



A-122-857  
Administrative Review  
POR: 1/1/2019 – 12/31/2019  
**Public Document**  
E&C/IV: Team

November 23, 2021

**MEMORANDUM TO:** Ryan Majerus  
Deputy Assistant Secretary  
for Policy & Negotiations,  
performing the non-exclusive functions and duties of the  
Assistant Secretary for Enforcement and Compliance

**FROM:** James Maeder  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

**SUBJECT:** Issues and Decision Memorandum for the Final Results of the  
2019 Antidumping Duty Administrative Review Certain Softwood  
Lumber Products from Canada

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## I. SUMMARY

On May 27, 2021, the Department of Commerce (Commerce) published its preliminary results in the 2019 administrative review of the antidumping duty (AD) order of certain softwood lumber products (softwood lumber) from Canada.<sup>1</sup> The period of review (POR) is January 1, 2019, through December 31, 2019. This administrative review covers two mandatory respondents: Canfor<sup>2</sup> and West Fraser,<sup>3</sup> and 271 non-selected producers/exporters that we did not individually examine. Based on our analysis of the comments received, we made certain changes to our margin calculations for Canfor and West Fraser and the non-selected producers/exporters. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues for which we received comments:

- Comment 1. Particular Market Situation Allegation
- Comment 2. Whether it was Proper to Accept Proprietary Grades
- Comment 3. Whether it was Proper not to Select Resolute as a Respondent
- Comment 4. Whether it was Proper not to Select Respondents based on Sampling

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<sup>1</sup> See *Certain Softwood Lumber Products from Canada: Preliminary Results of Antidumping Duty Administrative Review*, 86 FR 28551 (May 27, 2021) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

<sup>2</sup> As described in the *Preliminary Results* PDM at 5, we have treated Canfor Corporation, Canadian Forest Products Ltd., and Canfor Wood Products Marketing Ltd. (collectively, Canfor) as a single entity.

<sup>3</sup> As described in the *Preliminary Results* PDM at 6-7, we have treated West Fraser Mills Ltd., Blue Ridge Lumber Inc., Manning Forest Products Ltd., and Sundre Forest Products Inc. (collectively, West Fraser) as a single entity.



- Comment 5. Whether it was Proper not to have Adjusted U.S. Price by Countervailing Duties
- Comment 6. Zeroing
- Comment 7. Differential Pricing
- Comment 8. The Cohen's *d* and Ratio Test
- Comment 9. Whether Commerce's Simple Average of Variances is Appropriate
- Comment 10. Whether to Update J.D. Irving's Cash Deposit Rate
- Comment 11. Whether Commerce Used the Proper Market Price for Canfor's Wood Chip Sales
- Comment 12. Whether It Is Proper to Value Steam Based on the Market Price for Electricity, and Whether the Market Price of Electricity Should be Based Solely on Electricity Prices in Alberta
- Comment 13. Whether Canfor's Prince George Sawmill's Purchases of Electricity Should be Adjusted
- Comment 14. Whether Canfor's Restructuring Costs Should be Excluded from Mill Costs
- Comment 15. Whether Commerce Should Adjust Canfor's Reported Net Interest Expense
- Comment 16. Whether Commerce Committed a Ministerial Error in the Calculation of Canfor's Margin
- Comment 17. Whether Commerce Should Include the Total Amount of Restructuring and Impairment Charges in West Fraser's General and Administrative Expense Ratio
- Comment 18. Whether Commerce Made Certain Ministerial Errors With Respect to West Fraser's Byproduct Offset
- Comment 19. Whether Commerce Made Certain Methodological Errors With Respect to West Fraser's Byproduct Offset
- Comment 20. Whether Commerce Should Make an Adjustment to West Fraser's Seed Purchases
- Comment 21. Whether Commerce Should Use West Fraser's Alternative Grade Group Information

## II. BACKGROUND

As noted above, on May 27, 2021, Commerce published its *Preliminary Results*.<sup>4</sup> On September 8, 2021, Commerce extended the deadline of these final results until November 23, 2021.<sup>5</sup>

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<sup>4</sup> See *Preliminary Results*.

<sup>5</sup> See Memorandum, "Extension of Deadline for Final Results of Antidumping Duty Administrative Review – 2019," dated September 8, 2021.

On July 8, 2021, eight parties submitted either case briefs or letters in lieu of case briefs.<sup>6</sup> On July 23, 2021, seven parties submitted rebuttal briefs.<sup>7</sup> The petitioner,<sup>8</sup> Canfor, Resolute, and West Fraser requested hearings and we held a hearing on September 9, 2021.<sup>9</sup>

### III. SCOPE OF THE ORDER

The merchandise covered by this order is softwood lumber, siding, flooring and certain other coniferous wood (softwood lumber products). The scope includes:

- Coniferous wood, sawn, or chipped lengthwise, sliced or peeled, whether or not planed, whether or not sanded, or whether or not finger-jointed, of an actual thickness exceeding six millimeters.
- Coniferous wood siding, flooring, and other coniferous wood (other than moldings and dowel rods), including strips and friezes for parquet flooring, that is continuously shaped (including, but not limited to, tongued, grooved, rebated, chamfered, V-jointed, beaded, molded, rounded) along any of its edges, ends, or faces, whether or not planed, whether or not sanded, or whether or not end-jointed.
- Coniferous drilled and notched lumber and angle cut lumber.
- Coniferous lumber stacked on edge and fastened together with nails, whether or not with plywood sheathing.
- Components or parts of semi-finished or unassembled finished products made from subject merchandise that would otherwise meet the definition of the scope above.

Finished products are not covered by the scope of this order. For the purposes of this scope, finished products contain, or are comprised of, subject merchandise and have undergone sufficient processing such that they can no longer be considered intermediate products, and such products can be readily differentiated from merchandise subject to this order at the time of importation. Such differentiation may, for example, be shown through marks of special adaptation as a particular product. The following products are illustrative of the type of merchandise that is considered “finished” for the purpose of this scope: I-joists; assembled pallets; cutting boards; assembled picture frames; garage doors.

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<sup>6</sup> See Canfor’s Letter, “Case Brief,” (Canfor’s Case Brief); *see also* Government of Canada (GOC)’s Letter, “Case Brief of the Government of Canada,” (GOC’s Case Brief); Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (Petitioner)’s Letter, “Case Brief” (Petitioner’s Case Brief); Resolute Growth Canada Inc.; Forest Products Mauricie LP; Société en commandite Scierie Opitciwan; Resolute-LP Engineered Wood Larouche Inc.; Resolute-LP Engineered Wood St; Prime Limited Partnership; and Resolute FP Canada Inc. (Resolute)’s Letter, “Resolute’s Case Brief,” (Resolute’s Case Brief); Tolko Marketing and Sales Ltd., Tolko Industries Ltd., and Gilbert Smith Forest Products Ltd. (Tolko)’s Letter, “Letter in Lieu of a Case Brief,” (Tolko’s Case Brief); Sierra Pacific Industries’ Letter, “Case Brief,” (Sierra Pacific’s Case Brief); J.D. Irving, Limited (J.D. Irving)’s Letter, “Case Brief,” (J.D. Irving’s Case Brief); West Fraser’s Letter, “Case Brief of West Fraser Mills Ltd.,” (West Fraser’s Case Brief), all dated July 8, 2021.

<sup>7</sup> See Canfor’s Letter, “Canfor Rebuttal Brief”; GOC’s Letter, “Canadian Parties’ Rebuttal Brief”; Petitioner’s Letter, “Rebuttal Brief”; Resolute’s Letter, “Resolute’s Rebuttal Brief”; Sierra Pacific Industries’ Letter, “Rebuttal Brief”; Olympic Industries, Inc. and Olympic Industries ULC (Olympic)’s Letter, “Letter in Lieu of a Rebuttal”; and West Fraser’s Letter, “Rebuttal Brief of West Fraser Mills Ltd.,” all dated July 23, 2021.

<sup>8</sup> The petitioner is the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations.

<sup>9</sup> See Hearing Transcript, “Public Hearing,” dated September 9, 2021.

The following items are excluded from the scope of this order:

- Softwood lumber products certified by the Atlantic Lumber Board as being first produced in the Provinces of Newfoundland and Labrador, Nova Scotia, or Prince Edward Island from logs harvested in Newfoundland and Labrador, Nova Scotia, or Prince Edward Island.
- U.S.-origin lumber shipped to Canada for processing and imported into the United States if the processing occurring in Canada is limited to one or more of the following: (1) Kiln drying; (2) planing to create smooth-to-size board; or (3) sanding.
- Box-spring frame kits if they contain the following wooden pieces--two side rails, two end (or top) rails and varying numbers of slats. The side rails and the end rails must be radius-cut at both ends. The kits must be individually packaged and must contain the exact number of wooden components needed to make a particular box-spring frame, with no further processing required. None of the components exceeds 1” in actual thickness or 83” in length.
- Radius-cut box-spring-frame components, not exceeding 1” in actual thickness or 83” in length, ready for assembly without further processing. The radius cuts must be present on both ends of the boards and must be substantially cut so as to completely round one corner.

Softwood lumber product imports are generally entered under Chapter 44 of the Harmonized Tariff Schedule of the United States (HTSUS). This chapter of the HTSUS covers “Wood and articles of wood.” Softwood lumber products that are subject to this order are currently classifiable under the following ten-digit HTSUS subheadings in Chapter 44:

4406.11.0000; 4406.91.0000; 4407.10.01.01; 4407.10.01.02; 4407.10.01.15; 4407.10.01.16; 4407.10.01.17; 4407.10.01.18; 4407.10.01.19; 4407.10.01.20; 4407.10.01.42; 4407.10.01.43; 4407.10.01.44; 4407.10.01.45; 4407.10.01.46; 4407.10.01.47; 4407.10.01.48; 4407.10.01.49; 4407.10.01.52; 4407.10.01.53; 4407.10.01.54; 4407.10.01.55; 4407.10.01.56; 4407.10.01.57; 4407.10.01.58; 4407.10.01.59; 4407.10.01.64; 4407.10.01.65; 4407.10.01.66; 4407.10.01.67; 4407.10.01.68; 4407.10.01.69; 4407.10.01.74; 4407.10.01.75; 4407.10.01.76; 4407.10.01.77; 4407.10.01.82; 4407.10.01.83; 4407.10.01.92; 4407.10.01.93; 4407.11.00.01; 4407.11.00.02; 4407.11.00.42; 4407.11.00.43; 4407.11.00.44; 4407.11.00.45; 4407.11.00.46; 4407.11.00.47; 4407.11.00.48; 4407.11.00.49; 4407.11.00.52; 4407.11.00.53; 4407.12.00.01; 4407.12.00.02; 4407.12.00.17; 4407.12.00.18; 4407.12.00.19; 4407.12.00.20; 4407.12.00.58; 4407.12.00.59; 4407.19.05.00; 4407.19.06.00; 4407.19.10.01; 4407.19.10.02; 4407.19.10.54; 4407.19.10.55; 4407.19.10.56; 4407.19.10.57; 4407.19.10.64; 4407.19.10.65; 4407.19.10.66; 4407.19.10.67; 4407.19.10.68; 4407.19.10.69; 4407.19.10.74; 4407.19.10.75; 4407.19.10.76; 4407.19.10.77; 4407.19.10.82; 4407.19.10.83; 4407.19.10.92; 4407.19.10.93; 4409.10.05.00; 4409.10.10.20; 4409.10.10.40; 4409.10.10.60; 4409.10.10.80; 4409.10.20.00; 4409.10.90.20; 4409.10.90.40; 4418.50.0010; 4418.50.0030; 4418.50.0050 and 4418.99.10.00.

Subject merchandise as described above might be identified on entry documentation as stringers, square cut box-spring-frame components, fence pickets, truss components, pallet components, flooring, and door and window frame parts. Items so identified might be entered under the following ten-digit HTSUS subheadings in Chapter 44:

4415.20.40.00; 4415.20.80.00; 4418.99.90.05; 4418.99.90.20; 4418.99.90.40; 4418.99.90.95; 4421.99.70.40; and 4421.99.97.80.

Although these HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

#### IV. DISCUSSION OF THE ISSUES

##### Comment 1. Particular Market Situation Allegation

##### Interested Party Comments<sup>10</sup>

###### *Petitioner*

- Commerce improperly failed to initiate a particular market situation (PMS) investigation.
- Commerce acted inconsistently with its own practice by failing to initiate a PMS investigation when the allegation contained sufficient information.
- Section 504 of the Trade Preferences Extension Act of 2015 (TPEA) provides Commerce with the authority to adjust the cost of producing a foreign like product where a “particular market situation” adversely impacts the reliability of respondents’ own cost data.
- According to Commerce’s practice, it receives an allegation, sets a schedule for rebuttal, and then decides whether to initiate an investigation.
- Commerce acted arbitrarily when it declined to initiate a PMS investigation when the petitioner’s allegation provided sufficient evidence to warrant an investigation.
- The petitioner has provided evidence that Canadian government incentives have allowed large lumber producers to substitute traditional sources of energy with internally-produced biomass.
- Prior to the Canadian government incentives, lumber producers incurred significant costs to dispose of sawmill byproducts.
- Large lumber producers’ costs of production (COP) are also distorted by Canadian government purchases of energy from lumber producers at above-market rates.
- Commerce has previously applied countervailing duty (CVD)-based PMS adjustments in other cases, but Commerce declined to even gather information in this case.
- Commerce’s statement that the allegation was similar to previous allegations demonstrates that Commerce failed to consider the petitioner’s allegation.
- The evidence Commerce relied on in rejecting the petitioner’s allegation was insufficient to dismiss it out of hand.
- Commerce’s analysis of the costs of byproduct disposal overlooks certain key facts.
- Commerce made improper comparisons when examining the financial impact of Canfor’s Green Energy facility.
- Commerce failed to consider what energy costs “would have been” absent subsidies from the Government of Canada (GOC).

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<sup>10</sup> Resolute also submitted a letter in lieu of a rebuttal brief that supported and incorporated the arguments of the GOC and other Canadian parties.

- Commerce failed to consider the evidence presented by the petitioner and failed to grapple with the PMS allegation.
- Commerce should accept the PMS allegation and calculate an adjustment to the mandatory respondents' energy costs.

#### *Sierra Pacific*

- Commerce erred in declining to investigate the petitioner's PMS allegation.
- The legislative history of section 503 of TPEA reflects Congressional intent that Commerce disregard costs of inputs when the inputs have been subsidized.
- Nothing in the statute or the legislative history indicate that alleged interventions must significantly distort a foreign producer's COP for a PMS to exist.
- Commerce improperly made a determination regarding the PMS allegation on a company-specific basis rather than a market-wide basis.

#### *Canfor*

- The petitioner simply repeated its arguments regarding its PMS allegation.
- Commerce properly found that the petitioner's allegation did not meet the burden of proof.
- Commerce was correct in rejecting the petitioner's allegation.
- The arguments contained in the GOC's rebuttal brief regarding the PMS allegation are incorporated by reference.

#### *GOC*

- Commerce correctly rejected the petitioner's PMS allegation.
- The petitioner failed to substantiate its claim and Commerce has consistently required the petitioner to substantiate its claims.
- Commerce's decision regarding the PMS allegation is consistent with its past practice.
- Commerce does not as a practice further investigate unsubstantiated PMS allegations.
- The petitioner has not identified any other PMS allegations analogous to the PMS allegation in this case.
- Commerce appropriately examined and rejected the petitioner's specific PMS allegation.
- Commerce examined the specific evidence presented in support of the petitioner's allegation and concluded that the evidence was insufficient.
- The petitioner's explanations regarding the significance of any cost distortion continue to be inadequate.
- Commerce correctly determined that there is no evidence of significant cost savings through energy produced at the cogeneration facility.
- Commerce determined the net-effect of energy produced by internally consumed biomass – it determined that the effect is insignificant.
- Bioenergy is a small amount of the energy mix in any region – the petitioner cannot credibly contend that this distorts the market as a whole.
- Bioenergy is more expensive than other forms of energy and would raise third-party input costs rather than lower them.
- Commerce correctly considered and rejected the claims relating to reduced energy purchases.



- The petitioner failed to explain how this small level of energy cost savings distorts respondents' COP for softwood lumber.
- The statute provides no authority for Commerce to impute costs for inputs that a respondent did not actually purchase.
- The petitioner failed to identify any price in any market that is distorted.
- The petitioner's claims regarding excess self-produced energy sold back to the grid undermine the claim that the electricity market is distorted.
- As Commerce stated, the petitioner did not adequately demonstrate that a separate income stream from electricity generation distorts the COP of softwood lumber.
- The petitioner failed to support its request for CVD-based PMS adjustments.
- None of the alleged subsidy programs affect third-party energy production costs or third-party energy sales prices to lumber producers.
- Application of a CVD-based PMS adjustment would be an improper double remedy.
- Commerce has previously rejected PMS allegations based on insignificant alleged distortions.
- Sierra Pacific's cited cases do not support its proposition.
- Commerce assessed the adequacy of the PMS allegation based on what the petitioner submitted – the allegation focused on large lumber producers (specifically the respondents).

#### *West Fraser*

- Commerce offered a thorough analysis explaining its reasons for rejecting the petitioner's PMS allegation.
- Commerce directly addressed the petitioner's PMS allegation claims regarding disposal cost savings.
- Commerce explained that the minimal impact of cost savings does not warrant a departure from Commerce's normal practice.
- Commerce concluded that the petitioner did not connect separate income streams from energy generation to distortions in the COP.
- The petitioner ignores its burden to substantiate the PMS allegation.
- The arguments contained in the GOC's rebuttal brief regarding the PMS allegation are incorporated by reference.

**Commerce's Position:** Before addressing the arguments of the parties, we first examine the framework of the law regarding PMS and PMS adjustments. The TPEA expressly incorporates the concept of PMS into the statutory provisions concerning ordinary course of trade and constructed value. The TPEA expressly permits Commerce to use an alternative calculation methodology when a PMS exists such that the cost of materials does not "accurately reflect the cost of production in the ordinary course of trade."<sup>11</sup> Section 771(15) of the Act also explains what is considered outside the ordinary course of trade, including when a "particular market situation prevents a proper comparison with the export price or constructed export price." Further, we emphasize that Commerce typically relies on a respondent's own books and records to calculate costs<sup>12</sup> — the PMS provision is an exception to that rule.

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<sup>11</sup> See section 773(e) of the Tariff Act of 1930, as amended (the Act).

<sup>12</sup> See section 773(f)(1)(A) of the Act.

Next, we turn to the arguments of the parties. First, the petitioner argues that Commerce departed from its practice when it declined to gather further information regarding the PMS allegation. Specifically, the petitioner argues that it is Commerce’s practice to use “a CVD rate as its PMS adjustment in antidumping proceedings.”<sup>13</sup> Despite this practice, the petitioner argues, Commerce failed to even investigate the PMS allegation. The petitioner’s argument oversimplifies Commerce’s practice with regard to the treatment of PMS allegations. First, Commerce routinely analyzes PMS allegations for sufficiency prior to gathering further information – in this case and in other cases as well.<sup>14</sup> Second, *Biodiesel from Argentina*, which the petitioner relies upon, is an inapt comparison for this case. Specifically, in *Biodiesel from Argentina*, Commerce found that the Argentine government’s control over pricing in the Argentine biodiesel market was so pervasive and impactful that prices could not be considered competitively set — thus, the prices were outside the ordinary course of trade.<sup>15</sup> As we will further discuss below, the petitioner in this case did not present evidence of any significant market distortions or any significant distortions to the COP for softwood lumber.

