs, in the calculation of the cost of production would not be consistent with the directive of these provisions in the Act.

The petitioner correctly points out that the acquisition costs of purchased pasta were included in *Certain Pasta from Italy 1996*. However, the Department reviewed this practice in a more recent segment of that proceeding and stated that "{a}lthough we agree that the acquisition cost of the purchased pasta was accepted in previous pasta reviews, this treatment was inconsistent with the law and with the treatment in other cases."[120]

We disagree with the petitioner's claim that the Department should have obtained a COP for the third-party lumber and in the absence of such, the acquisition costs should serve as a proxy. As noted in *Certain Pasta from Italy 2004*, "{t}he Department has determined that it is necessary to use the producer's cost of production to accurately calculate the total costs and expenses incurred in producing subject merchandise. Furthermore, when a COP inquiry has been initiated, section 773(b)(1) of the Act clearly directs the Department to '...determine whether, in fact, such sales were made at less than the cost of production.' An acquisition price for a finished product does not translate into a cost of production."

Further, while the Department has on occasion obtained a third-party producer's COP when there was no transformation of the input merchandise within the scope of the order by the respondent,[121] this case does not warrant such an approach since Canfor produced significant quantities of the merchandise under consideration. *See also Certain Pasta from Italy 2004*, where the Department stated that the respondent "produced all of the CONNUMs and provided its own production costs for all the CONNUMs sold in the U.S. and home market," therefore, the Department "rel{ied} solely upon Zaffiri's cost of producing pasta."

We disagree with the petitioner that the Department's method at the *Preliminary Results* failed to eliminate the effect of purchased lumber on Canfor's margin. The Department's method eliminates the effect by reducing the weighting by the purchased quantity. The reported sales data

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[120] *See Final Results of the Sixth Administrative Review of the Antidumping Order and Determination Not to Revoke in Part: Certain Pasta from Italy*, 69 FR 6255 (February 10, 2004) (*Certain Pasta From Italy 2004*) and accompanying Issues and Decision Memorandum at Comment 42.

[121] *See Fresh and Chilled Atlantic Salmon from Norway: Final Results of Antidumping Duty Administrative Review*, 61 FR 65522 (December 13, 1996) and accompanying Issues and Decision Memorandum at Comment 1.

for Canfor's U.S. and home market sales represent only Canfor's sale prices. The data do not reflect the sale prices of the third-parties which produced the lumber.

The petitioner's claim that the purchase of finished product from third-parties is analogous with multiple facilities is unfounded. The situations where different locations of the same company produce the same merchandise is vastly different from one company buying finished goods from another company. In cases where there are multiple locations of the same company, we require the company to report its cost of producing the merchandise under consideration. The purchase price of finished goods does not, by definition, reflect the cost of producing the purchased product.

Thus, consistent with the law and the prior administrative review, we have not included the acquisition costs of purchased lumber in Canfor's cost of production for the final results.

Comment 23: Logging Services from Affiliates

Canfor claims that the Department's adjustment to increase its cost of purchased logging services from its affiliate to the price of its unaffiliated logging services is unwarranted. Canfor argues that the price paid to the affiliated logging provider was justified based on its location. Canfor claims that the affiliate's price was ranked seventh of the prices for all of Canfor's 14 suppliers, which means it was not priced below market value. Canfor claims that the difference in price paid to affiliated and unaffiliated parties was such a small percentage of the standard deviation of the average unaffiliated price that the difference is not significant enough to warrant an adjustment.

The petitioner counters that based on the respondent's location theory, the affiliated logger's prices should be higher, and not lower than the prices charged by the unaffiliated suppliers. Therefore, the petitioner maintains that the Department's adjustment to Canfor's logging costs for the *Preliminary Results* was appropriate. Due to the proprietary nature of the location theory, please refer to our cost calculation memorandum for further discussion.[122]

Department's Position:

We agree with petitioner. Section 773(f)(2) of the Act states that a transaction directly or indirectly occurring between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If such a transaction is disregarded, and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.[123] Accordingly, for the *Preliminary Results* we compared the market price of all of

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[122] *See* the *Canfor Final Results Cost Memo*.

[123] *See* section 773(f)(2) of the Act.

Canfor's purchases of logging services during the POR to the price of logging services obtained from Canfor's affiliate. Because there were numerous transactions with unaffiliated parties, we believe the entire pool of Canfor's reported unaffiliated purchases reasonably reflects the average market price.

With regard to Canfor's statistical argument comparing the standard deviation of the market price to the affiliated price, the Department has discretion to analyze and adjust affiliated-party transactions, regardless of the standard deviation from the market price. Section 773(f)(2) of the Act states that the Department may disregard affiliated-party transactions if "in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in the sales of merchandise under consideration in the market under consideration." That is, the Act allows for the Department to make an adjustment regardless of the size of that adjustment. Thus, we disagree with Canfor that an adjustment is not warranted because of the size of differences in prices paid to affiliated and unaffiliated parties. As a result, we have continued to apply our adjustment to Canfor's affiliated logging prices for these final results.[124]

Comment 24: Lakeland's G&A Offsets

Canfor argues that the Department has double-counted the management fees that it received from Lakeland, by excluding the income from Canfor's reported G&A expense, while including the equal expense amount in Lakeland's G&A expenses. Canfor explains that it does not question whether the payments should be included in the G&A expense rates, however, the respondent asserts that the fees must be treated consistently. To do so, the respondent argues that the Department must either exclude the management fees and related income from Canfor and Lakeland's G&A expense rates, or include them in the rates. Canfor also argues that when the Department moved the sundry income from Canfor's financial expense rate to its G&A expense rate, it erroneously included it in the G&A expense rate as an expense rather than as income. Canfor asserts that the Department should correct this for the final results.

The petitioner did not comment on the Lakeland management fees argument. Regarding the sundry income for which Canfor has offset G&A expense, the petitioner claims that it is not supported by the record as an appropriate G&A expense offset. The petitioner points to the Section D exhibit which shows that certain amounts included in the other income detail do not relate to the general expenses of the company.[125] Therefore, petitioner states that the Department should limit the sundry income that is used to reduce Lakeland's G&A expenses for the final results.

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[124] *See* the *Canfor Final Results Cost Memo*.

[125] *See* Canfor's April 29, 2005, supplemental Section D response at Exhibit 19.

Department's Position:

With regard to the first point, we note that contrary to Canfor's claim, we did not exclude the management fee income from Canfor's G&A expense rate in our *Preliminary Results*. Therefore, the management fee argument made by Canfor is baseless. On the other hand, with regard to sundry income, we agree with the respondent that we misapplied our correction and that the sundry income should be treated as an offset to the G&A expenses, not additional expenses in our calculations. However, we agree with the petitioner that the classification of the majority of the sundry income relates to sales adjustments and not general expenses of the company. Therefore, we have offset sundry income against G&A expenses only for the amount that relates to Canfor's G&A expenses.[126]

Comment 25: Lakeland's Interest Income

Canfor claims that Lakeland's negative financial expenses arose not from foreign exchange gains and losses, but were actually the result of interest income that Lakeland earned during the past year. Canfor argues that the Department erroneously capped Lakeland's financial expense rate in the *Preliminary Results*. Even though Canfor acknowledges that the Department frequently caps interest income offsets, it believes that doing so in this instance is inappropriate for two reasons. First, Canfor asserts that the interest income was earned from normal operations, not as a separate investment business and, therefore, should be allowed as part of Lakeland's G&A activities. Canfor asserts that interest income earned through operations should not be treated in a different manner from interest expense incurred through operations. Second, Canfor points out that a portion of the interest income earned by Lakeland was from a loan to an affiliated party. Because the loan is an affiliated party loan, Canfor argues that if the interest income is removed from Lakeland's G&A expense rate calculation, then the corresponding expense must be removed from the financial expenses of that affiliate -- The Pas.

The petitioner argues that the Department has properly limited Lakeland's interest income offset. The petitioner states that the Department's longstanding practice has been to limit the amount of short-term interest income allowable as an offset to the financial expenses.[127] The petitioner contends that there is no reason for the Department to alter its treatment of short-term interest income in this proceeding. Additionally, the petitioner claims that Lakeland has not proven that the interest income is short-term in nature and, therefore, should not be allowed to offset Canfor's financial expenses. Lastly, the petitioner argues that the Department should not remove the affiliated loan financial expenses from The Pas' financial expense rate calculation because it relates to long-term debt.

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[126] *See* the *Canfor Final Results Cost Memo*.

[127] *See Certain Pasta from Turkey: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Antidumping Duty Order in Part*, 67 FR 298 (January 3, 2002) and accompanying Issues and Decision Memorandum at Comment 3.

Department's Position:

When determining what is appropriate to include or exclude in G&A or interest expenses, the Department examines the nature of the activity and the relationship between this activity and the operations of the company. The interest income in question appears to relate to short-term interest income, not long-term interest income.[128] However, short-term interest income is appropriately classified under financial expenses and not as G&A expenses. Our practice has been consistent on this point.[129] As discussed in Comment 9 above, financing is a cost to a company, so if a company earns enough financial income that it recovers all of its financial expense, then that company did not have a resulting cost for financing during that period and the financing cost used for COP and CV should be zero. Therefore, it would be inappropriate for the company to reduce other components of the cost of production by the net financing income.

In this case, the short-term interest income is reported as an offset to Lakeland's financial expenses and the interest expenses related to the loan are included in The Pas' financial expenses. Because Canfor does not prepare consolidated financial statements that include its collapsed entities in this proceeding, it has reported company-specific financial expense rates. In this situation, based on the information on the record, it is appropriate to include the income and expenses related to this loan in each entity's financial expense rate. Therefore, we have continued to offset Lakeland's financial expenses with the short-term interest income related to the loan, limited to the amount of financial expenses, and we have also continued to include the expenses related to the loan in The Pas' financial expenses.

Comment 26: Clerical Error Allegations Specific to Canfor

Canfor argues that the Department should correct certain ministerial errors in its *Preliminary Results* margin calculations, including 1) calculating the correct assessment rate for sales made by Daaquam by changing the reported importer of record for certain sales; 2) correcting packing expenses to eliminate double-counting with the cost of manufacturing for Canfor as well as making a packing cost correction as noted at verification for Slocan; 3) applying the appropriate profit rate to each of the three separate sub-periods during the POR; 4) correctly deducting home market inventory carrying costs; 5) assigning home market rebates correctly, and; 6) treating Slocan's futures profits as revenue rather than as an expense.

In its rebuttal brief, the petitioner argues that the Department should not revise its calculated assessment rate for Canfor's Daaquam sales because Canfor has not provided information on the record demonstrating that Daaquam was the importer of record for the sales at issue. The

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[128] *See* Canfor's April 19, 2005, supplemental Section D response at Exhibit D-19.

[129] *See Final Results of Stainless Steel Sheet and Strip in Coils from Germany*, 69 FR 75930 (December 20, 2004) and accompanying Issues and Decision Memorandum at Comment 2; *see also Stainless Steel Sheet and Strip in Coils From Mexico; Final Results of Antidumping Duty Administrative Review*, 70 FR 3677 (January 26, 2005) and accompanying Issues and Decision Memorandum at Comment 11.

petitioner also argues that the Department should reject Canfor's proposed change to its reported packing expenses because Canfor has not demonstrated that double-counting occurred during the POR with respect to packing expenses. Specifically, the petitioner argues that no record evidence demonstrates that the amount of "other packing costs" which Canfor claims was double counted was actually included in its COGS. The petitioner also argues that the Department should classify Slocan's submitted U.S. indirect selling expenses (futures profits) as Canadian incurred expenses, not U.S. incurred expenses, because Slocan has no U.S. sales offices and the personnel related to these selling activities were located in Canada. Finally, the petitioner argues that the Department should revise an aberrational entered value reported by Canfor during the POR. Canfor did not comment on this issue.