Sierra Pacific also argues that Commerce improperly applied a “significance” standard when it failed to further investigate the PMS allegation. Sierra Pacific argues that nothing in the statute or legislative history states that there must be a “significant” distortion of costs for a PMS to exist. We disagree. Sierra Pacific ignores the important threshold built into the language of the statute — the concept of the ordinary course of trade. Commerce’s regulations note that transactions outside the ordinary course of trade “have characteristics that are extraordinary for the market in question.”<sup>16</sup> Section 771(15) of the Act also explains that certain sales or transactions are outside the ordinary course of trade when a “particular market situation prevents a proper comparison with the export price or constructed export price.” This language demonstrates that the circumstances in a market must be severe or significant enough to prevent a proper comparison with export price (EP) or constructed export price (CEP). As we further explain below, the petitioner’s allegation did not warrant further action because it did not sufficiently demonstrate that the COP for softwood lumber was distorted by the GOC’s alleged market interventions.

Sierra Pacific continues its argument, stating that it is Commerce’s practice to conduct a qualitative analysis of a PMS allegation to determine whether a PMS exists. After this qualitative analysis, Sierra Pacific argues, Commerce will gather more information regarding a PMS. Sierra Pacific’s assessment is incorrect. In rejecting PMS allegations, we have previously

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<sup>13</sup> See Petitioner’s Case Brief at 19 (citing *Biodiesel from Argentina: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 83 FR 8837 (March 1, 2018) (*Biodiesel from Argentina*), and accompanying Issues and Decision Memorandum (IDM) at Comment 4).

<sup>14</sup> See, e.g., *Mattresses from Indonesia: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 85 FR 69597 (November 3, 2020), and accompanying PDM at V; *Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Final Results of Antidumping Duty Administrative Review; 2016–2017*, 84 FR 44845 (August 27, 2019) (*CWP from the UAE*), and accompanying IDM at Comment 1; see also *Certain Softwood Lumber Products from Canada: Preliminary Results of Antidumping Duty Administrative Review and Rescission of Review, in Part; 2017–2018*, 85 FR 7282 (February 7, 2020), and accompanying PDM at VI.

<sup>15</sup> See *Biodiesel from Argentina* at Comment 2.

<sup>16</sup> See 19 CFR 351.102(b)(35).



stated that quantification is not necessary to find the existence of a PMS, but Commerce does require evidence of distortions to COP or pricing that bring them outside the ordinary course of trade.<sup>17</sup> In PMS cases, Commerce examines the totality of the circumstances when evaluating allegations, and in the instant case, there is no record evidence of significant distortions to the COP.

The petitioner also argues that Commerce improperly dismissed the PMS allegation despite the petitioner's presentation of sufficient evidence. In its case brief, the petitioner reiterates the main points in its PMS allegation. First, the petitioner argues that one of the ways that the COP for softwood lumber is distorted is because, absent GOC intervention, large lumber producers would need to incur high costs to dispose of lumber byproducts. The petitioner's argument here is premised upon the inadequately supported assumption that, absent the bioenergy generation operations, the large lumber producers *must utilize costly disposal for all of the lumber byproducts*. As we explained in the Preliminary PMS Memorandum, record evidence demonstrates that costly disposal for lumber byproducts is not inevitable absent the bioenergy generation operations.<sup>18</sup> The petitioner argues over the particular numbers cited by Commerce and argues that Commerce's point is undermined by the specific numbers from West Fraser and Canfor. However, the point here is that the petitioner's assumption is inadequately supported by record evidence and the petitioner's argument is speculative. The petitioner never explains why it assumes that costly disposal is a foregone conclusion absent the bioenergy generation operations when record evidence shows that there are other options. Although a 2006 report cited by the petitioner shows that some lumber producers did employ costly disposal of byproducts,<sup>19</sup> it is speculative to assume that these producers would continue to engage in costly disposal absent the bioenergy generation operations. Without reasonable explanations and record evidence from the petitioner on these key points, the petitioner's disposal cost estimates are speculative and not sufficient to show that the COP for softwood lumber is distorted.

Further, the petitioner proceeds to reiterate that the COP for softwood lumber is distorted because bioenergy generation projects reduce energy costs. As explained in the Preliminary PMS Memorandum, we found that any cost savings were negligible.<sup>20</sup> In its case brief, the petitioner attempts to support its position by presenting percentages without the context of the underlying numbers – the petitioner cites to the reduced intensity of energy purchases and the percentage of facilities that generate some form of renewable energy from wood materials. When considering record evidence (*i.e.*, the reported COP for large lumber producers), we continue to find the impact of energy savings is negligible.<sup>21</sup>

The petitioner offers two arguments against our analysis that the energy cost savings of the bioenergy generation operations are negligible. First, for Canfor, the petitioner argues that we made an inapt comparison when we compared the energy cost savings of Canfor Green Energy – Grande Prairie (Green Energy) to Canfor's total cost of manufacturing. However, this

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<sup>17</sup> See *CWP from the UAE* at Comment 1.

<sup>18</sup> See Memorandum, "Decision on Particular Market Situation Allegation," dated May 20, 2021 at 8-9 (Preliminary PMS Memorandum).

<sup>19</sup> See Preliminary PMS Memorandum at 8-9.

<sup>20</sup> *Id.* at 10.

<sup>21</sup> *Id.*

comparison highlights why the PMS allegation is deficient. The petitioner’s PMS allegation focuses on “large lumber producers,” with specific examples from Canfor and West Fraser, and argues for a market-wide distortion. Comparing the savings of Canfor’s Green Energy facility to Canfor’s total cost of manufacturing is a valid comparison in order to demonstrate the minimal impact of the energy savings from a broader perspective. However, the Green Energy facility does not significantly impact the cost of manufacturing for Canfor overall, because energy costs represent a small amount of the COP for softwood lumber.<sup>22</sup> Canfor’s Green Energy facility is an unpersuasive example to demonstrate that the alleged PMS is significant enough to prevent a proper comparison of EP or CEP on a broader, market-wide basis.

The second argument that petitioner offers against our analysis of negligible cost savings relates to West Fraser. The petitioner argues that Commerce failed to analyze “what West Fraser’s energy consumption would have been” absent the GOC’s alleged market-distorting industrial policies. This argument fails because it calls for an unreasonable approach to this case. Specifically, the petitioner here asks Commerce to engage in extensive speculation and use that speculation as a basis to further investigate the alleged PMS. In this case, the petitioner has not provided any persuasive record evidence to support its argument on its speculative statements and relying on speculation is not sufficient to show any significant distortions to the COP for softwood lumber.

Finally, the petitioner continues to argue that the COP for softwood lumber is distorted by the GOC energy purchases for more than adequate remuneration. In the preliminary PMS determination, we noted that the petitioner did not connect the separate revenue stream for each company’s facilities to distortions in each company’s respective COP.<sup>23</sup> In addition, the petitioner did not demonstrate how such income from energy generation appreciably affected the COP for Canfor or West Fraser.<sup>24</sup> In its case brief, the petitioner reiterated its claims on this issue without addressing our positions. Accordingly, we continue to find that the petitioner did not adequately demonstrate how the alleged energy purchases for more than adequate remuneration distort the COP for softwood lumber for either Canfor or West Fraser.

Above, we have addressed the substance of the petitioner’s and Sierra Pacific’s arguments with respect to the PMS allegation. However, the petitioner and Sierra Pacific make additional arguments, which we now address. First, Sierra Pacific argues that Commerce improperly made the preliminary PMS determination based on a company-specific analysis, rather than a market-wide analysis. We disagree. First, our PMS determination is based on a market-wide analysis.<sup>25</sup> For example, we explain that a limited subset of wood residuals is used for bioenergy generation in the softwood lumber market and that energy costs are a small input in the COP for softwood lumber overall.<sup>26</sup> Also, we note that the allegation presented by the petitioner largely focused on company-specific evidence for “large lumber producers,” specifically Canfor and West Fraser.

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<sup>22</sup> *Id.* at 9 (citing Canadian Parties’ Letter, “Response to Petitioner’s August 3, 2020 Particular Market Situation (‘PMS’) Allegation,” dated August 24, 2020 at 17.

<sup>23</sup> *Id.* at 9, 11.

<sup>24</sup> *Id.*

<sup>25</sup> *See, e.g.*, Preliminary PMS Memorandum at 11 (“We determine that this allegation lacks the record evidence which indicates that the COP of softwood lumber is distorted given the negligible impact of bioenergy generation on the cost of production.”).

<sup>26</sup> *Id.* at 8-9.

Moreover, the fact that the petitioner's focus is on company-specific evidence rather than proof of market-wide distortion is another reason the petitioner's allegation is not sufficient for Commerce to find a country-wide PMS. In particular, the petitioner's company-specific examples did not prove a significant distortion in the COP for softwood lumber on a market-wide basis.

Second, the petitioner accuses Commerce of pre-judging its PMS allegation. The petitioner states that Commerce's observation that the current PMS allegation is "very similar" to previously rejected allegations "demonstrates that {Commerce} failed to engage with the PMS allegation." Our Preliminary PMS Memorandum reflects our extensive analysis of each distinct prong of the petitioner's allegation and connected our arguments to specific information and numbers on the record of this proceeding.<sup>27</sup> After our detailed analysis, we stated that the petitioner's current allegation is similar to allegations we previously rejected and explained that the current allegation, like the previous allegations, failed to demonstrate that the COP for softwood lumber is distorted by the GOC's alleged market interventions.<sup>28</sup> Thus, the petitioner's claim that we failed to engage with this allegation is not accurate and disregards the detailed analysis in the Preliminary PMS Memorandum.

For all of the above reasons, for the final results, we maintain that the petitioner's PMS allegation, along with its submitted factual information, do not support further investigation into whether a PMS exists.

## **Comment 2. Whether it was Proper to Accept Proprietary Grades**

### *Petitioner*

- In reporting the physical characteristics of respective sales, both Canfor and West Fraser reported various proprietary "appearance grade" softwood lumber products, despite all of these sales falling within existing National Lumber Grades Authority (NLGA) grades.<sup>29</sup>
- The language of the AD duty questionnaire permits respondents to go beyond the three-digit code for the NLGA grade or NLGA Grade Equivalent only if there is no NLGA equivalent. Accordingly, for the final results, Commerce should adjust both Canfor and West Fraser's reporting of "NLGA Grade Equivalent" in the "NLGAGRDH/U" field.

### *GOC and Canfor*

- Commerce should continue to distinguish appearance grade products from other NLGA graded products. Commerce has repeatedly recognized that appearance grade lumber products are distinct products and command a premium price.
- Commerce determined in the first administrative review of this order (AR1) that "certain customers pay a premium for a piece of softwood lumber that has a better appearance

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<sup>27</sup> *Id.* at 9-10.

<sup>28</sup> *Id.* at 11.

<sup>29</sup> See Canfor's Letter, "Section A Initial Questionnaire Response," dated June 18, 2020 (Canfor's Section A Response) at A-43; see also West Fraser's Letter, "Certain Softwood Lumber Products from Canada, Case No. A-122-857 Response to Sections B-C Supplemental Antidumping Duty Questionnaire," dated November 3, 2020 (West Fraser's B-D Supplemental Response) at 14.

than softwood lumber classified under the same NLGA grade and used for the same application.”<sup>30</sup>

- The petitioner incorrectly claims that the language of the AD duty questionnaire only permits respondents to use additional three-digit codes when there is no NLGA Equivalent.
- Commerce’s instructions for reporting NLGA grades expressly identify appearance grade products as an example for which companies can say there was no NLGA equivalent.

**Commerce’s Position:** The petitioner has misconstrued the following instructions in the questionnaires: “{i}f you use grades which you believe have no NLGA equivalent, identify the grades and provide specifications for those grades.”<sup>31</sup> Consistent with the previous review, where we used the same language, and with our applied approach with regard to proprietary grades in the underlying investigation and even in the previous softwood lumber proceeding, we are instructing respondents that if they rely on their sales of proprietary grades for which the parameters and criteria differ from NLGA grades, then they should classify them according to their proprietary grade.

In the previous review of this proceeding, the petitioner misconstrued the exact same instructions in Commerce’s questionnaire in exactly the same manner as it did in the current review. That is, it argued that respondents may only report unique proprietary appearance grades for lumber that would not fall within an existing NLGA grade. We provided the same explanation of our instructions and intent in AR1 as we did above.<sup>32</sup> We further noted that the petitioner’s interpretation was nonsensical since, to our knowledge, there is an NLGA grade for all types of softwood lumber.

The petitioner has not raised any arguments concerning the appropriateness or accuracy of allowing respondents to classify and Commerce to recognize such classifications of lumber when sold under proprietary grades as such. Rather, the petitioner has simply repeated its misinterpretation of these instructions and Commerce’s intent. Our instructions in the questionnaire and intent here are unchanged from the investigation and AR1, which are that, where the respondents in the normal course of business in making sales rely on proprietary grades for which the parameters and criteria differ from NLGA grades, then respondents should classify such sales accordingly. The respondents have understood our instructions, reported consistent with the intent of our instructions, and provided proof that they sold to their claimed proprietary grades<sup>33</sup> and so consistent with the *Preliminary Results*, we have recognized Canfor and West Fraser’s reported proprietary grades.

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<sup>30</sup> See *Certain Softwood Lumber Products from Canada: Final Results of Antidumping Duty Administrative Review; 2017–2018*, 85 FR 76519 (November 30, 2020) (*Lumber ARI Final*), and accompanying IDM at 50-51.

<sup>31</sup> See Commerce’s Letter, Initial Antidumping Questionnaire, dated May 21, 2020 (Initial AD Questionnaire); see also *Lumber ARI Final* IDM at 15.

<sup>32</sup> See *Lumber ARI Final* IDM at 14-16.

<sup>33</sup> See Canfor’s Section A Response at A-43 – A-45; see also Canfor’s Letter, “Sections B-D Initial Questionnaire Response,” dated July 13, 2020 (Canfor’s Section B-D Response) at B-15 – B-18, C-14 – C-17; Canfor’s Letter, “Supplemental Sections A-D Questionnaire Response,” dated September 30, 2020 (Canfor’s Supplemental Sections A-D Response) at 2-8 and Exhibits B-26 through B-28; West Fraser’s B-D Supplemental Response at 14.

### Comment 3. Whether it was Proper not to Select Resolute as a Respondent

#### *Resolute*

- Commerce has been investigating and reviewing allegations of dumping of imports of softwood lumber from Canada since 2001. Until 2020, Commerce never investigated or reviewed fewer than three companies, operating in at least four different Canadian provinces in two distinct regions of the North American continent and has reviewed as many as seven in a single proceeding.<sup>34</sup> In doing so, Commerce has emphasized the scale of the imports and the geographic differences across the continent producing differences in forests, operations, and markets, all creating different conditions for possible dumping. Commerce’s decision to break with this practice and only select two mandatory respondents and not select Resolute as the third mandatory respondent was arbitrary and capricious.
- Commerce had sufficient resources to examine Resolute. Commerce has significant experience examining Resolute in numerous reviews and the investigation underlying this proceeding. In the concurrent CVD review, after J.D. Irving requested to be a mandatory respondent and met with Commerce officials, including the Secretary of Commerce at the time,<sup>35</sup> Commerce selected J.D. Irving as a respondent.<sup>36</sup> Despite meeting with Commerce officials on several occasions, and despite Commerce’s familiarity with the operations of Resolute as they relate to dumping, Commerce claimed that it did not have sufficient resources to devote to examining Resolute.<sup>37</sup>
- Commerce already has recognized the need, in Canadian investigations and reviews, for expansive geographic coverage. Commerce has accepted J.D. Irving Ltd. as a fourth respondent in the companion CVD review, thereby covering Western, Central, and Eastern Canada. Yet, Commerce in the AD review thus far has limited itself to only two respondents with no coverage of Central or Eastern Canada.
- Commerce previously had acknowledged and recognized the important differences in Canadian lumber operations in different parts of the continent. The cost structures are different because of differences in the forests that translate into differences in species and tree sizes; Central Canadian companies tend to be integrated with pulp and paper production unlike western companies; there are different transportation systems (British Columbia companies moving logs in booms over water; Central Canadian companies relying on rail and trucking); the markets generally are bound by geography, with western Canadian companies serving predominantly a western and southern market and Central Canadian companies delivering predominantly to the Midwest and East.
- Resolute had the lowest AD margin in both the investigation and the first administrative review.

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<sup>34</sup> See Resolute’s Case Brief at 3 (citing *Notice of Preliminary Results of Antidumping Duty Administrative Review and Postponement of Final Results: Certain Softwood Lumber Products from Canada*, 69 FR 33235 (June 14, 2004)).

<sup>35</sup> *Id.* at 7 (citing Resolute’s Letter, “New Factual Information for the AD Record,” dated December 21, 2020).

<sup>36</sup> *Id.* at 11 (citing *Certain Softwood Lumber Products from Canada: Preliminary Results and Partial Rescission of the Countervailing Duty Administrative Review, 2019*, 86 FR 28556 (May 27, 2021)).

<sup>37</sup> *Id.* at 6 (citing Memorandum, “Meeting with Officials from the Embassy of Canada,” dated September 2, 2020; see also Memorandum, “Meeting with Officials from the Embassy of Canada,” dated November 4, 2020).



- Although Commerce may not have a statutory obligation to consider geographic differences, Commerce made it a relevant consideration in every AD investigation and review of softwood lumber from Canada for nearly two decades. Commerce has not provided a rational or reasonable explanation for its departure from its past practice.<sup>38</sup>
- Commerce’s conclusions that all softwood lumber products “are of the same class or kind of merchandise”<sup>39</sup> and that its experience in the prior AD administrative review and the investigation did not indicate that geographic differences were relevant,<sup>40</sup> as well as Commerce’s reliance on the margins of the first administrative review being within one point of each other<sup>41</sup> ignores the fact that the range of margins was much wider in the investigation and in the *Preliminary Results*.<sup>42</sup>
- Although Commerce does have some discretion in the allocation of its resources, arbitrary or capricious allocations of resources abuse that discretion. Section 782(a)(1)(B) of the Act dictates that Commerce must accept voluntary respondents when they submit questionnaire responses timely and the number of exporters or producers subject to the review is “not so large that any additional individual examination of such exporters or producers would be unduly burdensome to the administering authority and inhibit the timely completion of the investigation or review.”
- “Although Commerce claimed not to have resources for a third respondent in the AD review, Commerce accepted a fourth respondent in the companion CVD review... The deciding factor for selecting a fourth respondent in the CVD review, and only two, suddenly making allegedly scarce resources available and with no other explanation offered, appears to have been access to the Secretary of Commerce.”<sup>43</sup>
- For voluntary respondents, Commerce must “rely on something other than its initial decision to limit the number of mandatory respondents.”<sup>44</sup> Commerce offered three explanations for excluding Resolute as a mandatory respondent in these circumstances: no statutory obligation to consider geographic coverage or the types of differences in the forests and company cost structures identified by Resolute; complexity of issues; and limited resources.<sup>45</sup> These explanations are nearly identical to those Commerce subsequently advanced when declining to accept Resolute as a voluntary respondent, especially regarding complex issues and limited resources.<sup>46</sup> It offered no explanation for

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<sup>38</sup> *Id.* at 17 (citing *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 57 (1983) (“an agency changing its course must supply a reasoned analysis”) (internal quotation and citation omitted); see also *Nippon Steel Corp. v. U.S Int’l Trade Comm’n*, 494 F.3d 1371, 1377 n.5 (Fed. Cir. 2007) (“When an agency decides to change course, however, it must adequately explain the reason for a reversal of policy”).

<sup>39</sup> *Id.* at 7 (citing Memorandum, “Resolute FP Canada Inc.’s Request for Selection as a Voluntary Respondent,” dated November 4, 2020).

<sup>40</sup> *Id.* at 9 (citing Memorandum, “Respondent Selection,” dated May 20, 2020 (RSM) at 7-8).

<sup>41</sup> *Id.* at 10 (citing *Certain Softwood Lumber Products from Canada: Antidumping Duty Order and Partial Amended Final Determination*, 83 FR 350, 351 (January 3, 2018) (*Softwood Lumber Order*)).

<sup>42</sup> *Id.* (citing *Preliminary Results*).

<sup>43</sup> *Id.* at 12-13.

<sup>44</sup> *Id.* at 13 (citing *Husteel Co. v. United States*, 98 F. Supp. 3d 1315, 1335 (CIT 2015) (*Husteel*) (citing *Grobtest & I-Mei Industrial (Vietnam) Co. v. United States*, 815 F. Supp. 2d 1342 (Ct. Int’l Trade 2012) and *Grobtest & I-Mei Industrial (Vietnam) Co. v. United States*, 853 F. Supp. 2d 1352 (CIT 2012))).

<sup>45</sup> *Id.* at 13 (citing Memorandum, “Resolute FP Canada Inc.’s Request for Selection as a Voluntary Respondent,” dated November 4, 2020).

<sup>46</sup> *Id.* at 14-15 (citing Memorandum, “Resolute FP Canada Inc.’s Request for Selection as a Voluntary Respondent,” dated November 4, 2020).



why the issues in the second administrative review were to be prohibitively complex after they were addressed in the first administrative review.

- Resolute made significant shipments of subject merchandise to the United States<sup>47</sup> and has submitted all sections of Commerce’s Questionnaire, which Commerce still can review to calculate an individual dumping margin within the time remaining, including extensions, before the final results are due in this administrative review. Commerce has accepted Resolute’s submissions. It is now bound to use them to calculate an AD margin specific to Resolute.

#### *Petitioner*

- Section 782(a)(2) of the Act specifies that Commerce has the discretion not to examine voluntary respondents if their number is so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation. The TPEA further amended section 782(a) of the Act to provide Commerce with even greater discretion to deny requests for voluntary respondent treatment. The new section 782(a)(2) of the Act requires the agency to accept voluntary respondents only when “the number of exporters or producers subject to the... review is not so large that any additional individual examination of such exporters or producers would be unduly burdensome... and inhibit the timely completion of the investigation or review.”
- Resolute fails to point to any contrary authority that would require Commerce to consider geography in selecting mandatory respondents when limiting individual review in accordance with section 777A(c)(2)(B) of the Act.
- The U.S. Court of International Trade (CIT) and the U.S. Court of Appeals for the Federal Circuit (CAFC) have found that “agencies with statutory enforcement responsibilities,” like Commerce, “enjoy broad discretion in allocating investigative and enforcement resources.”<sup>48</sup>
- In challenging Commerce’s decision not to individually review Resolute as a voluntary respondent, the company largely recycles the arguments that it made in challenging Commerce’s selection of mandatory respondents.
- In *Qingdao Qihang Tyre Co.*, the CIT sustained Commerce’s decision to deny voluntary respondent status to a foreign producer/exporter and noted that “{i}n the TPEA, Congress provided {Commerce} with broad discretion in deciding whether or not to accept a request for voluntary respondent status.”<sup>49</sup> In sustaining Commerce’s determination, the CIT held that Commerce “applied {the} factors Congress considered appropriate, including complexity of the review and its other resource commitments.”<sup>50</sup> Like the determination underpinning the CIT’s decision in *Qingdao Qihang Tyre Co.*, Commerce

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<sup>47</sup> See the RSM for the exact amount of shipments by Resolute.

<sup>48</sup> See Petitioner’s Case Brief at 28-29 (citing *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995) (*Torrington*) (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)); *Laizhou Auto Brake Equip. Co. v. United States*, 32 C.I.T. 711, 726 (June 26, 2008) (*Laizhou*) (“Commerce, like any organization seeking efficient operations, plans for the proper management of its time and resources.”).

<sup>49</sup> *Id.* at 30-31 (citing *Qingdao Qihang Tyre Co. v. United States*, 308 F. Supp. 3d 1329, 1365 (CIT 2018)(*Qingdao Qihang Tyre Co.*)).

<sup>50</sup> *Id.*

properly considered each of the factors Congress considered appropriate before rejecting Resolute's request for voluntary respondent treatment.

- Resolute's argument that reviewing it would not represent a significant strain on Commerce resources ignores the numerous detailed supplemental questionnaires that were issued to West Fraser and Canfor despite those companies having previously been subject to Commerce's examination.
- Resolute's reliance on *Husteel* where the CIT found Commerce to have ignored section 782(a) of the Act fails to recognize that the *Husteel* decision on which it relies pre-dates the TPEA amendments to section 782 of the Act.<sup>51</sup> Moreover, the CIT's decision in *Husteel* does not support Resolute's arguments. Specifically, in this review, Commerce provided additional analysis in declining to review Resolute as a voluntary respondent and did not "simply rely on the fact that it already chose to limit the number of respondents."<sup>52</sup>

**Commerce's Position:** We disagree with Resolute. We noted in the RSM, after "carefully considering the CBP data, our resource constraints, as well as the complexity of this administrative review, we find that the office responsible for this review has the resources to examine two mandatory respondents." This assessment was a good faith and accurate assessment of our resources. We also explained in the tolling memorandum on this record that our lack of resources to review three mandatory respondents is partially caused by the need to expend significant resources to address the "recent surge in the filing of new AD and CVD petitions and corresponding investigations."<sup>53</sup> Thus, it is logical that if we only had the resources to examine three respondents in the prior review, after experiencing a surge of new investigations, we would then only have resources to individually examine two respondents, which is the case here.

Resolute believes it should be selected due to the differences it believes exist in operations, markets, species, products, and costs in different regions in Canada and the fact that it is the only respondent selected as a mandatory respondent in both the underlying investigation and the first administrative review that is east of the Rocky Mountains. As an initial matter, Commerce is not obligated to consider geographic coverage in selecting respondents for individual examination. Selecting the exporters/producers accounting for the largest volume of exports that can be reasonably examined is consistent with our statutory mandate, which does not direct us to consider the types of differences outlined by Resolute. Additionally, our individual examination of Resolute in prior segments has not demonstrated that the differences outlined by Resolute result in relevant distinctions in the AD context. The margins for the mandatory respondents were between 1.15 percent and 1.99 percent despite respondents being from both east and west of the Rocky mountains.<sup>54</sup> This narrow range of margins among companies of varying size was also seen in the underlying investigation when margins of the individually examined respondents were between 3.20 percent and 7.22 percent.<sup>55</sup>

<sup>51</sup> *Id.* at 32 (citing Resolute's Case Brief at 13 (citing *Husteel*, 98 F. Supp. 3d 1315)).

<sup>52</sup> *Id.* at 33 (citing, *e.g.*, Resolute's Case Brief at 6-7 (detailing meetings between officials from J.D. Irving and Secretary Ross)); *Id.* at 12-13 (same).

<sup>53</sup> See Memorandum, "Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews," dated July 21, 2020.

<sup>54</sup> See *Lumber AR1 Final*.

<sup>55</sup> See *Softwood Lumber Order*.

Resolute notes that we selected a fourth respondent, J.D. Irving, in the concurrent CVD proceeding and that by doing so, we expanded our coverage, consistent with stated concerns over ensuring wide geographic coverage, to Western, Central, and Eastern Canada. As we noted above, our individual examination of Resolute in prior segments has not demonstrated that the geographic differences outlined by Resolute result in relevant distinctions in the AD context. Although the geographic region of the respondent may affect the province-specific subsidies for which the respondent is eligible in the CVD context, we do not find evidence of a demonstrated effect on dumping behavior.

Resolute's suspicion that our selection of J.D. Irving was the result of the owner of J.D. Irving gaining access to the Secretary of Commerce, while Resolute did not, is untrue. Rather, as stated above, our decision not to select Resolute was based, in part, on our finding that in the AD context, geographic coverage was a relatively unimportant determinant in the representativeness of a respondent's margin of all respondents' dumping margins and thus selecting Resolute would have been a poor allocation of our strained resources. We note that in the concurrent solar cells from China AD proceeding, which like this proceeding, is a relatively high-profile case covering a large amount of sales, we have always selected two respondents in the reviews.<sup>56</sup>

Resolute's claim that because we had already examined it in the investigation, first review, and in other proceedings, reviewing it again would not represent a significant strain on Commerce resources is without merit. With regard to the review as a whole, the amount of sales under review is extremely large and obtaining accurate data with which to select respondents is challenging. Despite spending several days attempting to obtain accurate U.S. softwood lumber import data, our first attempt failed and we had to repeat downloads of import data which again required several downloads over the course of several days before we were able to obtain accurate data.<sup>57</sup> We also had to consider several requests for limited reporting from respondents

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<sup>56</sup> See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2012-2013*, 80 FR 1021 (January 8, 2015), and accompanying PDM, unchanged in *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2012-2013*, 80 FR 40998 (July 14, 2015); see also *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2013-2014*, 81 FR 39905 (June 20, 2016); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2014-2015*, 82 FR 29033 (June 27, 2017); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2015-2016*, 83 FR 35616 (July 27, 2018); *Crystalline Silicon Photovoltaic Cells Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2016-2017*, 84 FR 36886 (July 30, 2019); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017-2018*, 85 FR 62275 (October 2, 2020); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Antidumping Administrative Review, and Preliminary Determination of No Shipments; 2018-2019*, 86 FR 21277 (April 22, 2021) (*Preliminary Results*), and accompanying PDM.

<sup>57</sup> See Memoranda, "Release of Customs and Border Protection Data," dated April 3, 2021; and "Second Release of Customs and Border Protection Data," dated April 16, 2021.

due to the many different types of sales and large quantities of sales covered by the scope of this review.<sup>58</sup> After examining Canfor and West Fraser's responses to the initial questionnaires, which included 30 pages of additional, softwood lumber-specific questions based on our experience administering the case,<sup>59</sup> we issued seven additional supplemental questionnaires to West Fraser and Canfor despite those companies having previously been subject to Commerce examination.<sup>60</sup> We further note that parties have submitted as many arguments in their case briefs regarding Canfor as they did in AR1.<sup>61</sup> Thus, by any measure, despite reviewing Canfor and West Fraser previously, and administering the first review and investigation, reviewing an additional company would have represented a significant strain on our resources.

Resolute cites to language in *Husteel* stating that for voluntary respondents, Commerce must "rely on something other than its initial decision to limit the number of mandatory respondents."<sup>62</sup> As an initial matter, *Husteel* concerned a final determination that precedes the 2015 passing of the TPEA and nothing in the Court's decision addresses the TPEA.<sup>63</sup> In *Qingdao Qihang Tyre Co.*, the CIT sustained Commerce's decision to deny voluntary respondent status to a foreign producer/exporter and noted that "{i}n the TPEA, Congress provided {Commerce} with broad discretion in deciding whether or not to accept a request for voluntary respondent status."<sup>64</sup> Resolute's claim that Commerce raised essentially no new challenges in its determination not to examine Resolute as a voluntary respondent than it did in the RSM ignores the fact that throughout the period between when the RSM was issued and when the determination not to select Resolute as a voluntary respondent, Commerce was experiencing a "recent surge" in newly filed AD and CVD petitions.<sup>65</sup> We noted the fact that new investigations were consuming significant resources and, thus, contributed to our determination not to examine Resolute as a voluntary respondent.<sup>66</sup> We also noted that we were facing new challenges examining both mandatory respondents, Canfor and West Fraser involving complex issues relating to byproducts, cost reconciliations, PMS allegations, and labor and energy reporting

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<sup>58</sup> See Memorandum, "Response to Requests Not to Report Certain Sales and Cost Data," dated June 24, 2020.

<sup>59</sup> See Initial AD Questionnaire at page D-16 to D-45.

<sup>60</sup> See Commerce's Letters, "Section A Supplemental Questionnaire (to Canfor)," dated July 21, 2020; "West Fraser Mills Ltd. Section A Supplemental Questionnaire," dated October 1, 2020; "Sections A-D Supplemental Questionnaire (to Canfor)," dated September 2, 2020; "West Fraser Mills Ltd. Sections B and C Supplemental Questionnaire," October 9, 2020; "West Fraser Mills Ltd. Sections A-D Supplemental Questionnaire," January 7, 2021; "West Fraser Mills Ltd. Section D Supplemental Questionnaire," dated March 23, 2021; "West Fraser Mills Ltd. Section D Supplemental Questionnaire," dated March 24, 2021; "West Fraser Mills Ltd. Section D Supplemental Questionnaire," dated April 26, 2021; "Second Sections A-D Supplemental Questionnaire (for Canfor), dated May 4, 2021.

<sup>61</sup> See *Lumber AR1 Final FR IDM*.

<sup>62</sup> *Id.* at 13 (citing *Husteel Co. v. United States*, 98 F. Supp. 3d 1315, 1335 (CIT 2015) (citing *Grobest & I-Mei Industrial (Vietnam) Co. v. United States*, 815 F. Supp. 2d 1342 (CIT 2012) and *Grobest & I-Mei Industrial (Vietnam) Co. v. United States*, 853 F. Supp. 2d 1352 (CIT 2012)).

<sup>63</sup> See *Husteel*.

<sup>64</sup> *Id.* at 30-31 (citing *Qingdao Qihang Tyre Co. v. United States*, 308 F. Supp. 3d 1329, 1365 (CIT 2018) (*Qingdao Qihang Tyre Co.*)).

<sup>65</sup> See the Memorandum, "Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews," dated July 21, 2020.

<sup>66</sup> See Memorandum, "Resolute FP Canada Inc.'s Request for Selection as a Voluntary Respondent," dated November 4, 2020.

methodologies.<sup>67</sup> Demonstrating the accuracy of our concerns are the comments in this IDM concerning most of these issues and more involving Canfor and West Fraser.

The reasonableness of our selection of the two companies Canfor and West Fraser is further bolstered by the fact that the Act assumes that the largest volume exporters are representative of all exporters.<sup>68</sup> While Resolute would no doubt argue that selecting it in addition to Canfor and West Fraser would be even “more” representative, considering: (1) the relatively small differences in margins demonstrated in this proceeding by respondents from different regions; (2) the fact that it is not abnormal for Commerce to rely on the selection of the two largest mandatory respondents in a review; (3) the stress on resources caused by the recent surge in new AD and CVD petitions filed; and (4) the fact demonstrated by this record that we continue to face many complex and time consuming issues in administering this review; our decision not to individually examine Resolute was not, contrary to Resolute’s assertions, arbitrary and capricious, but rather an efficient and reasonable allocation of resources. The CIT and CAFC have found that “agencies with statutory enforcement responsibilities,” like Commerce, “enjoy broad discretion in allocating investigative and enforcement resources.”<sup>69</sup> Further, as noted above, in *Qingdao Qihang Tyre Co.*, the CIT sustained Commerce’s decision to deny voluntary respondent status to a foreign producer/exporter and noted that “{i}n the TPEA, Congress provided {Commerce} with broad discretion in deciding whether or not to accept a request for voluntary respondent status.”<sup>70</sup> Because our decision not to select Resolute was based on a reasonable assessment of available resources and a reasonable allocation of these resources, we did not abuse the discretion granted by the courts in not selecting Resolute.

#### **Comment 4. Whether it was Proper not to Select Respondents based on Sampling**

##### *Petitioner*

- Much of Commerce’s justifications for not using sampling to select mandatory respondents is merely copied from the previous softwood lumber review and fails to address the unique factors present in the current review.
- The SAA explains that Commerce “will employ a sampling methodology” to ensure that the weighted average dumping margins provide “representative results.”<sup>71</sup>
- Commerce’s claim that the “unique time constraints of this administrative review” made sampling “unfeasible,”<sup>72</sup> ignores the fact that having to delay respondent selection until after the 90-day period for withdrawal of review requests and is thus not unique present in all administrative reviews.
- Commerce’s justification for not sampling on the grounds that sampling may “result in the review of one or more previously unexamined companies that are unfamiliar to Commerce” is also an unreasonable response to the petitioner’s sampling request. The purpose of using sampling for respondent selection purposes is to limit the “enforcement

<sup>67</sup> *Id.*

<sup>68</sup> See *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1353 (Fed. Cir. 2016).

<sup>69</sup> See *Torrington*; see also *Laizhou* at 726 (2008) (“Commerce, like any organization seeking efficient operations, plans for the proper management of its time and resources.”).

<sup>70</sup> See *Qingdao Qihang Tyre Co* at 1365.

<sup>71</sup> See Petitioner’s Case Brief at 4 (citing the *Uruguay Round Agreements Act, Statement of Administrative Action* (SAA), H.R. Doc. No. 103-316, at 872).

<sup>72</sup> *Id.* at 8 (citing the Memorandum, “Respondent Selection,” (RSM) dated May 2020 at 5).



concerns” that arise when Commerce selects only the largest respondents.<sup>73</sup> Of the 268 respondents included in this review, only four have been individually examined by Commerce in prior segments of this proceeding and these unexamined respondents account for a significant share of the entries under review.<sup>74</sup>

- By choosing to review West Fraser and Canfor—companies that were previously examined in both the investigation and first administrative review—Commerce ignored the main purpose of its sampling methodology—achieving a dumping margin that is representative of the entire Canadian softwood lumber industry. As a result, concerns raised in the Sampling Notice that non-selected respondents, will continue to believe that they are “excluded from individual examination” and “may decide to lower their prices as they recognize that their pricing behavior will not impact the AD rates assigned to them”<sup>75</sup> are present here. This is seen where of the nearly 200 entities specifically requesting a review of themselves, only West Fraser, Tolko Industries, Ltd., and Resolute FP Canada Inc. requested to be individually examined.<sup>76</sup> In fact, Canfor and West Fraser forecasted that they would be mandatory respondents and stated their expected dumping margins in the financial statements.<sup>77</sup>
- The petitioner included evidence in its sampling request showing that the productive capacities of the largest softwood lumber producers allow them an advantage over smaller firms in their ability to maintain economies of scale.<sup>78</sup> These economies of scale make these producers more efficient, allowing them to produce at a lower per-unit cost compared to smaller, less efficient producers, who must spread their fixed costs over a smaller total output.<sup>79</sup>

#### *Canfor, West Fraser, and the GOC*

- Selecting respondents through sampling at this stage of the review where the final results are due shortly would be both impractical and a waste of Commerce’s resources.
- Sampling is not the preferred respondent selection methodology for Commerce – as it notes in the RSM, this methodology is employed only in “rare cases.”<sup>80</sup>
- One of the requirements for Commerce to rely on sampling is that it has the resources to investigate at least three companies. Here, Commerce has stated that it does not have sufficient resources to meet this requirement.
- Even if Commerce had decided that its resources would allow review of at least three respondents, it would still have been justified in rejecting the petitioner’s request for sampling for failure to establish another necessary condition for use of that methodology. Specifically, the petitioner has failed to provide Commerce with evidence providing “a

<sup>73</sup> *Id.* at 8-9 (citing *Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 FR 65963, 65967 (November 4, 2013) (*Sampling Notice*)).