Department's Position:

We agree with Canfor in part. With regard to Daaquam, while we can identify the Daaquam sales, information gathered at verification does not definitively indicate that Daaquam was the importer of record for sales made after July 4, 2003 (the last date before Daaquam was integrated into Canfor's sales system). However, our purpose is to ensure that we collect the correct amount of duties. Because the Daaquam's sales made after July 4, 2003, were included with Canfor's sales in determining Canfor's assessment rate, we will instruct CBP that any sale produced by a member of the Canfor Group and imported by Daaquam will, effective July 5, 2003, be assessed at the Canfor rate. This will ensure that the correct amount of duties is collected whether Canfor or Daaquam is the importer of record of the sales in question.

With regard to Canfor's packing expense allegation, Canfor's responses clearly demonstrate that the total packing cost included in the databases, is not the same as the total packing cost deducted from the cost of manufacturing. The *Verification of the Sales Response of Canfor Corporation*, at 35, attributes this difference to labor costs. Because the lumber is packed at the mill, we find it highly unlikely that the labor cost associated with packing would not be included in Canfor's COGS (and, therefore, the cost of manufacturing Canfor reported to the Department, which reconciled to its COGS). Therefore, to avoid double-counting we have revised Canfor's packing costs to be exclusive of labor. In addition, we have made the correction to Slocan's packing costs noted at verification.

We have treated Slocan's futures profits as revenue and used them to offset indirect selling expenses (including inventory carrying cost) incurred in the United States, capped by the amount of those expenses. This is consistent with *the 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, (April 24, 2004) at page 4. We disagree with the petitioner's position that these profits should be treated as an offset to home market indirect selling expenses. Because the profits were earned on the Chicago Mercantile Exchange, they are clearly associated with economic activity in the United States.

With regard to Canfor's other allegations, we agree that these were errors and have corrected them in the final results.

We also agree with the petitioner that Canfor did report an aberrational entered value for one of its sales during the POR, and have revised the calculation of this sale for the purposes of these *Final Results.*

Issues Specific to Tembec

Comment 27: Names of Tembec Companies

Tembec asserts that the Department should include Tembec Industries Inc., Spruce Falls Inc., Marks Lumber Ltd., Produits Forestiers Temrex Limited Partnership, and Les Industries Davidson Inc. in its liquidation instructions to CBP. Tembec states that its customs brokers may have identified these companies on the customs entry documents a the exporter of Tembec's merchandise during the POR.

The petitioner did not comment on this issue.

Department's Position:

We agree with Tembec and have included the above listed companies' names in our liquidation instructions to CBP, with respect to this second administrative review.

Comment 28: Byproduct Offset Adjustment Factor

The petitioner contends that for the *Preliminary Results*, the Department appropriately adjusted the reported byproduct revenue earned by Tembec's lumber producing mills of a particular province for the sale of wood chips to affiliated customers, and states that in the past the Department has made similar adjustments. In support of this statement, the petitioner cites Comment 11 of the *Original Investigation Final Determination* and Comment 7 of the *First Review Final Results*. However, the petitioner claims that the Department erred in calculating the adjustment factor in the *Preliminary Results*, and for the final results should correct this error. According to the petitioner, the Department calculated the adjustment factor by multiplying the total quantity of wood chips sold to affiliated customers by the difference between the average affiliated and unaffiliated wood chip prices of the particular province, and expressed this adjustment value as a percentage of the total byproduct revenue reported in the cost database of the province specific lumber producing mills. However, the petitioner asserts that the adjustment value should be expressed as a percentage of the total actual byproduct revenue earned and recorded in the province-specific lumber producing mills' normal books and records, because the byproduct revenue reported in the cost database is different from the actual byproduct revenue earned by the lumber producing mills. Thus, the petitioner maintains that the correct adjustment factor should be calculated by dividing the adjusted value by the total actual byproduct revenue earned by the lumber producing mills of the particular province.

Tembec did not comment on this issue.

Department's Position:

We agree with the petitioner. For a majority of Tembec's lumber producing mills, the byproduct revenue reported in the cost database is different from the actual byproduct revenues earned because of inter-mill transfers of lumber products. Specifically, for the inter-mill transfers of lumber products the actual cost of the mill that produced and shipped the product was blended with the receiving mill's internal cost of production to obtain a cost for each type of product (*i.e.*, green rough, dry rough, green dressed, and dry dressed). This resulted in a double counting of the inter-mill transferred lumber products quantities, costs, and associated byproduct revenue in the cost database, once for the shipping mill and again for the receiving mill. Thus, the computation of the adjustment factor based on the byproduct amounts reported in the cost database results in a diluted adjustment because of the double-counting in the database. That is, we had to eliminate the double-counting before we could calculate the adjustment factor. Therefore, for the final results, we computed the adjustment factor based on the actual byproduct revenue earned by the lumber producing mills of the particular province.

In addition, we note that the record evidence shows that the mills located in the province in question only had inter-mill transfers of lumber products between mills within that same province. Thus, the facts surrounding the specific province in question in this review give merit to the petitioner's assertion that it is appropriate to calculate the adjustment factor as a percentage of the total byproduct revenue earned by the lumber producing mills of this particular province because the byproduct revenue adjustment factor also applies to the internally transferred lumber products of the particular province.

Comment 29: Adjustment of Variable Wood Costs

Tembec contends that for the *Preliminary Results*, the Department inappropriately adjusted the variable wood costs reported in the cost database. According to Tembec, the Department made an erroneous conclusion that Tembec has either overstated or understated the value of its external log sales that were used in the calculation of the reported wood costs for each lumber producing mill, because the cost of external log sales reported in Appendix D-1 (*i.e.*, the log cost worksheet of each sawmill) did not agree with the corresponding amount reported in the reconciliation worksheet (*i.e.*, the reconciliation of the COGS from each of the sawmill's financial statements to the costs reported in the cost database). The net adjustment was an increase in the reported wood costs. Tembec refers to the Memorandum from Sheikh M. Hannan, Senior Accountant, to Neal M. Halper, Director, Office of Accounting, Re: Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results for Tembec Inc., dated May 31, 2005, at page 2 and Attachment 4. Tembec claims that the amounts reported in Appendix D-1 represent Tembec's actual cost of its external log sales while the amounts reported in the reconciliation worksheet represent the revenues generated from these sales. Tembec maintains that the reported wood costs in the cost database were based on the amounts reported in Appendix D-1 and not on the amounts reported in the reconciliation worksheet. As such, Tembec asserts that it has not overstated or understated the log sale amounts used in calculating the wood costs reported in the

cost database. Therefore, for the final results Tembec argues that the Department should not adjust Tembec's reported variable wood costs.

Tembec explains that in its normal accounting system, proceeds from log sales are treated as an offset to log inventory. As such, according to Tembec, any profit or loss from external log sales is included in the calculation of the monthly consumption amount and its subsequent derivation of production costs. Tembec notes that it does record a "presentation" journal entry of an equal amount to "sales" and to "cost of goods sold" to account for the log sale proceeds. According to Tembec, the increase in cost of sales does not increase the cost of production because it is merely a presentation entry. The amounts appearing under the "Raw Material Sales" line item in the cost reconciliation worksheet represent the presentation entry that is eliminated from cost of sales in Tembec's normal accounting system. Tembec reiterates that it has eliminated the profit and loss on log sales from the consumption amount and used this adjusted consumption amount as the basis for calculating the cost of production reported in the cost database.

Tembec further explains that the lumber operations of four of its sawmills (*i.e.*, Opasatika, LaSarre N, Chapleau, and Senneterre) are integrated with the forest operations. These sawmills prepare combined financial statements for the forest and lumber operations. Logs from the forest unit are transferred to the lumber unit at internal prices which are simultaneously included as revenue and cost of sales in the financial statements. For purposes of reporting costs to the Department, Tembec adjusted these transfer prices to reflect the costs, and included the differences between the internal prices and the actual cost in the amounts appearing under the "Raw Material Sales" line item in the cost reconciliation worksheet. In addition, Tembec contends that for three sawmills (*i.e.*, Timmins, Kapuskasing, and Hearst) the cost of external log sales reported in the paper copy of Appendix D-1 and used by the Department to calculate the adjustments are different from the amounts reported in the electronic version of the Appendix D-1. The amounts in the electronic version agree with the amounts reported in the reconciliation worksheet.

The petitioner acknowledges that Tembec's explanation for the difference between the external log sale amounts reported in Appendix D-1 and the corresponding amounts reported in the reconciliation worksheet appear plausible, except for the four sawmills with integrated lumber and forest operations. The petitioner is skeptical of Tembec's explanation that the amounts appearing under the "Raw Material Sales" line item in the cost reconciliation worksheet for the four integrated sawmills represent the difference between internal transfer prices and costs. The petitioner contends that the Department for the final results should not adjust Tembec's reported sawmill variable wood costs except for the four integrated sawmills.

According to the petitioner, for two of the four integrated sawmills and their associated timberlands, Tembec reported no external log sales in the sawmill log cost worksheet and in the timberland unit log cost worksheet (*i.e.*, Appendix D-1). However, for these two integrated sawmills, Tembec reported significant log sale revenues in the reconciliation worksheet. The petitioner further contends that for the other two integrated sawmills, the difference in the log cost and reconciliation worksheet amounts are so significant that it is not possible for any sawmill to

earn or incur that amount of profit or loss. The petitioner maintains that for the four sawmills with integrated lumber and forest operations, the Department for the final results should continue to adjust the reported variable wood costs.

Department's Position:

We disagree with Tembec. As set forth in section 773(f)(1)(A) of the Act, the Department must assess the reasonableness of a respondent's cost allocation methodology. Before this can be done, however, the Department must ensure that the aggregate amount of costs incurred to produce the subject merchandise was properly reflected in the reported costs. The reconciliation of the COGS from the financial statement to the costs reported in the cost database is the starting point in assessing that the aggregate amount of the costs reported in the cost database captures all costs incurred by the respondent in producing the subject merchandise during the period under examination. This is done by performing a reconciliation of the respondent's submitted cost data to the company's audited financial statements. The reconciliation of the COGS from the financial statements to the submitted per-unit costs in the cost database, assists the Department in identifying and quantifying those differences in order to determine whether it was reasonable for the respondent to exclude certain costs for purposes of reporting COP and CV. In addition to the overall cost reconciliation, in the lumber proceeding, we requested that each respondent prepare a separate schedule (*i.e.*, Appendix D-1) that shows the log inventory movement for each timberland unit (*i.e.*, beginning inventory, harvested logs, purchased logs, sold logs, logs delivered to sawmills, and ending inventory) and sawmill (*i.e.*, beginning inventory, logs received from timberland units, purchased logs, sold logs, logs consumed in the production of lumber, and ending inventory).

In the *Original Investigation Final Determination*, the Department determined that any profit earned or loss incurred from external log sales should not be included in the reported costs of the subject merchandise.[130] In this second review, Tembec provided the costs of external log sales in the sawmill cost log worksheets (*i.e.*, Appendix D-1). In Tembec's normal accounting system, the profit and loss resulting from external log sales is included in the calculation of the lumber production costs. Therefore, the COGS in its internal accounting system includes the profit and loss from external log sales. However, for purposes of preparing the audited financial statements, Tembec records a "presentation" journal entry of an equal amount to "sales" and to "cost of goods sold" to show the proceeds (*i.e.*, the revenues) from external log sales, thus the resulting COGS in the income statement represents both the COGS for logs and lumber products and does not include any profit. In other words, the "presentation" journal entry eliminates the profit and loss from external log sales from the COGS presented in the audited financial statements.

As noted above, the starting point for the overall reconciliation is the COGS from the audited financial statement. Therefore, Tembec's reconciliation of the COGS from the audited financial statement to the costs reported in the cost database, started with the COGS from the audited financial statement, which did not include a profit or loss on external log sales due to the

[130] *See Original Investigation Final Determination* at Comment 28.

"presentation" journal entry (*i.e.*, the COGS represented the actual cost of both logs consumed for lumber production and logs sold). As such, starting with the COGS from the financial statement, Tembec reconciled this amount to the reported costs in the cost database. The reconciliation included several reconciling items, one of which was a deduction of the log revenue generated from external log sales. However, by deducting the revenues generated from the external log sales, instead of the actual costs of external log sales, as a reconciling item in the reconciliation worksheet, Tembec has effectively included the profit earned or loss incurred from external log sales in the costs reported in the cost database. In order for the reported COM in the cost database to be exclusive of profit or loss on external log sales, Tembec should have deducted the cost of external logs sold as a reconciling item, and not the revenues generated from the external log sales. If the reconciling item included the cost of external logs sold, the resulting cost of external log sales reported in Appendix D-1 would have agreed with the corresponding amount reported in the reconciliation worksheet. Accordingly, for the final results, to exclude the profit or loss on external log sales from the costs reported in the cost database, we have continued to adjust the variable wood costs reported in the cost database by including the cost of external log sales instead of the revenues generated from the external log sales as a reconciling item in the reconciliation worksheet.

With respect to Tembec's argument that the amounts appearing under the "Raw Material Sales" line item in the cost reconciliation worksheet for the four integrated sawmills (*i.e.*, Opasatika, LaSarre N, Chapleau, and Senneterre) reflect the differences between the internal prices and costs of logs received from the timberlands, we disagree. In response to a supplemental question issued by the Department, Tembec stated that the "Consumption Adjustment" (*i.e.*, another reconciling item in the reconciliation worksheet), not the "Raw Material Sales," reflects the differences between the internal prices of logs transferred from the timberlands and recorded in the sawmills' financial statements and the costs incurred by the timberlands to produce these logs.[131] We note from the reconciliation worksheet submitted in Exhibit 75 that there are consumption adjustment amounts for these four integrated sawmills. As such, Tembec's argument has no merit. Thus, consistent with the *Preliminary Results*, as facts available, pursuant to section 776(a) of the Act, we have continued to adjust Tembec's variable wood costs, for two out of the four sawmills in question, to reflect the cost of external log sales as reported in Appendix D-1.

However, for two of the remaining four integrated sawmills in question, Tembec reported no external log sales in Appendix D-1. Yet, in the reconciliation worksheet Tembec claims that these two integrated sawmills had external log sales. Thus, for these two integrated sawmills, we have adjusted the variable wood cost by including the amount claimed as "Raw Material Sales" in the reconciliation worksheet.

Finally, Tembec's contention that the cost of external log sales reported in the paper copy of Appendix D-1 and used by the Department to calculate the adjustments is different from the amounts reported in the electronic version of the Appendix D-1 for three sawmills (*i.e.*, Timmins,

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[131] *See* Tembec's March 11, 2005, first supplemental Section D response at page 14 and the most current Reconciliation Worksheet in the May 3, 2005, second supplemental Section D response at Exhibit 75.

Kapuskasing, and Hearst) is without merit. For these three sawmills, we compared the cost of external log sales reported in the paper copy of Appendix D-1 submitted in Exhibit 79 of the May 3, 2005, supplemental Section D response to the corresponding cost of external log sales reported in the electronic version, and noted that there are no differences. As such, the issue of using the cost of external log sales reported in the paper copy versus the cost of external log sales reported in the electronic version is moot.

Comment 30: G&A Expense Rate - Consolidated vs. Producer

Tembec explains that in the Section D response, it reported the G&A expense ratio based on the actual data contained in its 2003 fiscal year consolidated financial statements pertaining to the production of the subject merchandise. According to Tembec, section 773(b)(3)(B) of the Act requires the Department to calculate G&A expenses for cost of production and constructed value purposes based, as closely as possible, on actual data pertaining to the production and sale of the foreign like product. Later, Tembec provided an alternative G&A expense rate calculated based on the financial statements of its five lumber producing companies and the unconsolidated data of Tembec Industries Inc., in response to a specific request from the Department. According to Tembec, the unconsolidated data of Tembec Industries Inc. was not based on the financial statements but was derived from a manual accumulation of G&A expenses at each company facility that was not owned by a separate subsidiary. Tembec contends that for the *Preliminary Results*, the Department's use of the alternative G&A expense rate, instead of a G&A expense rate calculated based on the consolidated financial statements resulted in an artificial inflation of the G&A expenses. Tembec argues that for the final results, the Department should use the G&A expense rate calculated based on the consolidated financial statements.

Tembec maintains that the Department has a long standing practice of using audited financial statements as the basis for the G&A rate calculation. In support of this statement, Tembec cites *Notice of Final Results and Partial Recision of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Taiwan*, 67 FR 76721 (December 13, 2002) and accompanying Issues and Decision Memorandum at Comment 10. Tembec also cites to *Notice of Final Results of Antidumping Duty Administrative Review: Silicon Metal from Brazil*, 63 FR 6899, 6906 (February 11, 1998). Tembec points out that in the *Original Investigation Final Determination*, the Department rejected Tembec's forest product group G&A expense rate because there was no clear evidence that the data had been audited or was kept in accordance with Canadian GAAP. However, Tembec notes that similar to the *First Review Final Results*, the Department in this second review is also relying on unaudited data that is neither from the financial statements nor in conformance with Canadian GAAP. Tembec asserts that there are no audited unconsolidated financial statements for Tembec Industries Inc.[132] Tembec Industries Inc. does have an audited consolidated financial statement, but the Department refused to use it for the G&A expense rate calculation. Instead, the Department required Tembec to seek to create an

[132] According to Tembec, Tembec Industries Inc. prepares unconsolidated financial statements for tax purposes and are not audited. These financial statements are not useful for purposes of deriving G&A expense rate, because these financial statements, in addition to G&A expenses, also contain selling expenses (*i.e.*, SG&A).

equivalent to a financial statement for Tembec Industries Inc. excluding its separately incorporated subsidiaries.

Tembec further contends that the Tembec Industries Inc. data derived manually from various company facilities grossly overstates the G&A expenses because they fail to eliminate intra-company adjustments that are required for financial statement preparation in accordance with GAAP. In addition, using the Tembec Industries Inc. data in calculating the G&A expense rate results in an overstatement of the G&A expenses because all the corporate G&A expenses are allocated to the facilities that make up the unconsolidated Tembec Industries Inc., and none of the expenses are allocated to the facilities owned by the separately incorporated subsidiaries.

Tembec alleges that the Department rejected Tembec's audited consolidated financial statements in favor of an unconsolidated construct because the consolidated financial statements include data from entities that do not produce softwood lumber. However, Tembec explains that the Department itself contradicted its reasoning by using the consolidated Davidson Inc. financial statements in calculating Tembec's G&A expense rate. Davidson Inc. owns two subsidiaries, Davidson Industries Limited and Davidson Chili S.A. Davidson Industries Limited is a sales office in Ireland and Davidson Chili S.A. is a management company in Chile, and neither produces softwood lumber. Tembec argues that the Department is in error in calculating G&A expenses for purposes of an antidumping case on softwood lumber using data from two companies that do not produce the subject merchandise.

In addition, Tembec contends that for the *Preliminary Results*, the Department inappropriately included in the G&A expenses the write down of assets recognized by one of the softwood lumber producing companies which was classified as an "unusual item" in the audited financial statements. According to Tembec, this amount relates to the removal of fixed assets from services of a paper board facility.[133] Tembec argues that if this amount was not classified as an "unusual item" it would have been included in the COGS of the paperboard facility and excluded from the reported cost of the subject merchandise. Tembec reiterates that this amount is not related to the production of softwood lumber and is not a general expense applicable to the company as a whole. Therefore, for the final results the Department should not include the write down of fixed assets in the G&A expense rate calculation.

The petitioner states that in the first review of this proceeding, Tembec made similar arguments. The Department did not agree with Tembec, and did not use the G&A expense rate based on the consolidated financial statements as requested by Tembec. Instead, the Department calculated Tembec's G&A expense rate based on the unconsolidated financial statements of Tembec's six softwood lumber producing entities, and has properly explained its long standing practice of calculating the G&A expense rate. In support of this statement, the petitioner cites the *Original Investigation Final Determination* at Comment 23. The petitioner contends that for the *Preliminary Results*, the Department has appropriately calculated Tembec's G&A expense rate

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[133] *See* Tembec's 2003 fiscal year audited consolidated financial statements submitted at Exhibit 13 of Tembec's Section A Response (September 28, 2004) at notes 17 on page 74.

based on the unconsolidated financial statements of the six softwood lumber producing entities including Tembec Industries Inc., and for the final results, the Department should continue to do so because this practice is reasonable. In addition, the petitioner claims that Tembec has provided no new arguments that would persuade the Department to do otherwise.

The petitioner refutes Tembec's claim that the Department used unaudited data that is not from financial statements by pointing out that the data was from a schedule provided by Tembec which separately reported each company's financial results and reconciled the sum of each company to its audited consolidated financial statements. With respect to the use of Davidson's consolidated financial statements, the petitioner counters that the fault lies with Tembec and not the Department. In response to the Department's specific request to provide an alternative G&A expense rate based on the unconsolidated financial statements of the six subject merchandise producing companies, Tembec used Davidson's consolidated financial statements. According to the petitioner, the exclusion of Davidson's consolidated data will not have a material effect on the alternative G&A expense rate.

The petitioner further contends that the Department should include the write down of fixed assets amount in the G&A expense rate calculation, because the Department has consistently treated closure costs or expenses associated with asset write-offs to represent costs to the company as a whole, regardless of whether the assets were associated with the production of subject or non-subject merchandise. According to the petitioner, the fact that the write-off at issue is related to assets used for the production of non-subject merchandise is not relevant, because G&A expenses are those expenses which relate to the general operations of the company as a whole, rather than to the production process. What is relevant, is the fact that the write-off was incurred by a lumber producing entity. The petitioner claims that it is the Department's practice to include in G&A expenses those items that relate to the general operations of the company, even though some of these items can be traced to a particular product. In support of this claim, the petitioner cites *Corus Engineering Steels, Ltd. v. United States*, Slip Op. 03-110 at 18 (CIT August 27, 2003).[134] The petitioner maintains that for the final results, the Department should adhere to its long standing practice and continue to include the write down of fixed assets amount incurred by a lumber producing company in the G&A expense rate calculation.

Department's Position:

We disagree with Tembec that the Department should calculate the G&A expense rate based on its consolidated financial statements. Section 773(b)(3)(B) of the Act states that for purposes of calculating cost of production, the Department shall include "an amount for selling, general, and administrative expenses based on the actual data pertaining to the production and sales of the foreign like product by the exporter in question." When the antidumping law does not prescribe a

[134] According to the petitioner, the CIT upheld the Department's decision to include closure costs related the production of non-subject merchandise in the G&A expense rate calculation of the respondent company, as once assets are decommissioned, the company as a whole has to bear the expenses associated with the closure because the assets are no longer productive.

specific method for calculating the G&A expense rate, the determination of a reasonable and appropriate method is left to the discretion of the Department. Because there is no bright-line definition in the Act of what a G&A expense is or how the G&A expense rate should be calculated, the Department has, over time, developed a consistent and predictable practice for calculating and allocating G&A expenses. This reasonable, consistent, and predictable method is to calculate the rate based on the company-wide G&A costs incurred by the producing company allocated over the producing company's company-wide cost of sales and not on a consolidated, divisional, or product-specific basis. The Department normally computes the G&A expense rate of a company based on its unconsolidated operations because G&A at the producer level better represents the actual G&A expenses incurred by a company producing the merchandise under consideration.[135] In this case, the Department calculated the respondent's G&A expense rate based on the respondent's unconsolidated financial statements. Also, *see PET Resin from Indonesia* at Comment 15. In this case too, the Department calculated the respondent's G&A expense rate based on the respondent's unconsolidated financial statements. The Department's normal methodology for calculating a respondent's G&A expense ratio is both reasonable and predictable.