<sup>74</sup> *Id.* at 9 (citing RSM at 1 and Attachment II).

<sup>75</sup> *Id.* (citing *Sampling Notice* at 78 FR 65967).

<sup>76</sup> In addition to these entities, Canfor requested to be individually examined. *See* RSM at 9.

<sup>77</sup> *See* Petitioner’s Case Brief at 9 (citing West Fraser’s Section A Response at Exhibit 6; *see also* Canfor’s Letter, “Section A Initial Questionnaire Response,” dated June 18, 2020 at Exhibit A-16).

<sup>78</sup> *Id.* at 10 (citing Petitioner’s Letter, “Comments on CBP Data and Request for Sampling,” dated April 23, 2020 (*Sampling Letter* at 21 and n. 40)).

<sup>79</sup> *Id.* (citing *Sampling Letter* at Exhibit 7).

<sup>80</sup> *See* Canfor’s Rebuttal Brief at 10 (citing RSM at 6).



reasonable basis to believe or suspect that the average export prices and/or dumping margins for the largest exports differ from such information that would be associated with the remaining exporters.”

- As Commerce noted, when it does use sampling, “it is typically when there are multiple, and often numerous, prior reviews to draw upon for evidence of margin differentials attributable to size.”<sup>81</sup> This is only the second review and thus the record lacks almost any such information and the petitioner has failed to introduce any evidence of dumping margins differing between differently sized producers.
- The petitioner’s claim that smaller producers are not incentivized to adjust their pricing behavior since Commerce’s selection methodology will only lead to larger respondents being examined is mere speculation and is entirely unsupported by any facts about actual behavior.
- The petitioner’s speculation about the reasons why only larger producers requested to be selected as mandatory respondents in these proceedings in order to continue dumping undetected by this proceeding is surely inaccurate. There are two simple reasons why small producers would not request mandatory status: first, producers are well aware of Commerce’s preference to select large-volume producers and so many would view making their own request to be selected as futile; and second, as Commerce knows, given this review’s importance and scope, responding is an involved process in terms of investment of both time and resources that smaller producers cannot easily spare.
- Commerce’s guidelines for sampling require that such a methodology may be adopted only after Commerce has proposed a sampling methodology and provided interested parties with the opportunity to comment.<sup>82</sup> Further, after respondents are selected, they have at least an additional 30 days to respond to the initial questionnaires. If there was a need for any supplemental questionnaires or clarifications, it would be virtually impossible for Commerce to issue preliminary and final results for the new respondents even with the maximum statutorily permissible extension. Commerce’s lack of familiarity with new, sampled, respondents would likely lead to further delays and the ongoing COVID-19 pandemic would further complicate matters.
- The petitioner does not address the obstacles to sampling or the fact that the softwood lumber proceeding is uniquely complicated, covers more ground, and asks more of both Commerce and interested parties than other cases.
- Section 777A(c)(2)(B) of the Act allows Commerce to limit its examination to “exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.” Contrary to the petitioner’s citation that Commerce relies on sampling to achieve “representative results,”<sup>83</sup> the SAA says nothing about the threshold question of when Commerce should select respondents through sampling as opposed to reviewing large volume respondents and does not suggest that sampling is or should be Commerce’s preferred methodology for achieving representative results in situations where it is not practical to review all producers. Indeed, as Commerce noted when selecting respondents for this review, it is only in “rare cases” that Commerce selects respondents by sampling.<sup>84</sup>

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<sup>81</sup> See GOC’s Rebuttal Brief at 21 (citing RSM at 6).

<sup>82</sup> See GOC’s Rebuttal Brief at 15-16 (citing *Sampling Notice* at 78 FR 65968).

<sup>83</sup> *Id.* at 19 (citing Petitioner’s Case Brief at 4).

<sup>84</sup> *Id.* (citing the RSM at 6).

**Commerce's Position:** We disagree with the petitioner. Pursuant to section 777A(c)(2) of the Act, Commerce may limit its examination to: (A) a sample of exporters, producers, or types of products that Commerce determines is statistically valid based on the information available to Commerce at the time of selection, or (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that Commerce determines can be reasonably examined. Thus, the Act provides Commerce with the option of relying on export volume in selecting respondents. The petitioner acknowledges that the Act specifies no preference with regard to selecting respondents based on either export volume or sampling,<sup>85</sup> but immediately follows its acknowledgement of this ambiguity with the statement that:

however, the SAA explains that Commerce “will employ a sampling methodology” to ensure that the weighted average dumping margins provide “representative results.”<sup>86</sup>

The passage cited by the petitioner is relevant to a situation where Commerce has already determined to rely on sampling to select respondents.<sup>87</sup> It does not have the meaning that sampling provides more “representative results” than does selecting respondents based on export volume. Rather, the sentence cited by the petitioner identifies that sampling, if used, must be used in a manner that provides “representative results.”<sup>88</sup> Thus, the SAA does not specify or even imply a preference for relying on sampling over export volume in selecting respondents.

In general, Commerce will only rely on sampling for respondent selection purposes in AD administrative reviews when the following conditions are met:

- (1) There is a request by an interested party for the use of sampling to select respondents;
- (2) Commerce has the resources to examine individually at least three companies for the segment;
- (3) the largest three companies (or more if Commerce intends to select more than three respondents) by import volume of the subject merchandise under review account for normally no more than 50 percent of total volume; and
- (4) information obtained by or provided to Commerce provides a reasonable basis to believe or suspect that the average export prices and/or dumping margins for the largest exporters differ from such information that would be associated with the remaining exporters.<sup>89</sup>

We acknowledge that the petitioner requested that Commerce conduct sampling; however, as detailed in the RSM<sup>90</sup> and in the previous comment, we only have the resources to examine two respondents. Additionally, the petitioner has not argued that we have the resources to examine three respondents, nor has it argued that this condition for considering sampling as a method for

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<sup>85</sup> See Petitioner's Case Brief at 4 (citing the RSM at 4).

<sup>86</sup> *Id.* (citing the SAA at 872).

<sup>87</sup> See SAA at 872.

<sup>88</sup> *Id.*

<sup>89</sup> See *Sampling Notice* at 78 FR 65965.

<sup>90</sup> See RSM at 7.

selecting respondents is unreasonable. Thus, one of the conditions for relying on sampling is not met and the petitioner has not contested that this condition is met and all four of the conditions for relying on sampling must be met before Commerce will typically consider sampling.

Further, a second of the four conditions is not met because the record lacks a reasonable basis to believe or suspect that the average EPs and/or dumping margins for the largest exporters differ from such information that would be associated with the remaining exporters. We stated in the RSM, that it is rare for Commerce to rely on sampling and that we typically only rely on sampling when multiple reviews have been completed that we can draw upon for evidence of margin differentials attributable to size. When we rejected sampling for this POR, only the preliminary results of the first administrative review had been completed the margins for the mandatory respondents were between 1.18 percent and 1.99 percent.<sup>91</sup> Now that it has been completed, the margins for the mandatory respondents were between 1.15 percent and 1.99 percent.<sup>92</sup> This narrow range of margins among companies of varying size was also seen in the underlying investigation when margins of the individually examined respondents were between 3.20 percent and 7.22 percent.<sup>93</sup> Thus, not only has the second condition that Commerce has the resources to examine at least three respondents not been met, the only extant information from this proceeding fails to meet another criteria for relying on sampling, which is that such information provides a reasonable basis to believe or suspect that the average EPs and/or dumping margins for the largest exporters differ from such information that would be associated with the remaining exporters.

The counterarguments the petitioner has provided the first and second reviews' margins not showing variation due to size is unconvincing. The petitioner provides what it purports as evidence that the productive capacities of the largest softwood lumber producers allow them an advantage over smaller firms in their ability to maintain economies of scale.<sup>94</sup> However, the only evidence relied on to support its argument is a scholarly survey covering the history of the softwood lumber industry during the previous century.<sup>95</sup> Specifically, this survey discussed two studies covering the Canadian lumber productivity from 1965 to 1972 and 1963 to 1988 and the petitioner made no attempts to explain how studies of the Canadian lumber industry during these periods of between 56 and 33 years ago had any relevancy to the POR. In fact, the stated conclusions reached by the survey are that while there exist economists with expertise in the area of forest products sector productivity, the results of their studies "are highly technical and dependent on unrealistic assumptions about firm behavior, which limits their relevance for policy discussion," and that "there appear to be no studies which examine productivity developments in recent years."<sup>96</sup> Further, we note that the survey was published in 2003,<sup>97</sup> meaning the

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<sup>91</sup> See *Certain Softwood Lumber Products from Canada: Preliminary Results of Antidumping Duty Administrative Review and Rescission of Review, in Part; 2017–2018*, 85 FR 7282 (February 7, 2020).

<sup>92</sup> See *Lumber AR1 Final*.

<sup>93</sup> See *Softwood Lumber Order*.

<sup>94</sup> See the Petitioner's Letter, "Comments on CBP Data and Request for Sampling," dated March 23, 2021 (Petitioner Comments) at 10 (citing Petitioner's Letter, "Comments on CBP Data and Request for Sampling," dated April 23, 2020 at 21 and n. 40).

<sup>95</sup> *Id.*

<sup>96</sup> See Petitioner's Letter, "Comments on CBP Data and Request for Sampling," dated April 23, 2020 at Exhibit 7, p. 13.

<sup>97</sup> *Id.* at Exhibit 7.

publication is also two decades old. Thus, we find no evidence in this survey supporting the notion that economies of scale are resulting in significant differences in pricing by smaller firms relative to pricing by larger firms that the petitioner argues realize economies of scale advantages.

While the petitioner has cited to volatility during the POR and several Canadian government programs intended to aid small and medium-sized enterprises and further cited to difficulties at one smaller company, the petitioner has not linked any of these instances to a different impact on the margins of small and medium-sized enterprises than on the larger Canadian respondents. In fact, the petitioner's own submissions included one article identifying the economic difficulties experienced by four of the largest Canadian lumber companies during the POR<sup>98</sup> and another article placed on the record identified economic hardship experienced by Canfor and West Fraser, the two companies with the largest volume of shipments of softwood lumber throughout this proceeding.<sup>99</sup> We also note that the petitioner never attempted to demonstrate that the larger Canadian exporters did not also receive government assistance.

We also disagree with the petitioner that the fact that none of the smaller respondents requested voluntary treatment is indicative that their pricing behavior is different than the larger companies. Rather, it is just as likely that no smaller respondents requested voluntary treatment because Commerce typically selects companies based on shipment volume and smaller respondents are unlikely to be selected. Moreover, we find that even if we did employ sampling, there are nearly 300 companies under review. While we have noted above that we only have the resources to select two respondents – a fact that the petitioner has not disputed – even if we did select three mandatory respondents, a prerequisite for sampling, there is no evidence on the record that a company would change its pricing behavior or cost structure because it has a one-in-one hundred chance of being selected as a mandatory respondent.

The petitioner also cites to the annual reports of Canfor and West Fraser stating that each had estimated their dumping margins<sup>100</sup> and interpret this as evidence that the two mandatory respondents will adjust their pricing behavior as they determine appropriate, while the non-selected respondents do not have to consider the impact of their pricing decisions on their margin. However, the petitioner has pointed to no linkage between the fact that Canfor and West Fraser have informed their investors of their potential duties and these companies' pricing behavior.

In addition, the petitioner's other arguments likewise fail to undermine our stated rationale for not relying on sampling. As we stated in the RSM that

First, the unique time constraints of this administrative review make sampling an unfeasible approach to respondent selection. If Commerce were to conduct sampling, it would need to offer interested parties an opportunity to comment on

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<sup>98</sup> See Petitioner Comments at Exhibit 12.

<sup>99</sup> *Id.* at Exhibit 9.

<sup>100</sup> See Petitioner's Case Brief at 11-12 (citing Petitioner's Letter, "Comments on West Fraser Mills Ltd.'s Response to Section A of Initial Antidumping Duty Questionnaire," dated July 2, 2020 at Exhibit 6); *see also* Canfor's Section A Response at Exhibit A-16.

the proposed sampling methodology and conduct the sampling at the conclusion of the 90-day period for withdrawal of review requests (*i.e.*, July 28, 2020), further delaying respondent selection and the issuance of the questionnaire. The sampling process, therefore, would leave Commerce insufficient time to review the complex responses of the respondents in this review. This is a particular concern here, where the use of sampling may result in the review of one or more previously-unexamined companies that are unfamiliar to Commerce.<sup>101</sup>

Rather than address the content of our declared reasons for not sampling, the petitioner notes that we gave the same reasons for not selecting respondents based on sampling from the previous review. Noting that we are repeating certain concerns stated in the previous review does not make our concerns invalid. The petitioner also notes that these time constraints, contrary to our assertions, are not unique to this review, but would be faced by any administrative review. However, noting that some of our concerns here are no different than concerns that would be present in other proceedings also does not make such concerns invalid.

Further, we have explained that the complex responses and issues raised in this proceeding make the AD softwood lumber proceeding highly challenging to administer. This is a concern unique to this proceeding. It is common knowledge that the sales and costs under review here represent one of the largest cases in U.S. dollar amounts before Commerce and that Canadian softwood lumber companies often consist of multiple mills. The lengthy IDMs of the previous review<sup>102</sup> and investigation,<sup>103</sup> and this review attest that the very large amount of sales and costs cause significant complexities. Thus, we have cause here to be particularly concerned that significantly delaying the selection of companies to be individually examined, which would be the result of selecting respondents based on sampling, may lead to a situation where we are unable to administer this review.

By not even challenging our determination that we lack the resources to examine individually at least three companies, and by not demonstrating that the margins of the larger respondents differ from those of the smaller respondents, the petitioner has failed to meet two of the four criteria we state must be met before we will consider selecting respondents based on sampling. Further, as we noted in the RSM, sampling is employed only in “rare cases.”<sup>104</sup> We have also stated that these “rare cases” occur only “when there are multiple, and often numerous, prior reviews to draw upon for evidence of margin differentials attributable to size.”<sup>105</sup> This is only the second review of this order and thus the record lacks almost any such information. Further, the petitioner has failed to introduce any evidence of dumping margins differing between differently sized producers.

We do not disagree that this is a very large and complicated case, but as we have explained, the criteria which must be met to justify the use of sampling just does not exist here. Further, had

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<sup>101</sup> See RSM at 5-6.

<sup>102</sup> See *Lumber ARI Final IDM*.

<sup>103</sup> See *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstance*, 82 FR 51806 (November 8, 2017) (*Lumber Investigation*), and accompanying IDM.

<sup>104</sup> See Canfor’s Rebuttal Brief at 10 (citing RSM at 6).

<sup>105</sup> *Id.*



we tried to create an acceptable sampling methodology in this review, as we have explained, coping with the resulting time delays would have further imperiled our ability to administer this case. Accordingly, based on the reasons above, we find not relying on sampling in this proceeding is appropriate, because the petitioner has not provided any compelling counterarguments or evidence.

### **Comment 5. Whether it was Proper not to have Adjusted U.S. Price by Countervailing Duties**

#### *Petitioner*

- In order for Commerce to calculate accurate dumping margins it must ensure a tax-neutral comparison between U.S. price and the home market price. Accordingly, when the foreign exporter also acts as an importer, Commerce should treat CVDs as normal duties and reduce U.S. price by the amount of CVDs deposited at the time of entry.
- When an exporter's price to the U.S. customer includes CVDs, it does not allow for a tax neutral comparison between U.S. price and the home market price, and Commerce should adjust U.S. price in recognition of the fact that the U.S. price includes these additional costs. Under section 772(c)(2)(A) of the Act, Commerce must adjust U.S. price to remove any portion of that price attributable to "costs, charges, or expenses, and United States import duties which are incident to bringing the subject merchandise" into the United States. Consistent with section 772(c)(2)(A) of the Act, for sales made on a delivered duty paid basis, Commerce adjusts the U.S. price to account for merchandise processing fees, harbor maintenance fees, section 232 duties, and section 301 duties.<sup>106</sup> Likewise, Commerce should consider the CVD deposits paid by respondents acting as both exporters and imports as direct selling expenses and therefore deductible for the purpose of constructing EP and CEP.
- While parties have cited in arguments made prior to the preliminary results in *Low Enriched Uranium from France* as to when Commerce adopted a practice to not deduct CVDs in calculating EP and CEP,<sup>107</sup> in fact, this case only discusses the deduction of AD deposits from U.S. price in this review and finds that there is "no comparable provision to CVDs."<sup>108</sup> While in *Low Enriched Uranium from France* Commerce likens deducting CVD deposits from U.S. price to increasing a respondent's COP by the amount of countervailable subsidies received during the POR, the countervailable benefits received during the POR do not reflect the CVD cash deposit paid at the time of entry. Commerce

<sup>106</sup> See Petitioner's Case Brief at 41 (citing, e.g., *Certain Carbon and Alloy Steel Cut-To-Length Plate from Belgium: Final Results of Antidumping Duty Administrative Review; 2018-2019*, 86 FR 15648 (March 24, 2021) (*CTL from Belgium Final*), and accompanying IDM at Comment 1 (noting that "{s}ection 232 duties should be treated as 'United States import duties' for purposes of section 772(c)(2)(A) of the Tariff Act" and thereby deducted from U.S. price); *Circular Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017-2018*, 85 FR 3616 (January 22, 2020) (*CWP Turkey*); see also *Xanthan Gum from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2018-2019*, 86 FR 16189 (March 26, 2021) (*Xanthan Gum*), and accompanying IDM at Comment 3 (noting that "{s}ection 301 duties do not constitute "special duties," but rather, are considered normal U.S. import duties, which are appropriately deducted from U.S. price pursuant to section 772(c)(2)(A) of the Act).

<sup>107</sup> See Petitioner's Case Brief at 42 (citing Canfor's Letter, "Response to Petitioner's Pre-Preliminary Results Comments," dated April 27, 2021 at 3).

<sup>108</sup> *Id.* at 42-44 (citing *Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium from France*, 69 FR 46501, 46506 (March 24, 2021) (*Low Enriched Uranium from France*)).



ends this faulty analysis with a presumption that Congress has not given it the authority to subtract CVDs from U.S. price but offers no evidence or justification to support this presumption.<sup>109</sup> Thus, *Low Enriched Uranium from France* is not directive with respect to exporters paying CVD deposits as the importer of record.

- Canfor argues that section 301 duties are more similar to normal customs duties than AD or CVDs, which are not deducted from U.S. price.<sup>110</sup> However, CVDs are in fact similar to section 301 duties because their purpose is to protect against unfair foreign trade practices such as subsidization.
- Canfor also argues that section 301 duties and CVDs are different because section 301 duties are in place indefinitely, while CVDs are not.<sup>111</sup> However, since Commerce and the International Trade Commission will conduct sunset reviews of CVD orders every five years, the timeline to revoke such an order is, in fact, indefinite.