In the first administrative review of this proceeding, Tembec made similar arguments. In this second administrative review, Tembec did not provide any new arguments that would persuade the Department to abandon its long standing practice of computing the G&A expense rate based on the unconsolidated operations of a company. Therefore, consistent with the Department's practice in the *First Review Final Results*, for the final results of this review, we continue to use the G&A expense rate based on the unconsolidated financial statements of the six lumber producing entities (*i.e.*, Excel Forest Products, Spruce Falls Inc., Davidson Inc., Temrex Limited Partnership, Marks Lumber, and Tembec Industries Inc.).[136]

Further, we disagree with Tembec's claim that similar to the *First Review Final Results*, the Department in this second review is also relying on unaudited data that are neither from any financial statements nor in conformance with Canadian GAAP. We note that the financial statements of the six legal entities involved in the production of subject merchandise and also the financial statements of the rest of Tembec's subsidiaries and joint ventures are audited in conjunction with Tembec's audited consolidated financial statements. *See* Tembec's 2003 fiscal year audited consolidated financial statements submitted at Exhibit 13 of Tembec's Section A Response (September 28, 2004) at 53 and 60. Moreover, Tembec provided a schedule at Exhibit 33 of Tembec's March 11, 2005, first supplemental Section D response, which reported each company's financial results, separately, and the sum of each company in column 1 of the schedule agrees with the corresponding amount reported in the 2003 fiscal year audited consolidated financial statements submitted at Exhibit 13 of Tembec's September 28, 2004, Section A

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[135] *See Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from South Africa*, 67 FR 35485 (March 20, 2002) and accompanying Issues and Decision Memorandum at Comment 6.

[136] *See* Comment 23 of the *Original Investigation Final Determination*.

response. In addition, the data used to calculate Tembec's G&A rate is from the six lumber producing entities financial statements included in the schedule provided at Exhibit 33.

The Department acknowledges that it used the consolidated Davidson Inc. financial statements, and did not allocate the corporate G&A expenses for the Tembec G&A expense rate calculation. However, while the Department specifically requested G&A expense rates based on unconsolidated statements, Tembec did not provide such a rate for Davidson, Inc. In the February 11, 2005, first supplemental Section D questionnaire issued by the Department to Tembec, we included the following question:

> It appears from exhibit 16 of the section D response that the reported G&A expense ratio was calculated based on the amounts reported in Tembec's 2003 fiscal year audited consolidated financial statements. Provide a G&A expense rate based on the amounts reported in the 2003 fiscal year unconsolidated financial statements of the legal entities that produced softwood lumber during the POR. For guidance, please see the Memorandum from Sheikh Hannan, Senior Accountant, to Neal Halper, Director, Office of Accounting, Re: Cost of Production and Constructed Value Calculation Adjustments for the Final Results (December 13, 2004) in the first Antidumping Duty Administrative Review of Certain Softwood Lumber from Canada for Tembec Inc.

In reply to this question, Tembec stated:

> The requested alternative G&A expense ratio calculation is provided in Exhibit D-54.

Thus, we used the Davidson data from Exhibit 54 to calculate the G&A expense rate, where we requested Tembec to use the unconsolidated financial statements. In the first administrative review of this proceeding, Tembec made the same argument. We made it clear in the *First Review Final Results* that we requested Tembec to provide the selling and G&A expenses information of the unconsolidated Davidson Inc. (*i.e.*, without its two consolidated subsidiaries), which Tembec was unable to do. In this second review, we note that the Department requested Davidson unconsolidated data for calculating the G&A expense rate; however, Tembec again did not provide the unconsolidated financial statements of Davidson Inc. As such, under section 776(a) of the Act, we used the consolidated Davidson G&A expense data in Tembec's company-wide G&A expense rate calculation as facts otherwise available. However, we urge that Tembec use Davidson's unconsolidated financial statements to calculate the G&A expense ratio for future proceedings.

In the *First Review Final Results*, we agreed with Tembec's argument regarding the allocation of Tembec Industries Inc. corporate expenses. Instead of including all the corporate headquarters G&A expenses incurred by Tembec Industries Inc., we allocated the total corporate headquarters

G&A expenses to all of Tembec Industries Inc.'s consolidated subsidiaries and joint ventures. In the current review, however, we do not have the necessary information to allocate the corporate G&A expense to all of its consolidated subsidiaries and joint ventures. In the supplemental questionnaire, we indicated that Tembec should seek guidance from the *First Review Final Results* calculation memorandum to calculate the alternative G&A expense ratio.[137] In its response, Tembec did not mention that the submitted alternative G&A expense rate was calculated without the corporate G&A expense allocation, nor did Tembec provide necessary information for the Department to determine if an allocation of the corporate expenses was appropriate for this proceeding.

With respect to Tembec's argument that the assets removed from service (*i.e.*, the write-off of fixed assets) are "unusual items" and should be excluded from the G&A expense rate calculation, we disagree. This type of expense that is associated with the removal of production fixed assets from service is routinely incurred by large manufacturing companies and is related to their general operations. This item is neither "unusual in nature" nor "infrequent in occurrence" for a manufacturing company. As outlined in *Floral Trade Council of Davis, CA v. United States*, 16 CIT 1014, 1016 (Dec. 1, 1992) (*Floral Trade Council*), the Department may exclude certain expenses from its calculation considered to be extraordinary. In order for an event to be considered extraordinary it must be "unusual in nature and infrequent in occurrence."[138] For example, in *Floral Trade Council*, because of a sudden and unexpected collapse in the water tables, the well used to irrigate flowers for one respondent was unable to produce enough water for the farm. The shortage of water resulted in the loss of a large number of flowers. In addition, another respondent's plants were damaged by a virus previously unknown in Colombia. The CIT upheld the Department's determination that both of these situations were unique, infrequent, and unusual in nature for purposes of the G&A calculations. The write-down of fixed assets is not a similarly "unusual or infrequent" event.

Additionally, we disagree with Tembec that if this write-off of fixed assets was not classified as an "unusual item" in its audited financial statements, it would have been classified as a manufacturing cost for the paperboard facility and included in the COGS. Write-offs of fixed assets are not a manufacturing cost because once the assets are removed from service they cease to be operational. In contrast, the costs associated with assets currently being used in production are recognized as manufacturing costs and become part of product costs through depreciation expense. On the other hand, routine disposal or sale of non-production assets that are removed from service relate to the general operations of the company as a whole, and thus, the Department's approach is to allocate the gain or loss over the entire operations of the producer.

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[137] *See* Cost of Production and Constructed Value Calculation Adjustments for the Final Results for Tembec (December 12, 2004).

[138] *See Notice of Final Determination of Sales at Less Than Fair Value; Low Enriched Uranium from the United Kingdom, Germany and the Netherlands*, 66 FR 65886 (December 21, 2001) and accompanying Issues and Decision Memorandum at Comment 23. An event is "unusual in nature" if it is highly abnormal, and unrelated or incidentally related to the ordinary and typical activities of the entity, in light of the entity's environment. An event is "infrequent in occurrence" if it is not reasonably expected to recur in the foreseeable future.

Specifically, it is the Department's practice to include gains and losses incurred on the routine disposition and write-offs of fixed assets in the G&A expense ratio calculation. *See PET Resin from Indonesia* at Comment 13. The Department follows this practice because it is expected that a producer will periodically replace or write-off production equipment and, in doing so, will incur miscellaneous gains or losses and write-off expenses. Writing off and replacing production equipment is a normal and necessary part of doing business.[139] The gains or losses on the routine disposal or sale of assets and the expense incurred on the write-off of routine fixed assets relate to the general operations of the company as a whole because they result from activities that occurred to support on-going production operations. In short, such a write-off is a cost of doing business. Thus, the Department's treatment for these types of transactions is to allocate them over the entire operations of the producer.[140] As such, for the final results, we continued to include the write-off of assets amount recognized by one of Tembec's softwood lumber producing companies in the G&A rate calculation.

We note in contrast to the Department's practice related to the write-off and disposal of fixed assets, we do not include gains and losses incurred on the non-routine[141] disposition of fixed assets in the G&A expense ratio calculation.[142] [143] The respondents are in the business of producing and selling commercial goods to customers, they are not in the business of manufacturing and selling entire production facilities or business units. For further discussion on routine and non-routine disposition of fixed assets, *see* Comment 8 of this decision memorandum.

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[139] For example, the sale of an old machine that was replaced by a new machine, discarding of existing machines due to modernization or any other reasons, and replacement of equipment for changes in technology are considered routine. The respondent's facility continues to produce the product after the change is made and the facility remains an asset of the respondent.

[140] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil*, 65 FR 5554, 5582 (February 4, 2000); *see also Notice of Final Results of Antidumping Duty Administrative Review: Oil Country Tubular Goods from Argentina*, 68 FR 13262 (March 19, 2003) and accompanying Issues and Decision Memorandum at Comment 4.

[141] For example, the sale of an entire production facility, sale of a business unit, and sale of a business division, are considered non-routine. These sales differ from the sale of a piece of equipment, even large pieces of equipment. These non-routine sales encompass many pieces of production equipment, the buildings, land and fixtures. These are transactions that change the organization and structure of the company and its operations.

[142] *See PET Film, Sheet and Strip from Korea* at Comment 1. In this case, the Department excluded the gain realized by the respondent through the sale of its converted film division from the G&A rate calculation because the gain represents an item that is unrelated to respondent's normal business operations.

[143] *See Notice of Final Results of Antidumping Duty Administrative Review and Final Determination To Revoke the Order in Part: Certain Polyester Staple Fiber From Korea*, 69 FR 61341 (October 18, 2004) and accompanying Issues and Decision Memorandum at Comment 2. In this case, the Department excluded the losses incurred by the respondent from the sales of three business units which constituted separate line of business.

Comment 31: Clerical Error Allegations Specific to Tembec

Tembec claims the Department made three clerical errors. First, the Department performed an erroneous currency conversion on the reallocated price, which was already in U.S. dollars. Second, the Department failed to recalculate domestic indirect selling expenses for U.S. tally sales in the margin calculation program; and third, the Department incorrectly referenced certain Tembec mills in it indirect selling expense recalculation in the margin and comparison market programs.

The petitioner did not comment on these allegations. The petitioner claims that the Department made additional clerical errors in calculating Tembec's margin. First, the Department did not include the byproduct offset or green lumber purchase costs in the variable manufacturing costs; and second, the Department failed to include advertising expenses in U.S. direct selling expenses and CEP direct selling expenses.

Tembec did not comment on these allegations.

Department's Position:

We agree with both Tembec and the petitioner that the Department made the listed clerical errors. Thus, we have made these changes in the final results.

Issues Specific to Tolko

Comment 32: Log Purchases from Affiliated Parties

Tolko argues that the Department should not have increased its reported cost of logs purchased from affiliated parties because the Department incorrectly compared the average affiliated party purchase price to the average unaffiliated party purchase price for all British Columbia mills. Tolko asserts that this province-wide approach distorts the comparison between Tolko's log purchase prices from affiliated and unaffiliated parties. Tolko argues that the arm's-length comparison should be performed on a mill-specific basis. Tolko points out that its operations are organized such that each woodlands division supplies logs to one Tolko mill. Further, Tolko notes that each mill's log supply is managed separately because such factors as the wood quality, stumpage rates, and logging costs associated within a province may be very different.

Tolko asserts that the majority of its log purchases from affiliated parties were made by the mill in the northern region of British Columbia and for that mill, the average price that Tolko paid for purchases from affiliates was higher than the average purchase price from unaffiliated parties. In addition, Tolko contends that the average purchase price paid to affiliated parties at one of the mills in the southern region was higher than average purchase price paid to unaffiliated parties at that mill, at both mills in that mill's region, and at all three mills in the southern region. Tolko claims that the volume purchased at the other mill in the southern region was incorrectly included

in the list of log purchases from affiliated parties by mill because it was actually purchased by the woodlands unit and supplied to the plywood mill and not to the softwood lumber mill. Tolko goes on to note that, in any case, the affiliated quantity reported for this mill was minor and any adjustment would have no effect on Tolko's reported cost.

Tolko notes that in the *Original Investigation Final Determination* of this proceeding, the Department stated that "wood costs vary significantly by region due to different stumpage and harvesting costs."[144] Tolko argues that, in this review, the regional wood cost differential is clear from the prices Tolko paid even to its unaffiliated parties.