#### *Canfor, West Fraser and the GOC*

- The petitioner’s argument that Commerce should deduct the CVDs from the U.S. price in making margin comparisons is unfounded and goes against Commerce’s longstanding practice.<sup>112</sup> In fact, Commerce has never deducted CVD deposits or CVDs from U.S. price.<sup>113</sup>
- The petitioner mistakenly contends that Commerce never directly addressed the issue of deducting CVDs from price comparisons in *Low Enriched Uranium from France*. In fact, Commerce’s policy not to deduct CVDs from U.S. prices because CVDs are not U.S. import duties or selling expenses within the meaning of section 772(c)(2)(A) of the Act was formally established in that case.<sup>114</sup> Also established in that case was that section 232 and section 301 duties are distinguishable from AD and CVDs and that the practice of deducting section 232 and section 301 duties does not conflict with Commerce’s practice not to deduct CVDs.<sup>115</sup> The CIT and CAFC have consistently upheld these determinations fully articulated in *Low Enriched Uranium from France*.<sup>116</sup>

<sup>109</sup> *Id.* at 44 (citing *Low Enriched Uranium from France*, 69 FR at 46508).

<sup>110</sup> *Id.* (citing Canfor’s Letter, “Response to Petitioner’s Pre-Preliminary Results Comments,” dated April 27, 2021, at 3).

<sup>111</sup> *Id.* at 45.

<sup>112</sup> See GOC’s Rebuttal Brief at 24 (citing, e.g., *Certain Cut-To-Length Carbon Steel Plate from Germany*, 62 FR 18390, 18395 (April 15, 1997); *Certain Corrosion-Resistant Carbon Steel Flat Products from Korea*, 61 FR 18547, 18553 (April 26, 1996)).

<sup>113</sup> *Id.* (citing *Low Enriched Uranium from France*, 69 FR at 46506 (“In the 23 years that Commerce has administered the AD law, it has never deducted AD duties or CVDs from initial U.S. prices in calculating dumping margins.”)).

<sup>114</sup> *Id.* (citing *Low Enriched Uranium from France*, 69 FR at 46506 (“We agree that not deducting CVDs from U.S. prices is consistent with section 772(c)(2)(B). Section 771(6)(C) lists “export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the countervailable subsidy received.”)).

<sup>115</sup> *Id.* (citing *Standard Pipe from Turkey* IDM at 33 (“We have determined that {s}ection 232 duties are U.S. import duties.”); *Xanthan Gum* IDM at 5-6 (section 301 duties, “do not constitute ‘special duties,’ but rather are considered normal U.S. import duties” and could be deducted from U.S. prices pursuant to section 772(c)(2)(A) of the Act.)).

<sup>116</sup> *Id.* at 26-27 (citing *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1362-64 (Fed. Cir. 2007) (*Wheatland*) (“Like antidumping duties, Commerce found that 201 safeguard duties are remedial duties that provide relief from the adverse effects of import.”); *AK Steel Corp. v. United States*, 988 F. Supp. 594, 607-08 (CIT 1997) *aff’d*, 215 F.3d 1342 (Fed. Cir. 1999), *aff’d*, 215 F.3d 1342 (Fed. Cir. 1999) (*AK Steel*); *U.S. Steel Group v. United States*, 15 F. Supp. 2d. (*U.S. Steel Group*) at 898-900).

- Commerce’s decision to deduct section 232 duties was expressly premised on Commerce’s conclusion that section 232 duties are unlike CVDs or section 201 duties, both of which are not deducted.<sup>117</sup>
- The petitioner’s argument that CVDs are similar to section 301 duties because section 301 duties are imposed to “remedy foreign trade practices” and CVDs, like section 301 duties, “may be in place for an indefinite time period” misses the point that regardless of whatever similarities CVDs and section 301 duties have had, Commerce and the courts have consistently found section 301 duties to be import duties, while ADs and CVDs are not.<sup>118</sup>

**Commerce’s Position:** We disagree with the petitioner. Commerce has never deducted CVDs from U.S. price.<sup>119</sup> Section 772(c)(2)(A) of the Act specifies that Commerce will deduct U.S. import duties but makes no mention of CVD deposits or CVDs. We affirmed in *Low Enriched Uranium From France* that Commerce’s long standing determination that CVDs are neither United States import duties nor selling expenses within the meaning of section 772(c)(2)(A) of the Act and therefore should not be deducted from U.S. price. Our determination not to deduct CVDs from U.S. price has been upheld by both the CIT and CAFC.<sup>120</sup>

The petitioner has raised nothing that was not already addressed in *Low Enriched Uranium From France* and in the CIT and CAFC decisions. While the petitioner argues that the recent decision in *CTL from Belgium Final* affirming that we should continue to deduct section 232 and section 301 duties warrants reconsideration of our treatment of CVDs, in fact these recent decisions affirm the opposite. We explicitly stated in *Xanthan Gum* that section 301 duties “do not constitute ‘special duties,’ but rather are considered normal U.S. import duties. Therefore, we properly deducted them from U.S. prices pursuant to section 772(c)(2)(A) of the Act.”<sup>121</sup> In an explanation of why we deduct section 232 duties, we stated in *CWP from Turkey* that “{s}ection 232 duties are not akin to antidumping or section 201 duties. In particular, we find that section 232 duties are not focused on remedying injury to a domestic industry.”<sup>122</sup> This statement and

<sup>117</sup> *Id.* at 27 (citing *Circular Welded Carbon-Quality Steel Pipe From the Sultanate of Oman: Final Results of Antidumping Duty Administrative Review; 2018-2019*, 86 FR 18513 (April 9, 2021), and accompanying IDM at 9 (“Furthermore, as explained in CWPs from Turkey, we find that {s}ection 232 duties are not akin to AD or section 201 duties.”); *CWP from Turkey*, and accompanying IDM at 31 (“Here, however, we find that {s}ection 232 duties are not akin to antidumping or section 201 duties.”); *see also Certain Corrosion-Resistant Steel Products From Taiwan: Final Results of Antidumping Duty Administrative Review; 2017-2018*, 85 FR 16613 (March 24, 2020), and accompanying IDM at 9–10 (“{c}ountervailing duties remedy unfair competitive advantage that foreign exporters have over domestic producers as a result of foreign countervailable subsidies ... these types of duties ... protect {s} the bottom line of domestic producers.” (internal quotations omitted))).

<sup>118</sup> *Id.* at 29 (citing *Xanthan Gum* IDM at 5-6 ((section 301 duties, “do not constitute ‘special duties,’ but rather are considered normal U.S. import duties” and could be deducted from U.S. prices pursuant to section 772(c)(2)(A) of the Tariff Act.); *Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States*, 494 F. Supp. 3d 1365, 1372 (CIT 2021) (the court noted that a Senate Report provided by Commerce explained that “Congress intended that some duties implementing trade remedies, such as AD duties, are special duties to be distinguished from the normal duties that should be deducted from EP and CEP.” (emphasis added))).

<sup>119</sup> *See Low Enriched Uranium from France* at 46506 (“In the 23 years that Commerce has administered the AD law, it has never deducted AD duties or CVDs from initial U.S. prices in calculating dumping margins.”).

<sup>120</sup> *See Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1362—64 (Fed. Cir. 2007); *AK Steel*, 988 F. Supp. 594, 607-08; *U.S. Steel Group* at 898-900.

<sup>121</sup> *See Xanthan Gum* IDM at 5.

<sup>122</sup> *See CWP from Turkey* IDM at 31

logic clearly also applies to CVDs, which are also “focused on remedying injury to a domestic industry.” Further, in *AK Steel*, in upholding Commerce’s decision not to deduct AD and CVDs, the CAFC ruled that the logic for not deducting ADs because they were not U.S. import duties would apply equally to whether CVDs should be deducted.<sup>123</sup>

The distinction between section 232 duties and AD and CVDs was upheld in *Wheatland* where the CAFC sustained Commerce’s determination not to adjust U.S. price in AD proceedings for section 201 duties under the statutory provision.<sup>124</sup> Having acknowledged Commerce’s analysis of the legislative history to the AD Act of 1921, which “referred to ‘United States import duties’ as normal customs duties and referred to antidumping duties as ‘special dumping duties’ and that ‘special dumping duties’ were distinguished and treated differently from normal customs duties,” the CAFC in *Wheatland* agreed that “Congress did not intend all duties to be considered ‘United States import duties.’”<sup>125</sup> The CAFC then found reasonable Commerce’s analysis that section 201 duties were more akin to AD duties than “ordinary customs duties.”<sup>126</sup> Meanwhile, the CIT found in *Borusan* that a Senate Report provided by Commerce explained that “Congress intended that some duties implementing trade remedies, such as AD duties, are special duties to be distinguished from the normal duties that should be deducted from EP and CEP.”<sup>127</sup> Thus, while we agree with the petitioner that the issue of whether CVDs should be deducted is determined by whether U.S. import duties, which section 772(c)(2)(A) of the Act states should be deducted from U.S. price, would include CVDs, on that issue Commerce has long and consistently determined that CVDs are not U.S. import duties under that provision, and this determination has been upheld by both the CIT and CAFC.

We also disagree with the petitioner’s argument that CVDs are included where section 772(c)(2)(A) of the Act specifies that Commerce will deduct from U.S. price any “costs, charges, or expenses, and United States import duties.” We stated in *Low Enriched Uranium From France* that, “{w}hile CVDs are a special type of import duty, they are nevertheless a species of import duty, and are thus covered, if at all, by the phrase ‘United States import duties.’”<sup>128</sup> As stated above, Commerce and the Courts have determined that AD and CVDs are not covered under section 772(c)(2)(A) of the Act.

## Comment 6. Zeroing

### *Resolute*

- Zeroing is not the result of any formal rulemaking with notice and public opportunity to comment. Thus, Commerce is not constrained from meeting its international obligations to not use zeroing in its final results.
- Since 2004, the World Trade Organization (WTO) Appellate Body and WTO dispute settlement panels consistently have held, in a variety of contexts, that Commerce’s zeroing is inconsistent with Articles 2.4 and 9.3 of the Agreement on Implementation of

<sup>123</sup> See *AK Steel*, 988 F. Supp. 594, 607-08.

<sup>124</sup> See *Wheatland*, 495 F.3d 1355, 1363.

<sup>125</sup> *Id.* at 1361.

<sup>126</sup> *Id.* at 1362.

<sup>127</sup> See *Borusan* at 1371.

<sup>128</sup> See *Low Enriched Uranium from France*, 69 FR at 46505. This citation also refutes the petitioner’s argument that *Low Enriched Uranium from France* does not address whether CVDs should be deducted from U.S. price.

Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement). The Appellate Body observed in *United States – Washing Machines* that the first sentence of Article 2.4.2 of the AD Agreement requires “that dumping and margins of dumping have to be established for the product under investigation ‘as a whole.’”<sup>129</sup> Zeroing ignores a significant part of the whole, the values that are not dumped. The Appellate Body stated that Article 2.4.2 says that a finding of differential pricing authorizes the administering authority to use the average-to-transaction comparison method (A-to-T method), and then only in “limited circumstances,” but zeroing is not a permissible “limited circumstance” for use of the A-to-T method.

- The continuation of zeroing is inconsistent with the WTO obligations of the United States and is contrary to law.
- Commerce continued reliance on zeroing further violates its “ultimate statutory obligation ... to calculate margins as accurately as possible.”<sup>130</sup>

### *GOC*

- Commerce’s methodology of zeroing is not required by statute, and Commerce should change its practice to comport with the United States’ obligations under the AD Agreement.

### *Petitioner and Sierra Pacific*

- Commerce noted that WTO findings are not self-executing under U.S. law. Commerce has noted in its determinations that the CAFC has held that WTO reports are without effect under U.S. law unless and until they have been adopted pursuant to the specified statutory scheme established in the Uruguay Round Agreements Act (URAA).
- Commerce has not revised or changed its use of zeroing pursuant to the URAA’s implementation procedures.

### *Petitioner*

- In the April 2019 decision *Lumber from Canada-Panel Report*,<sup>131</sup> a WTO panel concluded that WTO rules do not prohibit zeroing. Further, numerous holdings of the CAFC have expressly and repeatedly held that Commerce’s application of an alternative comparison methodology, with zeroing, is consistent with U.S. law when the statutory requirements of section 777A(d)(1)(B) of the Act are met.

**Commerce’s Position:** We disagree with the GOC and Resolute. WTO findings are not self-executing under U.S. law.<sup>132</sup> The CAFC has held that WTO reports are without effect under U.S. law, “unless and until such a {report} has been adopted pursuant to the specified statutory scheme” established in the URAA.<sup>133</sup> In fact, Congress adopted an explicit statutory scheme in

<sup>129</sup> See Resolute’s Case Brief at 32.

<sup>130</sup> See Resolute’s Case Brief at 34.

<sup>131</sup> See *United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*, WT/DS534/R (April 9, 2019) (*Lumber from Canada-Panel Report*).

<sup>132</sup> See, e.g., SAA at 659 (“WTO dispute settlement panels will have no power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it.”); see also *Corus Staal* at 1343, 1349.

<sup>133</sup> See *Corus Staal* at 1343, 1347-49, cert. denied 126 S. Ct. 1023 (2006); accord *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007).

the URAA for addressing the implementation of WTO reports.<sup>134</sup> Indeed, the SAA noted that “WTO dispute settlement panels will have no power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it.”<sup>135</sup> As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to supersede automatically the exercise of Commerce’s discretion in applying the statute.<sup>136</sup> Commerce has not revised or changed its use of zeroing, nor has the United States adopted changes to its practice pursuant to the URAA’s implementation procedure. Lastly, contrary to Resolute’s assertion, Commerce is acting in accordance with and full respect for the law.

Commerce also disagrees with Resolute’s concept that the use of zeroing precludes Commerce from calculating an accurate weighted-average dumping margin. To the contrary, the purpose of resorting to an alternative comparison method is to reveal masked dumping using zeroing in conjunction with the average-to-transaction (A-to-T) comparison method,<sup>137</sup> where the average-to-average (A-to-A) comparison method cannot take into account the significant differences in U.S. prices.<sup>138</sup> Accordingly, for the final results, because we are applying the A-to-T method to West Fraser, as part of the mixed methodology, as we explain below, we will continue to apply zeroing in calculating West Fraser’s weighted-average dumping margins consistent with the statute, regulations and Commerce’s practice.<sup>139</sup>

## Comment 7. Differential Pricing

### *West Fraser*

- Commerce deviated from its practice and applied the A-to-T method to all of West Fraser’s U.S. sales, even though only 51.70 percent of West Fraser’s sales passed the Cohen’s *d* test.
- Commerce should apply the mixed comparison method for the final results of administrative review, consistent with its stated practice.

### *GOC*

- Commerce’s differential pricing analysis is inconsistent with U.S. law and the AD Agreement on several accounts.
  - By relying solely on the Cohen’s *d* test, Commerce failed to determine whether price differences were significant, including by ignoring qualitative factors.
  - Commerce failed to properly identify a pattern of U.S. prices that differ significantly among purchasers, regions or periods of time because it treated sales as part of a single pattern.

<sup>134</sup> See, e.g., 19 U.S.C. 3533, 3538 (sections 123 and 129 of the URAA).

<sup>135</sup> See SAA at 659.

<sup>136</sup> See, e.g., 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary).

<sup>137</sup> See SAA at 842-843.

<sup>138</sup> See section 777A(d)(1)(B)(ii) of the Act; see also *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2015-2016*, 83 FR 17146 (April 18, 2018), and accompanying IDM at Comment 8.

<sup>139</sup> See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).



- In applying the “meaningful difference” test, Commerce failed to properly explain why the preferred A-to-A method could not account for the identified price differences.
- The pattern of prices includes prices that are higher as well as lower.
- The differential pricing analysis for West Fraser includes zeroing, which unfairly inflates the magnitude of the margin of dumping.
- Commerce’s decision regarding this matter must not be arbitrary or unreasonable.
- Commerce’s has stated that it’s differential pricing analysis is a gap-filling exercise, but this exercise must not be in violation of international obligations.
- Commerce must explain why it incorrectly applied the A-to-T method to all of West Fraser’s U.S. sales to determine West Fraser’s weighted-average dumping margin.

#### *Resolute*

- Commerce applied the A-to-A method (without zeroing) to Canfor’s sales to determine its weighted-average dumping margin. However, it applied its A-to-T method (with zeroing) to West Fraser’s sales even though only 51.70 of West Fraser’s sales had passed the Cohen’s *d* test.
- West Fraser’s weighted-average dumping margin (using zeroing) was then combined with Canfor’s weighted-average dumping margin to determine the all-others rate.
- Commerce’s use of differential pricing and zeroing is not supported by substantial evidence and is not in accordance with law.
- Commerce’s differential pricing methodology does not justify the use of the A-to-T method with zeroing.
- Commerce did not adequately explain, as required by law, why the A-to-A method could not account for differences found by the Cohen’s *d* test.

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- It is well-established, supported by CAFC and CIT decisions, that Commerce “is not required to identify the cause of the price differences, if any, which are found to exist among purchasers, regions or time periods.”
- The CIT has held that the “meaningful difference test fulfills the statutory requirement that Commerce explain why the average-to-average method cannot account for the perceived pattern of pricing differences.”
- CIT has also affirmed that Commerce is under no obligation to consider that other qualitative factors, *i.e.*, other than masked, or “targeted,” dumping, may account for price differences.

**Commerce’s Position:** First, we agree with West Fraser, the GOC, and Resolute, in part, regarding the results of the differential pricing analysis applied to determine the appropriate comparison methodology for West Fraser. Commerce’s standard practice regarding the differential pricing analysis, as stated in the *Preliminary Results*, is “ [i]f the value of sales to purchasers, regions, and time periods that pass the Cohen’s *d* test accounts for more than 33 percent and less than 66 percent of the value of total sales, then the results support consideration of the application of an average-to-transaction method to those sales identified as passing the Cohen’s *d* test as an alternative to the average-to-average method, and application of the



average-to-average method to those sales identified as not passing the Cohen's *d* test." In the *Preliminary Results*, Commerce found that for West Fraser, "based on the results of the differential pricing analysis, Commerce preliminarily finds that 51.70 percent of the value of U.S. sales pass the Cohen's *d* test, and confirms the existence of a pattern of prices that differ significantly among purchasers, regions, or time periods." Given these results of the ratio test, Commerce should have applied the mixed comparison method (*i.e.*, apply the A-to-A method to the U.S. sales which did not pass the Cohen's *d* test and apply the A-to-T method to the U.S. sales which did pass the Cohen's *d* test) to determine West Fraser's weighted-average dumping margin for the *Preliminary Results*. However, Commerce mistakenly stated that it was applying the A-to-T method to all of West Fraser's U.S. sales. This statement was in error and, for the final results, for which the results of the ratio test have not changed for West Fraser, and consistent with its practice, Commerce will apply the mixed comparison method to calculate West Fraser's weighted-average dumping margin.

Second, we disagree with the GOC and Resolute that Commerce's differential pricing analysis is inconsistent with U.S. law. We note that there is nothing in section 777A(d) of the Act that mandates how Commerce measures whether there is a pattern of prices that differs significantly or explains why the A-to-A method or the transaction-to-transaction method cannot account for such differences. On the contrary, this is a gap filling exercise properly conducted by Commerce,<sup>140</sup> carrying out the purpose of the statute.<sup>141</sup> As explained in the *Preliminary Determination*, as well as in various other proceedings,<sup>142</sup> Commerce's differential pricing analysis is reasonable, and while certain, discrete aspects of the differential pricing analysis are currently under review by the courts, many parts have been affirmed by the CAFC.<sup>143</sup>

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<sup>140</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (*Chevron*) (recognizing deference where a statute is ambiguous and an agency's interpretation is reasonable); see also *Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1322, 1330 (Fed. Cir. 2017) (*Apex*) (applying *Chevron* deference in the context of Commerce's interpretation of section 777A(d)(1) of the Act).