Finally, Tolko asserts that in other cases the Department has compared input prices from affiliated and unaffiliated parties on a region-specific and mill-specific basis in assessing the arm's-length nature of the affiliated purchases. In particular, Tolko claims that in *Hot-Rolled Steel from Japan*, the Department compared electricity prices that one respondent paid to affiliated and unaffiliated parties on a mill-specific basis and not on an aggregate basis for all mills.[145]

The petitioner argues that the Department rejected virtually the same argument made by Tolko in the first administrative review of this proceeding, and that the Department should do so here for the same reasons.[146] The petitioner argues that the Department's use of a province-specific arm's-length test is reasonable and should be maintained for the final results of this review. The petitioner notes that when the province-specific test is employed, the log prices of Tolko's affiliated purchases are not representative of arm's-length prices. Therefore, according to the petitioner, an adjustment to those prices is required, as the Department did in the *Preliminary Results*.

Department's Position:

We agree with the petitioner. This issue arose in the final results of the last review (*see First Review Final Results* at Comment 28), and the facts have not materially changed from that review. Pursuant to section 773(f)(2) of the Act, transactions between affiliated parties may be disregarded if the transfer price does not fairly reflect the amount usually reflected in the market under consideration. In applying this provision, the Department's established practice is to compare the transfer price paid by the respondent to affiliated parties for production inputs to the price paid to

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[144] *See Original Investigation Final Determination* at Comment 11.

[145] *See Hot-Rolled Steel from Japan at* 24349.

[146] *See First Review Final Results* at Comment 28.

unaffiliated suppliers or, if this is unavailable, to the price at which the affiliated parties sold the input to unaffiliated purchasers in the market under consideration.[147]

The question in this case is how "the market under consideration" in section 773(f)(2) of the Act is defined. The Department's general practice is to define the market under consideration as the entire home market or third country. However, for elements of value that go into the calculation of cost, we have recognized that there are wide variations in wood chip prices in Canada, and have defined "the market under consideration" for wood chips as the province in which the sales occurred. Specifically, in *the Original Investigation Final Determination* at Comment 11, the Department established that a meaningful comparison of wood chip prices was necessary on a provincial, rather than a country-wide basis due to significant regional variations in wood chip and log costs. Accordingly, the Department performed its comparison of wood chip prices on a province-wide basis to account for these regional variations. In addition, while we recognize there may be some variations in prices within a province, separate analyses have only occurred where species and wood quality were demonstrated to have affected the price. For instance, we recognized that the inclusion of red cedar species in the analysis of wood chips distorted the average price of wood chips sold in British Columbia. *See* Comment 12 of this memorandum, which covers wood chip byproduct revenue.

Tolko is in essence asserting that each mill is its own market. This does not make logical or economic sense. For example, if three companies had mills within a short distance of each other, under Tolko's proposal, each mill would be its own market, when in reality the mills would be in competition with each other. Markets are affected by regional conditions and not the conditions at only one mill. Therefore, we are defining "the market under consideration" for Tolko's logs as the province. This is consistent with our treatment of wood chips (which are made from logs, and therefore have the same cost and price fact patterns as logs), for which we compare affiliated and unaffiliated prices on a province-wide basis.

While we continue to find evidence of variations in log prices between provinces in this review, we do not find that there is enough variation in log market prices between Tolko's mills within a province to warrant a mill-specific comparison of affiliated and unaffiliated log prices. We find there is insufficient evidence on the record in Tolko's case to demonstrate that species and wood quality differ substantially between Tolko's mills within British Columbia to warrant making a mill-specific comparison. Therefore, in accordance with section 773(f)(2) of the Act and the Department's established practice, we have compared the average price paid by Tolko for logs purchased during the POR from affiliated suppliers in British Columbia to the average purchase price paid to unaffiliated suppliers in British Columbia. In doing so, we have determined that

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[147] *See*, *e.g.*, *Certain Polyester Staple Fiber from Korea: Final Results of Antidumping Duty Administrative Review*, 68 FR 59366 (October 15, 2003) and accompanying Issues and Decision Memorandum at Comment 5; *see also Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Mexico*, 67 FR 55800 (August 30, 2002) and accompanying Issues and Decision Memorandum at Comment 13.

Tolko's purchases of logs from its affiliated suppliers were not at arm's-length prices. We, therefore, adjusted these prices in our *Preliminary Results* and final results.

Further, we find that Tolko's reference to *Hot Rolled Steel from Japan-LTFV* is misplaced. In *Hot Rolled Steel from Japan-LTFV*, the issue of whether the purchases of affiliated inputs should be compared on a region-specific or mill-specific basis was not addressed. Rather, the respondent argued that the Department should make the comparison based on different levels of distribution of its electricity suppliers. Thus, we find that the proper analysis is to compare Tolko's purchases of logs from affiliated and unaffiliated parties on a province-wide basis.

Comment 33: Clerical Error Allegations Specific to Tolko

Tolko maintains that the Department made a clerical error in its recalculation of credit expense for sales with price adjustments when it failed to convert the payment and shipment date fields to SAS format. The petitioner did not comment on this.

The petitioner alleges that the Department made two clerical errors in calculating Tolko's margin. First, the petitioner claims that the Department did not include Tolko's reported U.S. warranty expenses in the definition of CEP direct selling expenses. Second, the petitioner states that the Department inadvertently neglected to adjust for Tolko's U.S. dollar denominated diversion and switching charges incurred in the U.S. market. Tolko did not comment on these allegations.

Department's Position:

We agree with Tolko and the petitioner and have made these changes for the final results.

Issues Specific to Weldwood

Comment 34: Allocation of Wood Costs

In the *Preliminary Results*, the Department allocated Weldwood's woodlands costs using a volume based methodology. The petitioner argues that for the final results, the Department should use the mill-specific value-based wood costs recorded in Weldwood's normal books and records. Citing 19 U.S.C. 1677b(f)(1) (A) (*i.e.*, section 773(f)(1)(A) of the Act), the petitioner maintains that unless the costs recorded in a company's normal books and records are somehow unreasonable or distorted, the Department is required to employ such costs in its dumping margin.

The petitioner argues that the Department has not made a finding that the mill-specific wood costs recorded by Weldwood in its normal books and records were distorted or unreasonable. The petitioner argues that the transfer price-based mill-specific wood costs recorded by Weldwood in its normal books and records are likely more accurate and product-specific than the average volume-based wood costs employed by the Department. The petitioner contends that this is the reason the Department employed wood costs resulting from a value-based allocation scheme for

Weyerhaeuser's BC coastal operations in both the *Original Investigation Final Determination* and the *First Review Final Results*.[148]

The petitioner maintains that the Department has generally employed average, volume-based wood costs for respondents in this review, because 1) most of the respondents employ such volume-based costs in their normal books and records; and 2) most of the companies have no reasonable methodology for deriving value-based mill-specific wood costs. The petitioner argues that this is not the case for Weldwood and that differently situated companies can and should be afforded different treatment when that different treatment will provide a more accurate company-specific weighted average dumping margin.

Weldwood maintains that it used a value-based methodology in its normal books and records to record log costs and that its books and records accurately reflect its log costs. However, Weldwood states that it was recently acquired by West Fraser, which uses a volume-based log cost methodology and in accordance with West Fraser's practice, the Weldwood legacy woodlands units will be using a volume-based log cost methodology going forward. Therefore, Weldwood does not take a position regarding the Department's application of a volume-based log cost methodology in this second administrative review.

Department's Position:

We disagree with petitioner that for this review the Department should use Weldwood's value allocation based mill-specific wood costs as recorded in its normal books and records. Section 773(f)(1)(A) of the Act provides that the Department is to normally rely on data from a respondent's normal books and records where those records are prepared in accordance with home country GAAP and reasonably reflect the costs of producing the merchandise. However, it also states that the Department shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the proceeding provided that such allocations have been historically utilized by the exporter or producer. In this proceeding, we note that all log inventory values are recorded in Weldwood's normal books and records at the timberland units and not at the sawmills. In Weldwood's normal books and records each sawmill sources its logs from a designated timberland unit and logs are transferred from a timberland unit to its corresponding sawmill based on an average cost methodology (*i.e.*, a volume-based allocation). However, the transfer price of logs that are transferred between the timberland units are based on internally set values. Although logs transferred between timberland units are value-based on internally set formulas, logs harvested by each timberland unit are recorded at the average cost.[149] Thus, both volume and internally set formulaic value-based

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[148] *See* Memorandum from Ernest Gziryan, Accountant, to Neal Halper, Director, Office of Accounting, Re: Weyerhaeuser Preliminary Cost Analysis Memo; *see also First Review Final Results* at Comment 2.

[149] *See* Memorandum to the File from Mark Todd, Accountant, to Neal Halper, Director, Office of Accounting, Re: Verification Report on the Cost of Production and Constructed Value Data Submitted by Weldwood of Canada, Ltd., dated May 31, 2005 (*Weldwood COP/CV Verification Report*), at pages 9 and 22-23.

allocation methodologies are used in Weldwood's normal books and records. As such, it's essential to note that in considering each of these allocation methods that the purpose of the allocation is to assign costs to the logs transferred between the timberland units that capture the cost differences, if any, associated with the logs in order to accurately calculate the COM of lumber produced at each sawmill.

In considering the proper allocation of log costs between Weldwood's timberland units we reviewed the basis used for the allocation and the type and species of logs transferred. Accordingly, we found that Weldwood's transfer pricing methodology between timberland units was not based on prevailing market values, but rather on an internally generated formula.[150] Thus, although the methodology was verified (*i.e.*, the formula) the actual transfer prices were not verifiable because they were set based on internal negotiations that were not linked to prevailing market prices or other supporting documentation. Moreover, we found that Weldwood's transfer pricing formula was inconsistent. Specifically, we found that the transfer pricing formula differed by timberland unit for similar logs being transferred to the same end-user. We also found that the transfer prices differed for similar logs from the same timberland unit to different end-users.[151]

As a result, we have concluded that the allocation basis employed by Weldwood in its normal books and records does not accurately and reasonably capture the costs associated with logs harvested by Weldwood's timberland units. Thus, for these final results, the Department continues to calculate log transfer prices between timberland units based on an average cost (volume-based) methodology because the product mix of logs harvested by Weldwood's timberland units are primarily of similar quality and species.

The petitioner's comparison of Weldwood's timberland operations to Weyerhaeuser's BC coastal operations is misplaced. Weyerhaeuser's BC coastal division is 1) geographically situated differently from other respondents; 2) it harvests logs of a more diverse range and species; and 3) it sells a significant volume of logs. *See First Review Final Results* at Comment 26. Weldwood's timberland units are similar to Weyerhaeuser's interior division and the other respondents in this proceeding. Specifically, Weldwood's timberland units are situated either in the BC interior or in the Ontario province, their harvested logs are primarily of a single species, and Weldwood consumes the vast majority of its harvested logs. Thus, the petitioner is wrong in its assertion that Weldwood's timberland operations are comparable to Weyerhaeuser's BC coastal operations.

Comment 35: Clerical Error Allegation Specific to Weldwood

In its case brief, Weldwood claims that the Department ran an outdated program in the sequence of programs used for the cost of production calculation. Weldwood requests that the Department use the most updated file for the final results. It also requests that the Department transfer

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[150] *See Weldwood COP/CV Verification Report* at page 22 and at Exhibit 3, page 951.

[151] *See Id.*

changes identified in *Weldwood's Preliminary Results Memo*[152] from the outdated program to the updated program.

The petitioner did not comment on this issue.

Department's Position:

We agree with Weldwood. We have incorporated the changes identified in Appendices B and E of Weldwood's case brief into the final results. *See Weldwood's Final Results Memo*.[153]

Issues Specific to West Fraser

Comment 36: Order is Not Valid for West Fraser and Should be Revoked

West Fraser asserts that on June 9, 2005, the NAFTA panel reviewing the *Original Investigation Final Determination* affirmed a *de minimis* margin for West Fraser and ordered that the Department must revoke the antidumping order for West Fraser as though a negative LTFV margin had been entered *ab initio*. West Fraser also argues that the NAFTA Panel found that, to the extent West Fraser's antidumping duty deposits remained unliquidated, West Fraser was entitled to a refund of those deposits. West Fraser further claims that in ruling on one of the United State's Motions for Reconsideration, the NAFTA panel reaffirmed this decision on July 21, 2005. Citing the above NAFTA panels and *Asociacion de Exportadores de Flores v. United States,*[154] West Fraser argues that the Department may not assess AD duties pursuant to an administrative review. Therefore, West Fraser requests that the Department terminate the review as to West Fraser and order CBP to refund, with interest, all cash deposits of estimated AD duties for all West Fraser entries covered by this review.

The petitioner did not comment on this issue.

Department's Position:

We disagree with West Fraser. Pursuant to the June 9, 2005, NAFTA Panel decision, the Department submitted its third remand redetermination to the Panel on July 11, 2005. In that

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[152] *See* Memorandum to the File from Shane Subler, International Trade Compliance Analyst, to Constance Handley, Program Manager, Re: Preliminary Results for Antidumping Duty Order Review of Certain Softwood Lumber Products from Canada, dated May 31, 2005 (*Weldwood's Preliminary Results Memo*).

[153] *See* Memorandum to the File from Shane Subler, International Trade Compliance Analyst, to Constance Handley, Program Manager, Re: Final Results for Antidumping Duty Order Review of Certain Softwood Lumber Products from Canada, dated December 5, 2005 (*Weldwood's Final Results Memo*).

[154] *See Asociacion Colombiana de Exportadores de Flores v. Unites States*, 916 F.2d 1571, 1577 (Fed. Cir. 1990).

remand, the Department recalculated West Fraser's antidumping duty margin, as it did for all other respondents, using the comparison methodology set out in the *Section 129 Determination*. Pursuant to that remand redetermination, West Fraser's recalculated margin is no longer *de minimis*. Accordingly, we continue to include West Fraser in the antidumping duty order.

Issues Specific to Weyerhaeuser

Comment 37: Level of Trade for Weyerhaeuser's VMI sales

The petitioner contends that the Department should determine that Weyerhaeuser's vendor managed inventory (VMI) sales made by SWL in Canada and in the United States are at the same advanced level of trade (LOT). In the *Preliminary Results*, the Department ruled that despite the fact the same selling functions were performed for the VMI sales in both markets, the U.S. VMI sales were at a less advance LOT because the selling functions related to them were performed in the United States and, therefore, backed out of the CEP. According to the petitioner, in examining the LOT at which VMI sales were made in both markets, the Department should have examined the underlying indirect selling expenses reported by Weyerhaeuser for the VMI sales.

In making its argument, the petitioner cites to the Preamble to the Department's regulation where it states "{a}n analysis of selling activities alone is insufficient to establish the LOT. . . Substantial differences in the amount of selling expenses associated with two groups of sales also may indicate that the two groups are at different levels of trade."[155] Further, the petitioner maintains that the Department has examined the amount of indirect selling expenses in determining LOT in prior cases. In *Hot-Rolled Steel from Japan 2002*,[156] the Department relied on a quantitative analysis of selling expenses as a "rule of thumb" to ensure that the claims made for different LOTs were warranted. In *Shrimp from Thailand*,[157] the Department denied a respondent's claim that U.S. CEP sales were made at a different LOT than sales in the comparison market after, in part, examining the amount of indirect selling expenses associated with the respondent's sales.

The petitioner points out that the home market indirect selling expenses factor Weyerhaeuser reported for both markets is identical, indicating that the similar selling functions were performed for both markets. If those selling functions were not identical, the petitioner maintains that Weyerhaeuser should have adjusted its home market indirect selling expense ratio to be

[155] *See Antidumping Duties; Countervailing Duties*, 52 FR 27,296, 27,371 (May 19, 1997) (*the Preamble*).

[156] *See Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan: Final Results of Antidumping Duty Administrative Review*, 67 FR 2408 (January 17, 2002) (*Hot-Rolled Steel from Japan 2002*) and accompanying Issues and Decision Memorandum at Comment 1.

[157] *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand*, 69 FR 76,918 (January 17, 2002) (*Shrimp from Thailand*) and accompanying Issues and Decision Memorandum at Comment 5.

significantly higher than the ratio for U.S. indirect selling expenses incurred in Canada. Accordingly, the petitioner argues that the Department should determine that both home market and U.S. VMI sales made by SWI are made at the same advanced LOT.

Weyerhaeuser counters that SWI's U.S VMI sales are properly classified as a less advanced LOT than its home market VMI sales. According to Weyerhaeuser, SWL Western (located in the United States) manages the U.S. VMI sales, resulting in SWI Canada performing only limited selling functions with regard to those sales, a fact recognized by the Department in the *Preliminary Results*, as well as the *First Review Final Results*.[158] Given that the underlying facts have not changed since the first review, Weyerhaeuser contends that there is no reasonable basis for the Department to alter its LOT classification in this review.

Weyerhaeuser maintains that the Departments regulations, the preamble and Department precedent all support the conclusion that the Department may find that multiple LOTs exist even in the presence of a single indirect selling expense ratio, especially when that ratio is based on the most reasonable allocation methodology available to a respondent.[159] Consistent with past segments of the proceeding Weyerhaeuser states that for its SWL unit, it reported a single indirect selling expense ratio for all North American sales because the expenses related to all of its selling activities are reported at a single cost center. Further, Weyerhaeuser states that the Department has verified this methodology twice and confirmed that it is reasonable.[160]

In order to identify LOTs for CEP sales, Weyerhaeuser points out that the Department considers only the selling functions reflected in the price after the deduction of expenses and profit under section 772(d) of the Act. Further, 19 CFR 351.412(c)(2) states that the Department "will determine that sales are made at different levels of trade if they are made a different marketing stages." According to Weyerhaeuser, nothing in the statute or regulations suggests that the Department must rely on indirect selling expenses ratios to determine LOT. In addition, Weyerhaeuser claims that the petitioner's cite to the Preamble is taken out of context and, when read completely, the Preamble makes it clear that LOT is to be determined in the context of the seller's whole scheme of marketing.

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[158] *See First Review Final Results* at Comment 38.

[159] *See*, *e.g.*, *Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago*, 70 FR 12648 (March 15, 2005) (*Wire Rod from Trinidad and Tobago*) and accompanying Issues and Decision Memorandum at Comment 4.

[160] *See* Memorandum from James Kemp and Salim Bhabhrawala, International Trade Compliance Analysts, to Gary Taverman, Director, Office 5, Re: Verification of the Sales Response of Weyerhaeuser Company in the Antidumping Duty Administrative Review of Certain Softwood Lumber Products from Canada, at 40, (June 2, 2004); *see also* Memorandum from Constance Handley, Program Manager, and Salim Bhabhrawala, International Trade Compliance Analyst, to Gary Taverman, Director, Office 5, Re: Verification of the Sales Response of Weyerhaeuser Company in the Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada, at 32 (February 4, 2002).

According to Weyerhaeuser, the Department's use of indirect selling expenses is only intended to be part of a broader qualitative analysis that includes a review of customer categories, channels of distribution and selling functions.[161] Given the reasonable basis for SWL Canada's indirect selling expense ratio, Weyerhaeuser maintains that the Department properly focused on other qualitative factors in determining that SWI's VMI sales are not made at the same LOTs.

Department's Position:

We agree with Weyerhaeuser. The substantial selling functions performed by SWL in Canada are provided by SWL Western for the U.S. sales. Since the functions provided by SWL in the United States are not reflected in the CEP after the deduction of expenses, we do not consider them in our LOT analysis.[162] While the Department can and has looked at the level of indirect selling expenses in cases where it was not clear whether the difference in selling functions between the claimed LOTs were substantial, the difference in indirect selling expenses alone, is not dispositive.[163] In *Hot-Rolled Steel from Japan 2002* and *Shrimp from Thailand*, the Department used indirect selling expenses as only one of a number of factors in determining whether a substantial difference in selling functions existed. In this case, it is clear from a qualitative analysis that a substantial difference in selling functions does exist. As noted in the *Preliminary Results*, SWL has a designated sales team responsible for VMI sales which worked with the customers to develop a sales volume plan, managed the flow of products and replenishing process, and aligned the sales volume plan with Weyerhaeuser's production plans. It also offered extra services such as bar coding, cut-in-two, half packing, and precision end trimming. These selling functions were managed by SWL Western in the United States and, therefore, are not considered for the purposes of defining the U.S. LOT. The selling functions performed in Canada for the U.S. VMI sales were minimal.[164]

Further, the Department has in the past accepted identical indirect selling expenses for distinct LOTs where a respondent's record keeping system did not allow it to assign specific indirect selling expenses to a particular market.[165] The petitioner has suggested that Weyerhaeuser should have reported significantly higher selling expenses for SWL's Canadian VMI sales. While we agree it would have been optimal had Weyerhaeuser been able to more accurately allocate its indirect selling expenses, there is no evidence to suggest that Weyerhaeuser had the means to do a more accurate calculation. Without such means, any allocation that it attempted would have been

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[161] *See Shrimp from Thailand* at Comment 5.

[162] *See* 19 CFR 351.412(c)(ii).

[163] *See Notice of Final Results of Antidumping Duty Administrative Review: Small Diameter Circular Seamless Carbon and Alloy Standard, Line and Pressure Pipe from Brazil*, 70 FR 7243 (*Brazil Pipe*) and accompanying Issues and Decision Memorandum at Comment 2.

[164] See Weyerhaeuser's Section A response, dated September 29, 2004, at pages A-32-A-34.

[165] *See e,g.*, *Brazil Pipe* at Comment 2; *see also Wire Rod from Trinidad and Tobago* at Comment 4.

arbitrary and unverifiable. Therefore, we have accepted Weyerhaeuser's reported indirect selling expense ratio, but have not considered it in making our LOT determination.

Comment 38: Assessment for Weyerhaeuser's Unaffiliated Importers of Record

Weyerhaeuser states that it did not know the entered value of merchandise which was imported by unaffiliated parties. In the case of these sales, Weyerhaeuser attempted to calculate an entered value. Now, Weyerhaeuser claims that the entered values it reported to the Department for these sales were understated, resulting in overstated assessment rates. According to Weyerhaeuser, it sold other importers specialty products that it did not typically sell on an export price basis. Therefore, it reported the entered values for sales to unaffiliated importers using broad averages, which were not reflective of the actual entered values. Weyerhaeuser requests that the Department assess these sales on a per-unit, rather than an *ad valorem* basis.

The petitioner did not comment on this issue.

Department's Position:

We agree with Weyerhaeuser. Our examination of the reported gross unit prices and freight costs indicates that the reported entered values for these sales are in error. We note that the questionnaire requests that the respondent report the entered value of EP sales "if known." Because the sales in question were EP sales, and Weyerhaeuser did not know the entered value, it erred in not simply leaving the field blank. We can ensure that the entire amount owed from these importers can be collected by using a per-unit assessment rate. Therefore, we will instruct CBP to do so. We have recalculated the entered value of these sales for use in the *de minimis* test and the review-specific average assessment rate. *See* Memorandum from David Layton, International Trade Compliance Analyst, to Constance Handley, Program Manager, Re: Weyerhaeuser's Final Results Calculation Memorandum for the Antidumping Duty Order Review of Certain Softwood Lumber Products from Canada, dated December 5, 2005.

Comment 39: Log Cost Allocation for British Columbia Coastal Operations

Weyerhaeuser claims that for the *Preliminary Results* the Department unlawfully disregarded Weyerhaeuser's records by reallocating the cost of logs for one of Weyerhaeuser's business units, BCC, and that the Department should compute BCC's log costs based on Weyerhaeuser's records which reflect a volume-based cost allocation.