<sup>141</sup> See *Koyo Seiko Co., Ltd. v. United States*, 20 F.3d 1156, 1159 (Fed. Cir. 1994) ("The purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value. Averaging U.S. prices defeats this purpose by allowing foreign manufacturers to offset sales made at less-than-fair value with higher priced sales. Commerce refers to this practice as 'masked dumping.' By using individual U.S. prices in calculating dumping margins, Commerce is able to identify a merchant who dumps the product intermittently—sometimes selling below the foreign market value and sometimes selling above it. We cannot say that this is an unfair or unreasonable result." (internal citations omitted)).

<sup>142</sup> See, e.g., *Welded Line Pipe from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 80 FR 61366 (October 13, 2015), and accompanying IDM at Comment 1; *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 32937 (June 10, 2015), and accompanying IDM at Comments 1 and 2; and *Welded ASTM A-312 Stainless Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 46647 (July 18, 2016) at Comment 4.

<sup>143</sup> See, e.g., *Dillinger France S.A. v. United States*, 981 F.3d 1318, 1325 (Fed. Cir. 2020) (sustaining Commerce's use of the Cohen's *d* and ratio tests) (*Dillinger*); *Stupp Corporation v. United States*, 5 F.4th 1341, 1354-60 (Fed. Cir. 2021) (sustaining Commerce's application of the ratio test and meaningful difference test, but remanding Commerce's application of the Cohen's *d* test for further explanation in light of the size of the data groups being compared); *Apex*, 862 F.3d at 1331 (sustaining Commerce's meaningful difference analysis and its application of the A-to-T methodology to all of the respondent's sales).

Further, WTO findings are not self-executing under U.S. law.<sup>144</sup> The CAFC has held that WTO reports are without effect under U.S. law, “unless and until such a {report} has been adopted pursuant to the specified statutory scheme” established in the URAA.<sup>145</sup> In fact, Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.<sup>146</sup> Indeed, the SAA noted that “WTO dispute settlement panels will have no power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it.”<sup>147</sup> As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to supersede automatically the exercise of Commerce’s discretion in applying the statute.<sup>148</sup> Commerce has not revised or changed its use of the differential pricing analysis, nor has the United States adopted changes to its practice pursuant to the URAA’s implementation procedure.

### Comment 8. The Cohen’s *d* and Ratio Test

#### *Resolute*

- Commerce applies a “ratio test” to evaluate price differences and the test unreasonably “includes sales values that are not significantly different from each other, and only {are} different from aberrant groups of sales, resulting in an inflated total value of sales passing the Cohen’s *d* test and causing a false positive of a pattern.”<sup>149</sup>
- Commerce’s sum of the values of all sales from groups passing the Cohen’s *d* test is “distorted because Commerce includes the values of sales groups found to have significant price differences when they do not.”<sup>150</sup>
- “One group with significant price differences triggers all other groups to pass with each Cohen’s *d* test rotation.”<sup>151</sup> “For example, in the context of regions, were an exporter to sell in one state at significantly higher or lower prices, on average, the Cohen’s *d* test could create the appearance of significantly different prices in more than one state, even though the different prices appeared in only one state.”<sup>152</sup>
- “In theory, {Commerce} could adjust for the multiplier effect of the Cohen’s *d* test in the ratio test but, instead, it considers sales values of all groups passing the Cohen’s *d* test, as measured from all perspectives, to exhibit a pattern, regardless whether those differences are meaningful or attributable to only certain groups being different.”<sup>153</sup>
- Commerce’s Cohen’s *d* test “pollutes” the comparison group with tested groups already found to be significantly different because it counts the same significant price differences multiple times.

<sup>144</sup> See, e.g., SAA at 659 (“WTO dispute settlement panels will have no power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it.”); see also *Corus Staal* at 1343, 1349.

<sup>145</sup> See *Corus Staal* at 1343, 1347-49, cert. denied 126 S. Ct. 1023 (2006); accord *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007).

<sup>146</sup> See, e.g., 19 U.S.C. 3533, 3538 (sections 123 and 129 of the URAA).

<sup>147</sup> See SAA at 659.

<sup>148</sup> See, e.g., 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary).

<sup>149</sup> See *Resolute*’s Case Brief at 26.

<sup>150</sup> *Id.* at 27.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

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- Commerce’s application of the Cohen’s *d* test and the ratio test have repeatedly been sustained by the courts as a reasonable method for determining a pattern of price difference and should continue to be employed in the final results.

**Commerce’s Position:** As an initial matter, there is nothing in section 777A(d) of the Act that mandates how Commerce measures whether there is a pattern of prices that differs significantly or explains why the A-A method cannot account for such differences. On the contrary, carrying out the purpose of the statute<sup>154</sup> here is a gap-filling exercise properly conducted by Commerce.<sup>155</sup> As explained in the *Preliminary Results*, as well as in various other proceedings,<sup>156</sup> Commerce’s differential pricing analysis (including the use of price differences and control groups) is reasonable, including the use of the Cohen’s *d* test as a component in this analysis, and it is in no way contrary to the law.

The first statutory requirement, section 777A(d)(1)(B)(i) of the Act, requires that there be a pattern of prices for comparable merchandise that differ significantly among purchasers, regions or periods of time. To consider whether the pattern requirement is met, Commerce has applied the Cohen’s *d* and ratio tests.<sup>157</sup> The purpose of the Cohen’s *d* test is to determine whether, for comparable merchandise, the prices to a given purchaser, region or time period differ significantly from the prices of all other sales. The results of the Cohen’s *d* test do not determine whether a pattern existed during the period under examination. Separately, the purpose of the ratio test is to evaluate the extent of the significant price differences, found as a result of the Cohen’s *d* test, constitute a pattern of prices that differ significantly. As stated in the *Preliminary Results*, if the value of sales which pass the Cohen’s *d* test accounts for at least 33 percent of the total value of U.S. sales, then this is evidence that there exists a pattern of prices that differ significantly.<sup>158</sup>

<sup>154</sup> See *Koyo Seiko Co., Ltd. v. United States*, 20 F. 3d 1156, 1159 (Fed. Cir. 1994) (“The purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value. Averaging U.S. prices defeats this purpose by allowing foreign manufacturers to offset sales made at less-than-fair value with higher priced sales. Commerce refers to this practice as ‘masked dumping.’ By using individual U.S. prices in calculating dumping margins, Commerce is able to identify a merchant who dumps the product intermittently—sometimes selling below the foreign market value and sometimes selling above it. We cannot say that this is an unfair or unreasonable result.” (internal citations omitted)).

<sup>155</sup> See *Chevron*, 467 U.S. 837, 842-43 (recognizing deference where a statute is ambiguous, and an agency’s interpretation is reasonable); see also *Apex*, 862 F.3d at 1330 (applying *Chevron* deference in the context of Commerce’s interpretation of section 777A(d)(1) of the Act).

<sup>156</sup> See, e.g., *Large Diameter Welded Pipe from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 84 FR 6374 (February 27, 2019), and accompanying IDM at Comment 5; *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of the Antidumping Duty Administrative Review and Final Determination of No Shipments; 2015-2016*, 83 FR 17146 (April 18, 2018), and accompanying IDM at Comment 8; *Welded Line Pipe from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 80 FR 61366 (October 13, 2015), and accompanying IDM at Comment 1; *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 32937 (June 10, 2015), and accompanying IDM at Comments 1 and 2; and *Welded ASTM A-312 Stainless Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 46647 (July 18, 2016), and accompanying IDM at Comment 4.

<sup>157</sup> See *Preliminary Results* PDM at 9.

<sup>158</sup> *Id.*

Resolute appears to argue that the results of the ratio test are flawed because:

- (1) prices which have been found to differ significantly by the Cohen's *d* test are not significantly different, and
- (2) the results of the ratio test are inflated due to a "multiplier effect."

Commerce disagrees with Resolute that the Cohen's *d* test does not reasonably identify sale prices that differ significantly. As described in the *Preliminary Results*, the Cohen's *d* coefficient is "a generally recognized statistical measure of the extent of the difference between the mean (*i.e.*, weighted-average price) of a test group and the mean (*i.e.*, weighted-average price) of a comparison group."<sup>159</sup>

In the final determination for *Xanthan Gum*, Commerce explained that "effect size is a simple way of quantifying the difference between two groups and has many advantages over the use of tests of statistical significance alone." In addressing respondent Deosen's comment in *Xanthan Gum*, Commerce continued:

Effect size is the measurement that is derived from the Cohen's *d* test. Although Deosen argues that effect size is a statistic that is "widely used in meta-analysis," we note that the article also states that "effect size quantifies the size of the difference between two groups, and may therefore be said to be a true measure of the significance of the difference." The article points out the precise purpose for which the Department relies on the Cohen's *d* test to satisfy the statutory language, to measure whether a difference is significant.<sup>160</sup>

The Cohen's *d* coefficient is based on the difference between the means of the test and the comparison groups relative to the variances within the two groups, *i.e.*, the pooled standard deviation. Furthermore, as originally stated in *Xanthan Gum*:

In "Difference Between Two Means," the author states that "there is no objective answer" to the question of what constitutes a large effect. Although Deosen focuses on this excerpt for the proposition that the "guidelines are somewhat arbitrary," the author also notes that the guidelines suggested by Cohen as to what constitutes a small effect size, medium effect size, and large effect size "have been widely adopted." The author further explains that Cohen's *d* is a "commonly used measure" to "consider the difference between means in standardized units."<sup>161</sup>

Commerce thus relies on the Cohen's *d* coefficient as a measure of effect size to determine whether the observed price differences are significant. Nonetheless, Resolute simply asserts that

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<sup>159</sup> See *Preliminary Results* PDM at 9; see also *Dillinger*, 981 F.3d at 1324 ("The Cohen's *d* coefficient is a 'generally recognized statistical measure' of the extent of the difference between the weighted-average price of a test group and the weighted-average price of a comparison group.").

<sup>160</sup> See *Xanthan Gum* IDM at Comment 3 (emphasis in original, internal citations omitted).

<sup>161</sup> *Id.* at Comment 3 (internal citations omitted); quoting from David Lane, *et al.*, Chapter 19 "Effect Size," Section 2 "Difference Between Two Means."

the price differences found to be significant as a result of the Cohen's *d* test for this review nonetheless "are not significantly different from each other" perhaps because they are "only different from aberrant groups of sales."<sup>162</sup> Resolute provides no further argument or evidence to support such claims, and Commerce finds that Resolute's conclusions are without merit.

Resolute also states that "{o}ne group with significant price differences triggers all other groups to pass with each Cohen's *d* test rotation" and later provides an example which seems to argue that it would be unreasonable where the prices to one group differ significantly to another group also means that the prices to the second group also differ significantly to the first group.<sup>163</sup> We disagree with that assessment. If the prices to Group A differ significantly from the prices to Group B, then it is logical that the converse it also true, that the prices to Group B also differ significantly to the prices to Group A.

Further, Resolute appears to presume as part of its argument that there is a "multiplier effect" the inflates the results of the ratio test. We believe Resolute makes this presumption based on a concern that the price for a given sale which is found to differ significantly by more than one group, *e.g.*, by both purchaser and time period, is double counted when aggregating the results of the ratio test. However, we do not believe that there is reason for Resolute to be so concerned. If a given sale is found to be at a significant different price by more than one group, then the value of that sale will only be included once in the total value of sales which pass the Cohen's *d* test, *i.e.*, the numerator of the ratio test. Thus, Commerce disagrees with Resolute's presumption that there is a "multiplier effect" when aggregating the results of the Cohen's *d* test.

Lastly, Resolute asserts that Commerce's approach in the Cohen's *d* test is flawed because the comparison group includes sales from test groups which have already been found to include prices that differ significantly. If one were to extend Resolute's logic that the flaw of the Cohen's *d* test is that the comparison group includes sales from each of the test groups, then under that presumption, the comparison group could be reduced to a nullity since each U.S. sale would at some point be part of a test group, and the sales which constitute each test group would either pass or fail the Cohen's *d* test.

Again, Resolute's presumptions in this regard are unfounded. The Cohen's *d* test reasonably reflects the statutory requirement to determine whether prices differ significantly "among purchasers, regions or periods of time." Consistent with the statutory language, the purpose of the Cohen's *d* test is to evaluate whether sales of comparable merchandise to a particular purchaser, region or time period in each test group exhibit prices that are significantly different from sales to *other* purchasers, regions, or time periods, respectively. In other words, each time the Cohen's *d* test compares a group of sales defined by purchaser, region, or time period, the comparison group of sales must include all other U.S. sales regardless of whether they "Pass" or "Fail" the Cohen's *d* test or whether they have even been tested yet. It is that universe of sales which serves as the basis to determine whether prices differ significantly. Therefore, excluding any sales from the comparison group other than the sales within the test group would skew (rather than correct for) the universe of sales against which the test group is compared.

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<sup>162</sup> See Resolute's Case Brief at 26.

<sup>163</sup> *Id.* at 27.



We find that the Cohen's *d* test reasonably reflects the statutory requirement to determine whether prices differ significantly "among purchasers, regions or periods of time." Each comparison involves the prices to a given purchaser, region or time period with all other prices of comparable merchandise to other purchasers, regions or time periods. To be clear, the purpose of the Cohen's *d* test is to examine whether the prices of merchandise to a distinct purchaser, region, or time period differ significantly with the prices of comparable merchandise to all other purchasers, regions or time periods, respectively. The ratio test then follows, and it is the ratio test which discerns whether or not a pattern exists based on the existence of those significant price differences.

Thus, for the reasons set forth here, we disagree with Resolute's arguments and continue to apply the Cohen's *d* and ratio tests in these final results.

### **Comment 9. Whether Commerce's Simple Average of Variances is Appropriate**

#### *Resolute*

- Commerce calculated the pooled standard deviation, denominator of the Cohen's *d* coefficient, by using the simple average of the variances of the test and comparison groups.
- The pooled variance is an average of the two variances of two separate groups. Commerce calculates a simple average of the variances that disregards the comparative sizes of test and control groups. Simple averaging creates a bias in outcomes.
- The CAFC vacated the use of a simple average rather than weighted average to calculate the pooled standard deviation.<sup>164</sup> Commerce should use a weighted average to calculate the pooled standard deviation or explain why it should not.

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- While Resolute is correct that the CAFC vacated the CIT's judgment sustaining the use of a simple average in *Mid Continent Steel CAFC*, the CAFC did not hold that the use of a simple average is necessarily unreasonable.
- Instead, the CAFC held that Commerce needed to provide "a more thorough consideration... of the issue... and, upon such consideration, a clear explanation of the choices that Commerce makes on the arguments and evidence presented to it."
- On remand, Commerce provided further explanation and continued to use a simple average when determining the pooled deviation in its Cohen's *d* test.
- The CIT sustained Commerce's remand and held that simple averaging to get the pooled variance was reasonable.
- Therefore, Commerce should continue to use a simple average, instead of a weighted average, to calculate the Cohen's *d* pooled standard deviation as part of its differential pricing analysis in the final results.

**Commerce's Position:** We agree with the petitioner. First, Commerce's use of simple averaging to calculate the pooled standard deviation is in accordance with law, as the CIT

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<sup>164</sup> See *Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662, 673-75 (Fed. Cir. 2019) (*Mid Continent Steel CAFC*).

sustained its use upon remand in *Mid Continent Steel CIT*.<sup>165</sup> However, despite the CIT's ruling, Resolute argues that the use of simple averaging disregards data and allows bias in outcomes. However, Commerce has explained that the opposite actually occurs. Specifically, Commerce has explained that:

Weighting, by volume, the average of the variances for the test and comparison groups creates a wide variation, from 0.04 to 0.59, as to the importance of the pricing behavior of the given group vis-à-vis all other groups when each pricing behavior is equally valid. In contrast, a simple average does not introduce such wide swings in the predominance of one of the pricing behaviors over the other, and is predictable because the importance given to each pricing behavior will be the same for all products. Thus, Commerce's use of a simple average addresses Commerce's expressed concern to use a consistent, predictable approach, where each pricing behavior is equally taken into account when gauging the significance of the difference in the mean prices of the test and comparison groups. Use of a weighted average, however, would inject an unpredictable, widely varying and seemingly random accounting of the two pricing behaviors when each of these pricing behaviors are equally representative of the prices to a given purchaser, region, or time period and the prices to all other purchasers, regions, or time periods.<sup>166</sup>

Further, Commerce also explained in its remand in *Mid Continent Steel CIT* that:

Using a weighted average (whether by volume, value, or number of transactions) would improperly give preference to one pricing behavior over another, and this preference would vary wildly for the same purchaser, region or time period for different products. Commerce's approach removes this bias and instability, and ensures the consistency and objectivity in evaluating the pricing differences between purchasers, regions, or time periods, consistent with the purpose of the Cohen's *d* test.<sup>167</sup>

Therefore, as has been thoroughly explained by Commerce and sustained by the CIT, unlike Resolute's claims, simple averaging actually removes bias from the calculation by ensuring that each pricing behavior is taken into account during the Cohen's *d* calculation and that one pricing behavior is not favored over another.

Therefore, given that the use of simple averaging to calculate the denominator of Cohen's *d* has been sustained by the CIT, and has been explained to be a reasonable methodology that seeks to

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<sup>165</sup> See *Mid Continent Steel & Wire, Inc. v. United States*, 495 F. Supp. 3d 1298 (CIT 2021) (*Mid Continent Steel CIT*).

<sup>166</sup> See Final Results of Redetermination Pursuant to Court Order in *Mid Continent Steel & Wire, Inc. v. United States*, Court No. 15-00213, dated June 16, 2020 at 14-15.

<sup>167</sup> *Id.* at 16.

ensure consistency, we will continue to use simple averaging in our application of the Cohen's *d* test for the final results.

### Comment 10. Whether to Update J.D. Irving's Cash Deposit Rate

#### *J.D. Irving*

- In the *Preliminary Results*, Commerce assigned J.D. Irving a weighted average of the mandatory respondents' dumping margins as the non-selected companies' AD cash deposit rate.<sup>168</sup> However, Commerce published the notice of initiation for the 2020 administrative review of the AD order on softwood lumber from Canada on March 4, 2021, and a review was not included for J.D. Irving.<sup>169</sup> Thus, J.D. Irving's 2020 entries will be liquidated at the cash deposit rate in effect at the time of entry.<sup>170</sup>
- Section 351.212(c)(1) of Commerce's regulations directs that, if a review is not requested for a particular foreign producer/exporter, Commerce will instruct CBP "to continue to collect the cash deposits previously ordered."
- In *Steel Jacks from Canada* and *Large Power Transformers from Italy*, Commerce explained that it establishes the estimated duty deposit rate based on the weighted-average margin for all sales during the POR, because the most recent POR should be the best indicator of future practices.<sup>171</sup>
- Commerce has previously stated that the lack of a request for a review constitutes a determination under section 751 of the Act.<sup>172</sup>
- The CIT established that since parties rely on the current cash deposit rate in force when deciding whether or not to request an administrative review, if Commerce were permitted to change the cash deposit rate for unreviewed firms, the number and complexity of administrative reviews would increase, thereby defeating the purpose of the 1989 amendments to the Act.<sup>173</sup>
- Since no party requested a review of J.D. Irving for the 2020 POR, it would be arbitrary and inconsistent with Congressional intent to replace the 2020 AD rate with the 2019 AD rate.
- Thus, in accordance with 19 CFR 351.212(c)(1)(ii), Commerce policy, and Congressional intent, the 2020 POR cash deposit rate of 1.57 percent should remain J.D. Irving's cash deposit rate going forward, and Commerce should not replace it with J.D. Irving's rate assigned in the 2019 POR.