Weyerhaeuser, citing section 773 (f)(1)(A) of the Act, argues that the antidumping law requires the Department to base its calculation of a company's cost of production on the company's audited books and records, if such records reasonably reflect the costs associated with the production and sale of the merchandise under consideration. Weyerhaeuser contends that the Court of Appeals for the Federal Circuit confirmed the statute's preference for using a producer's own cost records when calculating cost of production, citing *Thai Pineapple Pub. Co. V. United*

States, 187 F.3d 1362 (Fed. Cir. 1999) (*Thai Pineapple*). Weyerhaeuser alleges that the court stated that in order to use an alternative to a producer's audited cost allocation records, the Department must find that the alternative cost allocation methodology more reasonably reflects the producer's costs than the producer's own records.

Weyerhaeuser explains that it has vertically integrated lumber operations where BCC's timberlands develop and harvest timber logs which are consumed by BCC sawmills or sold to third parties. Weyerhaeuser asserts that BCC's timberlands allocate log costs only by volume in their accounting records, and BCC's sawmills use the timberlands' log costs allocated by volume when reporting a COGS for sales of lumber to third parties. Because of this, Weyerhaeuser maintains, the company's consolidated financial statements and WCL's financial statements likewise rely on BCC timberlands' log cost allocation.

Weyerhaeuser explains that it records transfer prices for transfers of logs to the sawmills as part of its decision to treat BCC timberlands and BCC sawmills as separate profit centers. Weyerhaeuser further explains that during the POR it used market-value-based transfer prices for logs from private lands but then adjusted the transfer prices to equal the timberlands' log costs allocated by volume when calculating COGS for Weyerhaeuser's audited financial statements. Weyerhaeuser alleges that no matter how it structures its business, the presence of transfer prices is irrelevant to how costs are allocated.

Weyerhaeuser notes that the Department distinguished BCC from SWL and other respondents because BCC sold a larger share of its logs and handled a more diverse mix of logs by species and grade. However, Weyerhaeuser alleges that its costs do not change whether it sells none, some, or all of its logs to third parties. According to Weyerhaeuser, a volume-based cost allocation is reasonable because the cost differences that do not relate to species and grade, such as harvest and delivery costs, are greater than differences in stumpage fees due to the mix of species and grades.

Finally, Weyerhaeuser argues that the Department's reallocation of BCC's log costs by value does not more reasonably reflect costs than the volume based cost allocation reported by Weyerhaeuser and used in its normal books and records. Weyerhaeuser asserts that the Department has incorrectly considered the market-based transfer prices recorded in the sawmills' books for logs from lands owned by the Canadian Government prior to January 1, 2003, to be cost allocation records. Weyerhaeuser holds that it discontinued its use of market-based transfer prices in January 2003 and since then (including throughout the entire POR) it has used cost-based transfer prices that are tied to the actual costs recorded in the BCC timberlands' books. It contends that under the Department's precedent, value-based cost allocations are appropriate only for joint products and that the Department established that log production is not a joint production process.[166] Therefore, Weyerhaeuser concludes, the Department has no basis to ignore Weyerhaeuser's cost records in calculating BCC's log costs.

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[166] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from India*, 63 FR 7250 (December 31, 1998) and *First Review Final Results* at Comment 3(c).

The petitioner asserts that under section 773(f)(1)(A) of the Act the Department has the discretion to allocate the cost of logs for BCC based on value instead of volume, as recorded in Weyerhaeuser's books and records, and should continue to do so for the final results. The petitioner asserts that the Department may disregard a cost allocation from a company's normal books and records where the allocation has not been used historically by the company, and where it would not reasonably reflect the cost of producing subject merchandise. The petitioner contends that both of these conditions exist in this case.

The petitioner argues that the Act requires the Department to consider all available evidence of the proper allocation of costs, if such allocations have been historically used. Petitioner cites the *First Review Final Results* at Comment 36 in support of its claim that at the beginning of this proceeding Weyerhaeuser's BCC sawmills historically relied on a value-based log cost allocation for BCC's log costs in its normal books and records. The petitioner disputes Weyerhaeuser's claim that it used a volume-based cost allocation at the parent level in the *First Review Final Results*, and notes that this issue is currently in litigation before the CIT.

The petitioner argues that Weyerhaeuser's volume-based allocation of log costs does not reasonably reflect the costs of producing subject merchandise. The petitioner states that BCC utilized a mix of various log species to produce subject merchandise, and the Department has found that different log species have different costs, as reflected in the different average stumpage rates collected by the British Columbia provincial government for different species. Considering the diverse mix of log species sold and consumed by BCC, the petitioner states that the Department appropriately relied on a value-based allocation for BCC's log costs in the *Original Investigation Final Determination* and the *First Review Final Results* because the log market prices reasonably reflect the costs of logs used to produce subject merchandise. The petitioner notes that nothing of relevance has changed in the current administrative review, and consequently, the Department should continue to use the value-based log cost allocation for the final results of this review.

Finally, the petitioner argues that the Department should not limit its value-based log cost allocation to BCC's stumpage costs, because different timber stands with different species located in different areas inevitably would result in different harvesting and transportation costs.

Department's Position:

We agree with the petitioner that Weyerhaeuser's BCC log costs must be allocated by value in order to accurately assign costs between logs sold and logs retained for use in the sawmills. Section 773(f)(1)(A) of the Act directs the Department to rely on data from a respondent's normal books and records where those records are prepared in accordance with home country GAAP and reasonably reflect the costs of producing the merchandise. However, the Act further stipulates that the Department should consider all available evidence on the proper allocation of costs, including that which is made available by the respondent, provided that such allocations have been historically used by the company.

In considering the proper allocation of log costs, we reviewed the methods used historically by Weyerhaeuser in its normal books and records. This Weyerhaeuser BCC-specific issue goes back to the *Original Investigation Final Determination* and the *First Review Final Results*.[167] During the LTFV investigation segment of this proceeding and for the first eight months of the first administrative review of this proceeding, Weyerhaeuser's BCC sawmills recorded in their normal books and records the logs transferred from the BCC timberland units at each log's market value, taking into account the quality and species of the logs transferred. For the last four months of the first administrative review of this proceeding, and during the entire current POR, Weyerhaeuser's BCC sawmills changed their method of recording the cost of logs transferred from the BCC timberland units. Instead of recording the transferred logs at their market value, the sawmills record the cost based on the transferring timberland units' average cost of logs harvested, ignoring differences associated with the quality and species of the logs. Thus, both a volume-based and value-based allocation method has been used in Weyerhaeuser's normal books and records.

We note that the purpose of the allocation is to assign costs to the logs transferred to the sawmills that capture all cost differences, if any, associated with the logs in order to accurately calculate the cost of manufacturing the lumber produced at each of the sawmills. Because there are quality differences between logs, which in turn affect the quality and grade of lumber produced from those logs, it is important to account for the different log costs. We also note that Weyerhaeuser is one of the parties that continue to agree with the Department's value-based allocation of wood costs. *See* Comment 10.

For reporting purposes, Weyerhaeuser used a volume-based cost allocation for logs harvested at the timberlands. As record evidence demonstrates, the BCC timberland units harvest a diverse product mix of logs.[168] These logs of multiple qualities and species are then sold on the open market or transferred to the BCC sawmills. In determining which logs are sold and which logs are transferred to each respective sawmill, the company considers a number of factors, such as quality of logs, species, size, etc. It is apparent that there are cost differences associated with each of these factors. Therefore, in order to accurately and reasonably capture these cost differences associated with the diverse product mix of logs harvested by the BCC timberlands, we find it more appropriate to rely on the value-based log cost allocation method used historically in Weyerhaeuser's normal books and records during the LTFV investigation of this proceeding and the majority of the first administrative review of this proceeding.

As to Weyerhaeuser's claim that the Department's use of the value-based log cost allocation does not more reasonably reflect the costs, and that by doing so we are treating BCC differently than its interior British Columbia division (*i.e.*, SWL) and the other respondents in this review, we disagree. If we relied on Weyerhaeuser's volume-based cost allocation for logs transferred to the

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[167] *See Original Investigation Final Determination* at Comment 46 and *First Review Final Results* at Comment 36.

[168] *See* Weyerhaeuser's April 4, 2005, supplemental Section D response at Exhibit SD-2.

sawmills, we would not capture any of the cost differences associated with the diverse range in quality and species of logs harvested. Weyerhaeuser's interior division and the other respondents (*see* Comment 34 with regard to Weldwood) do not harvest logs and produce lumber of a diverse range in quality and species (*e.g.*, old growth versus second and third generation, variety of species grown in British Columbia and the range of log quality due to the environment). As such, following a different approach is not only warranted, but is necessary to accurately capture the costs for the lumber produced at the BCC sawmills. For the final results, we used the value-based allocation of log costs transferred by BCC timberlands to sawmills.

Comment 40: Calculation of Various G&A Expenses

A. Double Counting of Integration Expenses

Weyerhaeuser maintains that in the *Preliminary Results*, when calculating the G&A expenses, the Department intended to subtract both the closure and integration expenses reported for WCL and Westwood Shipping Lines (WSL) and then add back the integration expenses. However, Weyerhaeuser claims, the Department subtracted the closure expenses for WCL, but not the integration expenses, thus double counting the integration expenses incurred by WCL. Further, Weyerhaeuser holds that if the Department does not treat closure and integration expenses uniformly in the final results and excludes integration expenses from the G&A calculation, the Department should correct this error to avoid double-counting of WCL integration expenses.

The petitioner did not comment on this issue.

Department's Position:

We agree with Weyerhaeuser that an error was made in the *Preliminary Results*. When calculating the G&A expenses, we intended to subtract from the total G&A expense the closure and integration expenses, and then to add back only the integration expenses. However, in our calculation we only subtracted the closure expenses; thus, they were double-counted by adding back the integration costs. For the final results we corrected our calculation accordingly. *See* Memorandum from Ernest Gziryan, Accountant, to Neal Halper, Director, Office 1, Re: Cost of Production and Constructed Value Calculation Adjustments for the Final Results, dated December 5, 2005 (*Weyerhaeuser Final Results Cost Memo*).

B. Gain on Sale of Timber Tracts

Weyerhaeuser objects to the Department's exclusion of the gain on sale of Canadian timber tracts from the WCL G&A expense in the *Preliminary Results*. According to Weyerhaeuser, the sales of these tracts of timber are similar to sales of small equipment, and the Department previously recognized that Weyerhaeuser treats its timber tracts as depreciable assets.[169] Weyerhaeuser

[169] *See Original LTFV Investigation Final Determination* at Comment 47.

claims that sales of timber tracts should be treated as sales of fixed assets and not as sales of land, because Weyerhaeuser depletes its private timber tracts and the depletion is captured in Weyerhaeuser's cost of production. Accordingly, Weyerhaeuser claims, the resulting gain should be included in the calculation of WCL's G&A rate for the final results.

The petitioner asserts that the Department properly excluded Weyerhaeuser's gain from the sale of Canadian timber tracts from the calculation of WCL's G&A expense. The petitioner maintains that Weyerhaeuser failed to differentiate between the portion of the reported gain which arose from the sale of land and the portion attributable to the sale of timber, even though Weyerhaeuser should have this information, as it is required for U.S. tax purposes. Thus, according to the petitioner, the Department should deny the offset in its entirety as there is no evidence on the record to determine the portion of the gain attributable to the sale of timber.

Department's Position:

We disagree with the petitioner that the gains and losses on the sale of small timber tracts should be excluded from the G&A rate calculation. These sales are routine minor transactions, and are to be expected as part of the normal operations of a large timberland unit. Such transactions are similar to that of a manufacturing company which will routinely dispose of and replace machinery and equipment within a production plant or mill. *See* Comment 8 regarding treatment of routine dispositions of machinery and equipment.

As to the petitioner's claim that Weyerhaeuser failed to differentiate between the portion of the gain related to the sale of land versus the portion attributable to the sale of timber, we note that the issue here is not whether land is involved in the sale, but how to account for gains and losses on the sale of small tracts of timber, and the question of the land component is not a factor in our treatment of these types of gains or losses. Therefore, for the final results, we have included the gain on the sale of timber tracts in the G&A rate calculation.