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- J.D. Irving's claim that the AD cash deposit rate applying to entries of subject merchandise going forward should be the rate used by Commerce for the third

<sup>168</sup> See J.D. Irving's Case Brief at 1 (citing *Preliminary Results*).

<sup>169</sup> *Id.* at 5 (citing *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 86 FR 12599 (March 4, 2021) (*Initiation Notice 2020*)).

<sup>170</sup> *Id.* at 4 (citing *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27313 (May 19, 1997)).

<sup>171</sup> *Id.* at 6 (citing *Steel Jacks from Canada*, 50 FR 42577, 42579 (October 21, 1985)); see also *Large Power Transformers from Italy*, 52 FR 46806, (December 10, 1987).

<sup>172</sup> *Id.* at 6 (citing *Antidumping Duties*, 54 FR 12742, 12756 (March 28, 1989) (*Preamble to Regulations*); see also H.R. Report 98-1156, 98<sup>th</sup> Congress, 2<sup>nd</sup> Session at 181 (October 5, 1984) (linking section 751(a) of the Act to the automatic-assessment rule for unreviewed foreign producers/exporters).)

<sup>173</sup> *Id.* (citing *Federal-Mogul Corp. v. United States*, 822 F. Supp. 782, 788 (CIT 1993) (*Federal-Mogul Corp.*)).

administrative review (2020 POR) ignores the plain text language of section 751(a)(2)(C) of the Act, which specifies that administrative reviews “shall be the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties.”

- In *Hubbell Power Systems, Inc. v. United States*, the CIT noted that the statute recognizes the importance of administrative reviews in determining cash deposit rates.<sup>174</sup>
- Similarly, in *Federal-Mogul Corp. v. United States*, the CIT found that section 751(a)(2) of the Act requires Commerce to use the AD duty assessment rate determined in that administrative review as the new cash deposit rate.<sup>175</sup>
- J.D. Irving incorrectly relies on 19 CFR 351.212(c), which is only applicable if no review was requested.
- In *United States Shoe Corporation v. United States*, the CAFC explained that passive activities, such as automatic liquidation instructions are not decisions or determinations.<sup>176</sup> Thus, Commerce’s issuance of automatic liquidation instructions for the third administrative review of the order does not constitute a determination for the purpose of establishing a cash deposit rate.
- J.D. Irving has cited to no instance where Commerce failed to follow the regulations or the Act in assigning a cash deposit rate based on results of the administrative review.
- Accordingly, for the final results, Commerce should assign J.D. Irving a cash deposit rate based on the final results of this administrative review.

**Commerce’s Position:** We disagree with J.D. Irving and will assign it a cash deposit rate based on the final results of this administrative review. While J.D. Irving is under review in this 2019 review – a fact J.D. Irving does not dispute – no review of J.D. Irving’s 2020 sales is being conducted.<sup>177</sup> When an entity is not under review, such as J.D. Irving in 2020 administrative review, we do not update its cash deposit rate and J.D. Irving has not cited to any instance to the contrary. Rather, as directed by section 751(a)(2)(C) of the Act, Commerce determines cash deposit rates based on results of administrative reviews. No review of J.D. Irving is being conducted for the 2020 review period. J.D. Irving’s argument thus ignores our statute.

Further, J.D. Irving ignores numerous rulings by the CIT and CAFC that, for a cash deposit instruction to be updated, an administrative review of that company must be conducted and completed. In *Hubbell Power Systems, Inc. v. United States*, the CIT noted that the statute recognizes the importance of administrative reviews in determining cash deposit rates.<sup>178</sup> Similarly, in *Federal-Mogul Corp. v. United States*, the CIT found that section 751(a)(2) of the Act requires that Commerce use the AD duty assessment rate determined in that administrative review as the new cash deposit rate.<sup>179</sup>

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<sup>174</sup> See Petitioner’s Rebuttal Brief at 53 (citing *Hubbell Power Systems, Inc. v. United States*, 884 F. Supp. 2d 1283, 1290 (CIT 2012) (*Hubbell Power System*)).

<sup>175</sup> *Id.* (citing *Federal-Mogul Corp.*).

<sup>176</sup> *Id.* at 56 (citing *United States Shoe Corporation v. United States*, 114 F.3d 1564, 1569 (Fed. Cir. 1997) (*United States Shoe Corporation*)).

<sup>177</sup> See *Initiation Notice 2020*.

<sup>178</sup> See *Hubbell Power Systems*.

<sup>179</sup> See *Federal-Mogul Corp.*

As noted above, section 751(a)(2)(C) of the Act directs Commerce to determine cash deposit rates based on results of administrative reviews. It would further seem obvious and axiomatic that we would not update a cash deposit rate when no review took place; however, J.D. Irving latches on to the word “determination” in the statement in the *Preamble to Regulations*, stating,

Because the cash deposit (or bond) rate is the basis for each interested party’s decision whether to exercise its right to request a review, it would make no sense to change the rate after the time for request has expired. Interested parties that believe the assessment level should be higher or lower than the estimated antidumping duties deposited at the time of entry can request an administrative review. In addition, the use of the cash deposit rate required at the time of entry is in accordance with the purpose of the entire review-upon-request mechanism, *i.e.*, to reduce unnecessary burdens.... In any event, the failure of an interested party to file a timely request for review constitutes a determination under section 751 of the dumping margin for the entries made during the review period.<sup>180</sup>

J.D. Irving misconstrues this passage to mean that a determination with regard to whether an updated cash deposit rate should apply to sales going forward was made in the 2020 review. However, no review of J.D. Irving was undertaken covering its sales during 2020 and Commerce has never updated a company’s cash deposit rate when the lack of a review request of a particular company resulted in automatic liquidation instructions being issued for that company.

The CAFC affirmed the notion in *United States Shoe Corporation* that ministerial actions, such as the issuance of automatic liquidation instructions for the 2020 administrative review, do not constitute a determination for the purpose of updating a cash deposit rate.<sup>181</sup> Specifically, in *United States Shoe Corporation* the CAFC found the Harbor Maintenance Tax to be a tax on exports akin to customs duties that are stipulated by law, and as such, the act of collecting the Harbor Maintenance Tax involved no analysis. Accordingly, the CAFC held that the collection of the Harbor Maintenance Tax was not the result of a “decision” by CBP, but rather a mere passive collection of money required by law.<sup>182</sup> Similar to *United States Shoe Corporation*, our issuance of automatic liquidation instructions was an automatic, ministerial action done pursuant to section 351.213(c) of our regulations which states that if we do not receive a request for an administrative review of an order we will assess antidumping duties at rates equal to the cash deposit rate applicable at entry. By its very name, the issuance of *automatic* liquidation instructions is a passive, automatic action requiring no analysis nor decision other than to follow the law and our regulations.

As noted above, section 751(a)(2)(C) of the Act directs Commerce to do exactly as we indicated we would to in the *Preliminary Results*, which was to determine J.D. Irving’s cash deposit rates based on results of administrative reviews. Therefore, consistent with the Act, our regulations, and numerous rulings by the courts, we have assigned J.D. Irving a cash deposit rate based on the non-selected companies’ rate determined for these final results.

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<sup>180</sup> See J.D. Irving’s Case Brief at 3-4 (citing *Preamble to Regulations*).

<sup>181</sup> See *United States Shoe Corporation*.

<sup>182</sup> *Id.* at 1569.



## Comment 11. Whether Commerce Used the Proper Market Price for Canfor’s Wood Chip Sales

### *Canfor*

- In determining the market value for sales of wood chips to affiliated parties, Commerce should disregard sales made by Canfor’s Radium and Elko sawmills made pursuant to a long-term supply contract entered into seven years prior to the POR.<sup>183</sup>
- When Canfor purchased the Radium and Elko sawmills in 2012, a stipulation of this agreement obligated those sawmills to supply chips under a long-term supply contract.<sup>184</sup> The chip prices established in that agreement are not reflective of prevailing supply and demand conditions, but rather were set with an eye toward providing a beneficial arrangement and successfully completing the sawmill purchase.<sup>185</sup>
- A comparison with the chip sales prices on the record demonstrates that the prices for chips sold by the Radium and Elko sawmills are substantially below the market prices for chips in British Columbia.<sup>186</sup>
- Commerce has held that it is not *per se* unreasonable to rely on prices set in long-term contracts as the market prices. However, that is because in Commerce’s view “long-term contracts still allow for price fluctuations in line with market conditions.”<sup>187</sup> The chip prices set in the agreement were fixed for a ten-year period with very limited possible adjustments based on the price of lumber and pulp. These potential adjustments do not consider market conditions for chips. The contract stipulates that the first price negotiation will take place in 2022, which is ten years after the initial contract was signed.<sup>188</sup>
- Commerce routinely states that it “seeks to find the market value that best represents the company’s own experience in the specific markets in which it operates.”<sup>189</sup> Chip prices set in 2012 as part of a broader transaction involving the purchase of the sawmills in question are not representative of the “specific market” at issue here – the market for wood chips in British Columbia in 2019.
- Commerce has previously held that the terms of certain contractual arrangements can distort the sales price to unaffiliated parties, such that it cannot be deemed reflective of market price. In the *2001 Lumber Investigation*, Canfor argued that “the nature of a proprietary contractual relationship,” along with the effect of certain intra-company transactions, distorted the price for chips sold to unaffiliated parties from its Alberta mills. Therefore, Canfor argued, a comparison between those unaffiliated chip prices and the prices for chips sold to affiliated parties from its British Columbia mills was not

<sup>183</sup> See Canfor’s Case Brief at 3 (citing Canfor’s Letter, “Sections B-D Initial Questionnaire Response,” dated July 13, 2020 (Canfor’s Sections B-D Response) at Exhibits D-14 and D-24.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 4 (citing Canfor’s Sections B-D Response at Exhibit D-14).

<sup>186</sup> *Id.* at Attachment I.

<sup>187</sup> *Id.* at 6 (citing *Ultra-High Molecular Weight Polyethylene from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 86 FR 11497 (February 25, 2021) (*Polyethylene from Korea*), and accompanying IDM at Comment 6).

<sup>188</sup> *Id.* at 4 (citing Canfor’s Sections B-D Response at Exhibit D-14).

<sup>189</sup> *Id.* (citing *Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Antidumping Duty Administrative Review*, 73 FR 7710 (February 11, 2008) (*SSSS Review Final*), and accompanying IDM at Comment 7.

appropriate. Commerce agreed, noting that “the verified information shows that the fair market value that Canfor’s mills obtain for sales of wood chips to unaffiliated purchasers is clearly distorted due to its contractual agreements.” Commerce instead compared Canfor’s sales of wood chips to affiliated parties in British Columbia to the weighted-average market price of the other respondents’ wood chip sales in British Columbia.<sup>190</sup> Canfor’s prices to unaffiliated purchasers in this review are similarly distorted by its contractual agreements and Commerce should make a similar determination that they cannot be used in a comparison to affiliated prices.

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- The mere fact that the contract in question was negotiated several years prior to the POR does not mean that the circumstances surrounding the sales reflect “unusual circumstances.” Indeed, Canfor’s argument would result in any long-term purchase or sale agreement being “unusual.” In fact, the record shows that these particular sales are not unusual.<sup>191</sup>
- Other proprietary conditions in the contract contradicts Canfor’s claim that prices in the long-term contract in question cannot be adjusted to reflect market conditions.<sup>192</sup>
- Canfor’s citation to *2001 Lumber Investigation* where Commerce disregarded prices set in a long-term contract is not analogous to the situation in this review. Specifically, Commerce noted in the previous softwood lumber proceeding that:

Record evidence shows that chip prices vary significantly by certain regions in Canada and that a comparison in the aggregate is not reflective of the inherent realities of the market under consideration. At each companies’ verification, we obtained information that demonstrated that wood costs vary significantly by region due to different stumpage and harvesting costs, and that the wood chip market logically tends to follow the log market. In addition, the existence of local pulp mills also effect {sic} the price of wood chips. Supply and demand factors also tend to cause wide variances in regional wood chip markets, whereby one region could be a net importer of chips and another region a net exporter due to oversupply. Consequently, a meaningful comparison that recognizes these differences must be done on a regionally consistent basis.<sup>193</sup>

Here, Canfor merely points to the fact that the prices reported for the Elko and Radium sawmills are below the market prices for chips in British Columbia. To that end, Commerce’s decision in the *2001 Lumber Investigation* is not relevant to the current issue because the issue in question in the previous investigation did not address wood chips sold pursuant to a long-term contract.

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<sup>190</sup> *Id.* at 5-6 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 FR 15539 (April 2, 2002) (*2001 Lumber Investigation*), and accompanying IDM at Comment 11).

<sup>191</sup> See Petitioner’s Case Brief at 36-37.

<sup>192</sup> *Id.* at 37 (citing Section B-D Response at Exhibit D-14).

<sup>193</sup> *Id.* at 38 (citing *2001 Lumber Investigation* IDM at Comment 11).

- Canfor’s citation to *Polyethylene from Korea* is unavailing because it also concerned a situation unrelated to here.<sup>194</sup> In *Polyethylene from Korea*, the respondent’s costs were reported using a net-realizable value (NRV) calculation, which included the production of six different co-products. For one of the co-products, the respondent based its NRV on published market prices, even though it made actual sales of this co-product pursuant to “long-term contracts established at the end of the prior year.”<sup>195</sup> Commerce determined that the actual sales value of that product should be used for the NRV calculation, rather than the published market prices, even though the sales price was dictated by a long-term contract.<sup>196</sup> Commerce also noted in that decision that “there is no record evidence concerning the exact details of the structure of such sales” and that “even if such sales were based on long-term contracts, it would not necessarily be unreasonable to rely on these prices.”<sup>197</sup>

**Commerce’s Position:** For the final results, Commerce continues to find that an adjustment of Canfor’s reported costs is necessary to reflect the market price of wood chips in British Columbia sold to an affiliate. According to section 773(f)(2) of the Act, Commerce may disregard transactions between affiliated persons if those transactions do not fairly reflect the value in the market under consideration (*i.e.*, if they are not made on an arm’s-length basis). In applying the “transactions disregarded” provision of the statute, Commerce compares the average transfer price for an input or service paid to an affiliated supplier with the market price for that input or service.<sup>198</sup> Here, because the sales revenue of wood chips is used as an offset to cost, Commerce seeks to ensure that the offset is valued at the lower of the transfer or market price.

At issue is the calculation of the market price to be used in the comparison. In analyzing whether Canfor’s transactions with affiliated parties were at arm’s length, Commerce included in its analysis wood chips sold by Canfor’s Elko and Radium sawmills to unaffiliated party A. Canfor argues that Commerce should not consider the sales of wood chips from its Elko and Radium mills to unaffiliated party A for the purpose of evaluating whether its byproduct sales were made at arms-length, because the “record demonstrate that there are unusual circumstances surrounding” the sales.<sup>199</sup> Specifically, according to Canfor, the value of these sales do not reflect market conditions during the POR because they were made pursuant to a long-term contract entered into in 2012.<sup>200</sup> Canfor argues that the terms of this contract are no longer reflective of the market price for wood chips because the market conditions during the POR did not reflect those conditions when it entered into the contract.<sup>201</sup>

<sup>194</sup> *Id.* at 39 (citing *Polyethylene from Korea* IDM at Comment 6).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Commerce’s preference for establishing a market value is a respondent’s own purchases of the input or service from unaffiliated suppliers, and when no such purchases are available, Commerce looks to the affiliated supplier’s sales to unaffiliated parties. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, 77 FR 17413 (March 26, 2012) (*Refrigerator-Freezers from Korea*), and accompanying IDM at Comment 17.

<sup>2</sup> *See* Canfor’s Case Brief at 1-7.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 2.

We disagree with Canfor that the prices paid to unaffiliated party A are not appropriate for use in our comparison. Canfor suggests that the chip prices set in the agreement represent unusual circumstances by virtue of the fact that it was negotiated several years prior to the POR. In analyzing the record, however, the contract appears to allow for periodic adjustments to the wood chip prices by reference to industry publications.<sup>202</sup> Therefore, even if the contract was executed in 2012, the provisions permit revisions in response to changes in market conditions. As such, the sales made to unaffiliated party A pursuant to the contract are a reasonable basis for a market price for wood chips. We do not consider the sales at issue to be unrepresentative of a market price for purposes of our transactions disregarded analysis, and we continue to find that an adjustment of Canfor's reported costs is necessary to reflect the market price of wood chips including the sales from its Elko and Radium mills.

**Comment 12. Whether It Is Proper to Value Steam Based on the Market Price for Electricity, and Whether the Market Price of Electricity Should be Based Solely on Electricity Prices in Alberta**

*Canfor*

- Commerce's valuation of steam based on the per kilowatt hour cost of electricity, converted to a per gigajoule cost, despite steam costs being on the record and despite relying on the same steam costs in the investigation, is non-sensical. Steam and electricity are two distinct types of energy, with utilization dependent on the individual process at issue. Steam and electricity are not interchangeable. Electricity powers equipment and lights and is used for heating the mills and administrative offices.<sup>203</sup> Steam is used to dry lumber in the kilns and cannot be used as electricity to power the mill.<sup>204</sup>
- Canfor's submitted information on the price of steam was based on its actual experience in the market and differs dramatically from the actual sale price of electricity in Alberta to the electricity company in Alberta.
- Commerce's converted electricity cost is eight times greater than Canfor's steam cost. For the final results, Commerce should value steam based on either the weighted-average cost for steam for 2003 through 2011 or the cost for 2011 alone.
- Commerce should only compare the electricity prices of Canfor transactions occurring in Alberta to market prices of electricity in Alberta and not to market prices in British Columbia. Throughout this case and in the previous softwood lumber proceeding, Commerce has consistently determined that input and byproduct prices in different provinces are not comparable. Commerce has done so because costs for logs and chips vary by provincial market, stumpage costs are charged by each provincial government, and other "supply and demand factors."<sup>143</sup> For the same reasons, Commerce should not deviate from its practice and should decline to compare electricity prices across provincial lines. Like the prices of logs and byproducts, the prices of electricity in British Columbia are not usable to determine the market value of electricity in Alberta.

<sup>202</sup> See Canfor's Section B-D Response at Exhibit D-14.

<sup>203</sup> See Canfor's Case Brief at 9 (citing Canfor's Sections B-D Response at D-28).