C. Fire Insurance Proceeds

Weyerhaeuser argues that the Department incorrectly disallowed the offset to WCL's G&A expense for fire insurance proceeds in the *Preliminary Results*. According to Weyerhaeuser, in 2003 Weyerhaeuser recognized the gain related to the fire insurance proceeds after finalizing the settlement amount with the insurance company for the fire that occurred in 2001. The respondent claims that it is the Department's practice to include fire insurance proceeds as offsets to G&A even when the insurance proceeds were paid for a fire that occurred prior to the POR.[170] Weyerhaeuser, citing *Notice of Final Determination of Sales at Less Than Fair Value: Static*

[170] *See Final Results of Antidumping Duty Administrative Review of Stainless Steel Bar from India*, 68 FR 47543 (August 11, 2003) (*Bar from India*) and the *Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances Determination: Silicomanganese from India*, 67 FR 15531 (April 2, 2002) (*Silicomanganese from India*) and accompanying Issues and Decision Memorandum at Comment 14.

Random Access Memory Semiconductors from Taiwan, 63 FR 8909 (February 23, 1998) (*Semiconductors from Taiwan*) at Comment 26 holds that the Department has included the insurance proceeds as an offset to G&A expenses because the Department included losses arising from fires in the cost of production. Therefore, the respondent argues, the Department should include Weyerhaeuser's fire insurance proceeds as an offset to WCL's G&A expenses for the final results.

The petitioner did not respond to this argument.

Department's Position:

We disagree with Weyerhaeuser that the entire amount of the insurance reimbursement at issue should be included as an offset to costs. The Department normally allows an offset for insurance reimbursement up to the amount of related losses incurred during the cost reporting period. As we stated in the *Notice of Final Determinations of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 FR 52741 (September 5, 2003) and accompanying Issues and Decision Memorandum at Comment 19, "we included the insurance proceeds because it compensates the farmer for higher than normal per-unit costs incurred. However, we consider it unreasonable to allow the farmer to further reduce its per-unit costs by profit received from the insurance company which goes beyond the additional costs incurred as a result of the insured event." We note that the fire for which the insurance reimbursement was received by Weyerhaeuser occurred in 2001 (*i.e.*, prior to the POR), and the majority of costs associated with the fire were incurred by the company at that time. Weyerhaeuser did, however, include in the reported costs expenses related to the fire which were incurred during the POR. While these current expenses were minor compared to the total amount of insurance proceeds received, we do consider it appropriate to allow the insurance proceeds to offset the costs incurred in the current year related to the fire. We disagree, however, that the excess of insurance proceeds over the current period fire related expenses incurred should be allowed to further reduce the current period's costs of production.[171] Accordingly, for the final results, we allowed Weyerhaeuser's fire insurance proceeds as an offset to WCL's G&A expense up to the amount of the related losses incurred during the POR.

We note that none of the cases cited by respondent deal with the issue at hand, *i.e.*, the matching of costs incurred as a result of the insured event with insurance proceeds received. For example, in *Bar from India* the issue was to determine whether the related expenses were included in the reported cost to allow the offset for insurance reimbursement. As we stated in that case, "{d}ue to the insignificant value of the offsets relative to Isibars' reported costs, we elected not to test whether the related expenses are included in the reported costs. As such, we have allowed Isibars' offsets for the reimbursement of insurance claims for the final results." In *Silicomanganese from India* the issue was whether insurance payments constitute an extraordinary income, and the Department established that the insurance payments are not extraordinary income. Finally, in

[171] *See* the *Weyerhaeuser Final Results Cost Memo.*

Semiconductors from Taiwan the respondent argued that expenses associated with a fire should be excluded from the reported costs because the facility where the fire occurred was not operational, and these expenses were extraordinary. Thus, none of the cases cited by the respondent address the matching of costs incurred as a result of the insured event with insurance proceeds received, and are therefore inapposite.

D. Integration Expenses as Part of Parent G&A

The petitioner notes that during the POR, Weyerhaeuser incurred certain integration expenses at the parent company level. The petitioner argues that because Weyerhaeuser did not assign these costs to any particular U.S. business segment, it is a parent-level expense, *i.e.*, the expenses related to its overall operations. The petitioner maintains that if, as Weyerhaeuser claims, these expenses were associated with Weyerhaeuser's purchases of U.S. entities, then the company could have attributed the amounts to particular U.S. business segments. The fact that Weyerhaeuser did not do so, the petitioner concludes, confirms that such expenses are properly allocated to the company as a whole, and should be included in the parent G&A expense rate.

The respondent states that it already assigned a certain amount of the integration expenses from its corporate business segment to its Canadian operations, and this amount was included in the WCL and WSL G&A expense rate calculations. Weyerhaeuser further states that its assignment of the remaining corporate integration expenses to its U.S. operations reasonably reflects its costs because these expenses arose principally from Weyerhaeuser's acquisitions of a company, Willamette, which had no operations in Canada (*see* Weyerhaeuser's 2003 Annual Report at page 72, Note 16). Thus, the respondent argues, there is no basis for concluding that these integration expenses benefitted Canadian operations, and as such, they should not be included in the reported costs.

Department's Position:

We agree with Weyerhaeuser. Contrary to the petitioner's assertion, Weyerhaeuser assigned the integration expenses at issue from its corporate business segment either to United States or Canadian operations, depending on whether the costs related to production operations located in the U.S. or Canada.[172] Weyerhaeuser included in its reported costs the integration expenses related to its Canadian operations. As we deem costs associated with Weyerhaeuser's U.S. operations unrelated to its Canadian operations, we did not include the U.S. related integration expenses recorded at the parent company level in the reported costs for the final results.

E. Offset to G&A for Miscellaneous Income

The petitioner argues that Weyerhaeuser failed to demonstrate that its claimed offset to G&A expenses for gain from miscellaneous asset sales is warranted. The petitioner claims that even

[172] *See* Weyerhaeuser's May 11, 2005, submission at Exhibit 8c.

though the Department requested information to support the offset, Weyerhaeuser provided information and an explanation for only a portion of the total amount of the offset. Thus, the petitioner argues, because the company failed to comply with the Department's express instructions, Weyerhaeuser failed to meet its burden to demonstrate entitlement to this adjustment as required by section 19 CFR 351.401(b)(1) of the Department's regulations. Therefore, according to the petitioner, the Department should disallow the offset to the G&A expense for the unexplained amount. Moreover, the petitioner claims, because the explanation provided by Weyerhaeuser for a portion of the offset was found by the Department to be deficient, the unexplained amount should also be found deficient.

The respondent argues that, contrary to the petitioner's assertion, for the *Preliminary Results* the Department did accept Weyerhaeuser's offset to G&A expense for the net gains from the sales of miscellaneous assets, except that the Department excluded the gains from the sales of timber tracts (which Weyerhaeuser opposes - *see* Comment 40B, "*Gain on Sale of Timber Tracts*"). Weyerhaeuser, citing the *Final Determination of Sales at Less Than Fair Value: New Minivans from Japan*, 57 FR 21937, 21943 (May 26, 1992), maintains that the Department generally considers disposal of fixed assets to be a normal part of a company's operations and, therefore, includes any gains or losses generated by these transactions in the cost of production calculation. Weyerhaeuser notes that due to the large volume of the transactions involving disposition of assets, Weyerhaeuser determined that it could not review each such item in a timely manner. Instead, it provided the Department with a list of all significant miscellaneous asset sales transactions. This list, according to Weyerhaeuser, demonstrated that the total miscellaneous asset sales account represents gains and losses from the sale of fixed assets. Thus, Weyerhaeuser holds, it fully complied with the Department's instructions and demonstrated that it is entitled to the G&A offset.

Department's Position:

We agree with Weyerhaueser that the offset to the G&A expense for the gain on sale of assets should be allowed. We disagree with the petitioner that Weyerhaeuser did not provide adequate support for the amount of the offset. We note that the Department requested details of the miscellaneous income, and Weyerhaeuser provided a list of all significant items included in the total. Thus, even though Weyerhaeuser provided information and an explanation for only a portion of the total amount of the offset, considering the large volume of the transactions involving disposition of assets, we found Weyerhaeuser's response satisfactory, and we did not ask further questions on this subject. We consider the routine disposition of fixed assets to be a normal part of a company's general operations and, as such, any gain or loss realized on the routine disposition of production assets should be included in the G&A expense rate calculation.[173]

[173] *See PET Resin from Indonesia* at Comment 13.

F. Research & Development (R&D) Income and Expense

Weyerhaeuser's reported G&A ratio consists of three components: the consolidated G&A ratio, the consolidated R&D ratio, and the WCL/WSL G&A ratio. The petitioner argues that Weyerhaeuser improperly included income related to the company's R&D activity (*i.e.*, government reimbursement for R&D activities in Canada) in the calculation of the WCL and WSL G&A expenses, when it should have reported this income as part of the R&D component of the G&A ratio. The petitioner claims that this failure to match expense and income items in proper categories artificially reduces the reported costs by increasing the impact of the income to Weyerhaeuser's benefit.

Weyerhaeuser argues that the Department should reject the petitioner's claim because the petitioner overlooked the fact that Weyerhaeuser did not remove its R&D expenses from the calculation of the WCL/WSL G&A expense rate, even though these expenses were also included in the consolidated R&D ratio calculation and, thus, were double counted at the consolidated parent-company level. Weyerhaeuser states that the company did not remove these expenses from the WCL/WSL G&A expense because it would require significant effort to do so, while there would be insignificant impact on the G&A rate. Weyerhaeuser claims that the numerator of the consolidated R&D expense ratio ties directly to the consolidated financial statements, which shows that it was not adjusted for any R&D expenses captured at the WCL/WSL level. The respondent also claims that the Department erred in the *Preliminary Results* by deducting the R&D amount from WCL/WSL's cost of sales denominator used in the G&A rate calculation, because, as explained above, Weyerhaeuser never excluded R&D expenses from its cost of manufacturing (COM).

Department's Position:

We agree with Weyerhaeuser that the R&D expenses should not be deducted from WCL/WSL's cost of sales denominator used in the G&A rate calculation because they were included in the reported cost of manufacturing. This is confirmed by the fact that there are no reconciling items related to R&D expenses on the cost reconciliation worksheets provided by Weyerhaeuser (*see* Weyerhaeuser's December 6, 2004, Section D response at Exhibits D-15 and D-16). We disagree with the petitioner's argument that by including the R&D income in the calculation of the WCL and WSL G&A expenses, Weyerhaeuser failed to match expense and income items in proper categories. Because the company has accounted for all of its Canadian R&D expenses at the WCL/WSL level, it is appropriate to reduce these expenses by the reimbursement provided by the Canadian government for R&D activities incurred in Canada. Therefore, for the final results we made no adjustment to the R&D rate calculation provided by Weyerhaeuser.

Comment 41: Clerical Error Allegations Specific to Weyerhaeuser

Weyerhaeuser argues that the Department committed a clerical error when it failed to remove Weyerhaeuser sales made under temporary import bonds (TIBs) from the margin calculation.

According the Weyerhaeuser, goods entering the United States under TIBs are not subject to AD duties.[174]

The petitioner did not comment on this issue. The petitioner alleges that the Department made an error in adjusting Weyerhaeuser's byproduct offset. Weyerhaeuser did not comment on this allegation.

Department's Position:

We agree with Weyerhaeuser regarding the TIB sales. With regard to the petitioner's claim, we note that we have not adjusted Weyerhaeuser's byproduct revenue for the final results, rendering this allegation moot. *See* Comment 12 above.

Recommendation

Based on our analysis of the comments received, we recommend adopting the positions described above. If these recommendations are accepted, we will publish in the *Federal Register* the final results of the AD review, changed circumstances review, and the final weighted-average dumping margins.

Agree _____ Disagree _____

_____
Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

_____
Date_____

[174] *See e.g., Oil Country Tubular Goods From Mexico: Rescission of Antidumping Duty Administrative Review*, 66 FR 26830, 26831 (May 15, 2001).