<sup>204</sup> *Id.*

- Within Canada, sales of electricity are confined within the provincial markets, or at the least, are not sold outside the respective power grids. Electricity is not available, marketable, or transportable from one province to another except through limited inter-provincial transmission corridors.<sup>205</sup>
- Regulatory bodies in Alberta and British Columbia set the prices for sale of electricity.<sup>206</sup> Therefore, British Columbia and Alberta’s regulations in each market affect the supply and demand of electricity in each province.
- The differences in the supply and demand for electricity between British Columbia and Alberta are demonstrable and significant, as evidenced by the price differential.<sup>207</sup>
- The purpose of comparing Canfor’s prices to market prices is to “to find the market value that best represents the company’s own experience in the specific markets in which it operates.”<sup>208</sup> The prices of Canfor’s electricity transactions in one province thus are not reflected in the prices of electricity in another province.
- Commerce committed a ministerial error in the *Preliminary Results*. Commerce stated that its intention was to base market price on prices in two provinces, but in calculating Canfor’s *Preliminary Results* margin, Commerce included the prices of only one of the two provinces in its calculation.<sup>209</sup>

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- The steam costs that Canfor advocates for are significantly outdated and would not result in a more accurate dumping margin. Accordingly, it was reasonable for Commerce to favor contemporaneous energy prices over those more than eight years outside the POR.
- Commerce was correct in using the prices in a province other than the transactions in question because the only prices of the type and nature of transaction in question, the identities of which are proprietary,<sup>149</sup> on the record of this review occurred only in the province other than that where the transactions in question took place.

**Commerce’s Position:** For the final results, Commerce continues to find that an adjustment of Canfor’s reported costs is necessary to reflect the market price of electricity provided by an affiliate. According to section 773(f)(2) of the Act, Commerce may disregard transactions between affiliated persons if those transactions do not fairly reflect the value in the market under consideration (*i.e.*, if they are not made on an arm’s-length basis). In applying the “transactions disregarded” provision of the statute, Commerce compares the average transfer price for an input or service paid to an affiliated supplier with the market price for that input or service.<sup>210</sup> Where

<sup>205</sup> *Id.* at 11 (citing *Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination*, 80 FR 63535 (October 20, 2015) (*Supercalendered Paper Investigation*), and accompanying IDM at 42).

<sup>206</sup> *Id.* (citing *Supercalendered Paper Investigation* IDM at 42; *see also* Petitioner Letter, “Allegation of a Particular Market Situation Regarding Respondents’ Cost of Production,” dated August 3, 2020 at 34, Exhibit 39).

<sup>207</sup> *Id.* at 12 (citing Memorandum, “Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – Canfor Corporation, Canadian Forest Products Ltd., and Canfor Wood Products Marketing Ltd.,” dated May 20, 2021 (Canfor Analysis Memo) at Attachment 1).

<sup>208</sup> *Id.* at 13 (citing *SSSS Review Final* IDM at Comment 7).

<sup>209</sup> *Id.* (citing Canfor Analysis Memo at Attachment 1).

<sup>210</sup> Commerce’s preference for establishing a market value is a respondent’s own purchases of the input or service from unaffiliated suppliers, and when no such purchases are available, Commerce looks to the affiliated supplier’s sales to unaffiliated parties. *See, e.g., Refrigerator-Freezers from Korea* IDM at, Comment 17.



the transfer price of an input or service is below its market price, Commerce normally will adjust the respondent's reported costs to reflect the market values on the record.

During the POR, one of Canfor's sawmills provided byproducts to an affiliate in exchange for electricity and steam. Because this is an even exchange, in the preliminary results, we compared the market value of the wood byproducts that the sawmill provides and the market value of the steam and electricity that the affiliate returned. We valued electricity in our analysis using prices of sales of excess electricity to the electricity company in Alberta<sup>211</sup> and purchases of electricity from the unaffiliated electricity company in British Columbia. Because we did not have contemporaneous market prices for steam on the record, we valued this input based on the market price for electricity. In doing so, we first converted the unit of measure for steam (*i.e.*, gigajoules) to the equivalent in kilowatt hours.<sup>212</sup>

Canfor argues that Commerce erred in the *Preliminary Results* by valuing steam in its analysis of these exchanges based on the cost of electricity and that Commerce should instead have relied on steam prices supplied by the company.<sup>213</sup> We note that there are no POR contemporaneous market prices (*e.g.*, purchases from unaffiliates) on the record for steam. We disagree that it is not appropriate to value steam based on the electricity prices on the record. The market prices for electricity are contemporaneous with the POR, unlike the prices for steam. Thus, we consider it preferable to value steam (converted first to kilowatt hours) based on the contemporaneous electricity market prices for purposes of evaluating whether the transactions between the sawmill and the affiliate were conducted on an arm's-length basis.

Canfor also argues that for purposes of this analysis, the value of electricity should be based on Alberta electricity prices alone and should not consider purchases in British Columbia from unaffiliated parties. We note that there are two market prices on the record for electricity. The first is the price of Canfor's purchases of electricity from its unaffiliated supplier in British Columbia, and the second is the price associated with its affiliate's sales to its unaffiliated customers in Alberta. We disagree that the electricity prices between both provinces are not comparable in determining market value. Both reflect unaffiliated transactions within the market under consideration (*i.e.*, Canada) for an identical input, electricity. As both are acceptable market prices, we calculated a weighted-average market price from the two sources for use in our analysis.<sup>214</sup>

Regarding the ministerial error alleged by Canfor, we agree that Commerce used the incorrect market price to value electricity, and we have corrected this ministerial error for the final results and based the market price on prices in two provinces, not one.

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<sup>211</sup> Canfor had no purchases of electricity from Alberta, only sales of excess electricity to it.

<sup>212</sup> See Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – Canfor Corporation, Canadian Forest Products Ltd., and Canfor Wood Products Marketing Ltd.," dated May 20, 2021 (Preliminary Analysis Memo for Canfor) at Attachment I.

<sup>213</sup> See Canfor's Case Brief at 9.

<sup>214</sup> See Preliminary Analysis Memo for Canfor at Attachment I.

### Comment 13. Whether Canfor's Prince George Sawmill's Purchases of Electricity Should be Adjusted

#### Canfor

- Canfor's Prince George (PG) sawmill purchases power from BC Hydro. However, the PG Sawmill is one of several facilities located in the same Northwood area and BC Hydro sends the consolidated electricity invoice to Affiliate A, the identity of which is proprietary,<sup>215</sup> to which the PG sawmill pays its share and then Affiliate A sends the total cost of the electricity invoice to BC Hydro. In the *Preliminary Results*, Commerce applied the transactions disregarded rule to transactions between Canfor's PG sawmill and Affiliate A and, in doing so, adjusted Canfor's electricity costs paid to Affiliate A by the PG sawmill to reflect a market price. Commerce was incorrect to do this, because the PG sawmill was supplied electricity by the unaffiliated party, BC Hydro, and not by Affiliate A. Thus, Commerce should make no adjustment to the PG sawmill's manufacturing costs.
- Commerce's methodology distorts Canfor's costs. The purpose of the transactions disregarded rule is to ensure that actual costs are not understated by less than arm's-length dealing among affiliated parties. Here, there is no possibility of the PG sawmill's costs being understated because the record is clear that the supplier of the electricity is the unaffiliated party BC Hydro and it is BC Hydro – not Affiliate A – that sets the price for the electricity consumed by the PG sawmill; and the PG sawmill actually paid the exact price for the electricity that was set by BC Hydro. There is thus no basis for Commerce to adjust these actual electricity costs paid to an unaffiliated supplier.
- Commerce has declined to apply the transactions disregarded rule in similar circumstances. When the record shows that an affiliate acts only as a purchase agent and is in fact not the supplier of the input, Commerce has found that the respondent only transacts with the unaffiliated input supplier, and not with the affiliate.<sup>216</sup>
- Canfor has made additional proprietary arguments in support of its claim that it directly receives the electricity from BC Hydro and that there is no way for the PG sawmill to directly pay BC Hydro for the electricity it consumes.<sup>217</sup>
- If Commerce continues to increase the payment reported by Canfor based on the selling, general, and administrative (SG&A) expenses of Affiliate A, Commerce should modify its adjustment. In *Bottom Mount Refrigerator-Freezers from Mexico*,<sup>218</sup> where Commerce adjusted the price of inputs purchased from an affiliate, Commerce found it “not appropriate to increase the cost of {} inputs by the amount of the affiliate's overall SG&A expenses.” Instead, Commerce used the actual costs incurred for providing the services plus an amount for the affiliate's general and administrative (G&A) expenses.<sup>219</sup>

<sup>215</sup> The identity of Canfor's affiliate receiving the invoice from BC Hydro is identified in the Canfor's Case Brief at 14.

<sup>216</sup> *Id.* at 16 (citing *Chlorinated Isocyanurates from Japan: Final Determination of Sales at Less Than Fair Value*, 56 FR 56059 (September 18, 2014), and accompanying IDM at Comment 4).

<sup>217</sup> *Id.* at 16-17 (citing Canfor's Letter, “Supplemental Section A Questionnaire Response,” dated August 7, 2020 (Canfor's Supp Section A Response) at Exhibit A-33).

<sup>218</sup> *Id.* at 18 (citing *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from Mexico*, 77 FR 17422 (March 26, 2012) (*Bottom Mount Refrigerator-Freezers from Mexico*), and accompanying IDM at Comment 28).

<sup>219</sup> *Id.*

Similarly, here, Commerce should not adjust the price of electricity from BC Hydro by costs that cannot possibly be related to the purported electricity transaction, such as intangible asset and right-of-use asset amortization. Instead, Commerce should, at most, include only the amortization expenses related to Affiliate A's sales and administration as these are the costs on the record that most closely demonstrate what the purported "services" would cost. Affiliate A's sales and administration amortization expenses are outlined in the depreciation tab of Canfor's cost reconciliation.<sup>220</sup>

*Petitioner*

- The record demonstrates that a transaction for electricity took place between the PG sawmill and Affiliate A and not between the PG sawmill and BC Hydro. Thus, Affiliate A serves as an affiliated reseller of electricity from BC Hydro to the PG sawmill, and Commerce's adjustment is consistent with its established practice for applying the transactions disregarded rule in this context.<sup>221</sup>
- Contrary to Canfor's claims, "the substance of the transaction" would not be "exactly the same"<sup>222</sup> if the PG sawmill bought electricity directly from BC Hydro because Affiliate A's handling of electricity charges goes beyond "administrative convenience" and affects the SG&A expenses of Canfor's PG sawmill.<sup>223</sup> Accordingly, in the final results, Commerce should continue to adjust the reported cost of electricity at Canfor's PG sawmill.

**Commerce's Position:** For the final results, Commerce continues to find that transactions between the PG sawmill and its affiliate should be subject to an analysis under section 773(f)(2) of the Act (the transactions disregarded rule). For purposes of the transactions disregarded rule, when the respondent purchases inputs from an affiliated supplier, we test the transfer price between the affiliated supplier and the respondent with the available market prices for the input. Available market prices may relate to a respondent's purchases of the same input directly from unaffiliated suppliers, and/or an affiliated reseller's average acquisition price plus the affiliated reseller's SG&A expenses.

Commerce's established practice when the respondent purchases inputs from an affiliated reseller is to value the input at the higher of the transfer price or the adjusted market price for the input (*i.e.*, the affiliate's average acquisition cost plus the affiliate's SG&A costs). Commerce has explained that the inclusion of the affiliate's SG&A expenses ensures that the adjusted market price reflects the affiliates' cost of providing the services. Further, Commerce has applied the transactions disregarded rule in instances where the affiliated services were limited to document handling and acting as the payment intermediary, as is the case here.

The record in this case demonstrates that a transaction for electricity took place between the PG sawmill and Affiliate A rather than directly between the sawmill and BC Hydro. Therefore,

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<sup>220</sup> *Id.*

<sup>221</sup> See Petitioner's Case Brief at 46 (citing *Lumber Investigation* IDM at Comment 27; see also *Lumber ARI Final* IDM at Comment 6).

<sup>222</sup> *Id.* at 47 (citing Canfor's Case Brief at 16).

<sup>223</sup> *Id.* (citing Canfor's Letter, "Section A Questionnaire Response," dated June 18, 2020 (Canfor's Section A Response) at A-15).

Affiliate A acts as an affiliated reseller of electricity from BC Hydro to the PG sawmill, and the analysis of the transactions between the mill and its affiliate is appropriate. In the current proceeding, Canadian Forest Products (of which the PG sawmill is part) and Affiliate A are separate legal entities and both manufacture products (Affiliate A produces non-subject merchandise). Affiliate A also functions as a middleman between all the facilities in what it terms the Northwood area (the entities in this area include Canfor's PG sawmill) and the unaffiliated supplier of electricity BC Hydro. While Affiliate A does not generate the electricity, it is the payment intermediary. While Canfor may consider these transactions to be only a pass-through to its affiliated Northwood area facilities, the fact remains that Affiliate A provided services to the Northwood area facilities by acting as the document handler (*e.g.*, providing documentation for allocating the costs to the different facilities, invoicing each of the Northwood area facilities, processing the receipt of payments from the Northwood area facilities, *etc.*) and acting as the payment intermediary. Accordingly, we consider it appropriate for the final results to continue to include Affiliate A's SG&A expenses in the electricity market price computation to account for the services Affiliate A is providing. Our approach here is consistent with our treatment of a highly similar pattern of payments in the underlying investigation and previous review of this proceeding.<sup>224</sup>

Canfor argues that if we continue to make this adjustment, we should revise the calculation of the Affiliate A's SG&A rate to exclude certain amortization expenses (*e.g.*, on intangible assets). However, Canfor has provided no evidence that the amortization expenses in question are not related to the Affiliate A's selling and administration activities. We note that we already excluded from the numerator of the affiliate's SG&A calculation depreciation and amortization related to manufacturing activities (*e.g.*, that related to property, plant, and equipment, *etc.*).<sup>225</sup> Therefore, for the final results, we will continue to include these amortization expenses in SG&A expenses.

#### **Comment 14. Whether Canfor's Restructuring Costs Should be Excluded from Mill Costs**

##### *Canfor*

- In 2019, Canfor incurred a substantial amount of costs related to the closure and indefinite curtailment of two of its mills and other restructuring efforts. These mill closures and restructuring costs are extraordinary, non-recurring expenses of the company that are not reflective of the cost of producing subject softwood lumber during the POR. Accordingly, they should not be included in Canfor's current period sawmill costs for purposes of the below-cost test.
- Specifically, on June 3, 2019, Canfor announced its intention to permanently close the Vavenby sawmill following its sale.<sup>226</sup> On July 18, 2019, Canfor announced further capacity reductions at two of its BC sawmills.<sup>227</sup> The Mackenzie sawmill was indefinitely curtailed effective July 18, 2019, and one of two shifts was permanently

<sup>224</sup> *Lumber Investigation* IDM at Comment 27 and *Lumber ARI Final IDM* at Comment 6.

<sup>225</sup> See Preliminary Analysis Memo for Canfor at Attachment I.

<sup>226</sup> *Id.* at 20 (citing Canfor's Section B-D Response at D-35).

<sup>227</sup> *Id.*

eliminated at the Isle Pierre sawmill effective September 20, 2019.<sup>228</sup> Due to these closures and other indefinite curtailments, restructuring, mill closure and severance costs of \$21.2 million were recognized during 2019.<sup>229</sup>

- In the previous softwood lumber proceeding, Commerce excluded gains and losses associated with plant closures, which were similar to the costs that Canfor incurred in 2019, from the total costs used in determining whether Canfor's reported home market sales were made below costs.<sup>230</sup> Commerce determined that the closure costs did not reasonably reflect the costs associated with lumber production and excluded the net gains and losses incurred for the permanent closure of the production facility.<sup>231</sup>
- In the underlying investigation, Commerce excluded costs associated with permanent shutdowns of Resolute's Fort Frances mill and Tolko's Nicola Valley and Manitoba facilities from the total costs used in determining whether reported home market sales were made below costs.<sup>232</sup> Commerce reiterated that its "longstanding practice has been to exclude costs that are related to the permanent closure or sale of entire production facilities, as they no longer relate to the normal, ongoing operations of a company."<sup>233</sup> These are the exact same circumstances that occur in this review.

#### *Petitioner*

- The citation Canfor refers to when it discusses Canfor's Isle Pierre sawmill closure does not include the information cited,<sup>234</sup> nor does Canfor's initial Section D response identify whether Canfor's Vavenby's planer mill "permanently closed"<sup>235</sup> or the date that Mackenzie's planer mill was "indefinitely curtailed."<sup>236</sup> Finally, there is no discussion of how the "permanent closure" of Canfor's Vavenby sawmill contrasts with the "indefinite curtailment" at the company's Mackenzie sawmill.<sup>237</sup>
- Even if Commerce considers all arguments presented by Canfor in its case brief, they should be found to lack merit. In general, Commerce includes restructuring costs in the general and administrative (G&A) ratio.<sup>238</sup> Even if some restructuring costs may be excluded in certain situations, Commerce must analyze the nature of purported

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<sup>228</sup> *Id.* Commerce notes that this is an incorrect citation. However, this information exists on the record in Canfor's Consolidated Financial Statements included in Canfor's Section A Response at Exhibit A-16 at p. 29, which Canfor cited in the following citation (n. 61).

<sup>229</sup> *Id.* (citing Canfor's Section A Response at A-16, n. 17).

<sup>230</sup> See Canfor's Case Brief at 10 (citing *2001 Lumber Investigation* IDM at Comment 8).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 19-20 (citing *Lumber Investigation* IDM at 94-95, 108-09).

<sup>233</sup> *Id.* at 108.

<sup>234</sup> See Petitioner's Rebuttal Brief at 50 (citing Canfor's Case Brief at 20; and Canfor's Section B-D Response at D-35)

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 51 (citing, e.g., *Certain Steel Concrete Reinforcing Bars from Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part*, 71 FR 65082 (November 7, 2006), and accompanying IDM at Comment 17 ("While we agree with the petitioners that it is Commerce's practice to include restructuring charges in the G&A expense calculation, we disagree that the nature of the excluded expenses in question was restructuring charges.")).



restructuring costs to determine if such costs should be excluded.<sup>239</sup> In this case, Canfor does not attempt to explain why reported restructuring costs unrelated to closures at Vavenby, Mackenzie, and Isle Pierre should be excluded.<sup>240</sup>

**Commerce's Position:** As an initial matter, while the petitioner is correct that Canfor cited to certain closures at all three mills inaccurately in one instance,<sup>241</sup> this information does exist on the record and was cited by Canfor accurately in the following citation.<sup>242</sup> Thus, we do not find that Canfor's case brief contains new factual information.

We agree with Canfor that expenses related to the closure of its Vavenby sawmill are appropriately excluded from the reported costs. However, with respect to line closures and curtailments at its other facilities, we continue to include the costs related to the indefinite curtailment and other restructuring efforts in G&A costs.

Commerce has an established practice of excluding gains or losses related to the permanent closure or sale of an entire facility.<sup>243</sup> The sale of an entire production facility is a significant transaction, 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 its general operations. However, where a shutdown consists of the closure of some production lines at a facility while other production lines at the same facility continue to operate (*i.e.*, where the entire facility has not been shut down), Commerce's approach has been to include the associated gains or losses as part of G&A expenses.<sup>244</sup>

According to Canfor, the company announced its intention to permanently close the Vavenby sawmill following its sale in 2019. Canfor further explained that operations at the Mackenzie sawmill were indefinitely curtailed, and that one of the two shifts at its Isle Pierre facility was permanently eliminated. We agree that the expenses related to the permanent closure of the Vavenby sawmill should be excluded from the reported costs. Although the petitioner asserts otherwise, we find that Canfor has provided sufficient evidence to establish that the company's Vavenby facility was permanently closed during the POR. Notably, the company's 2019 audited financial statements explain that "the Company announced its intention to permanently close the Vavenby sawmill following {its} sale" and further that "due to the aforementioned closure of the

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<sup>239</sup> *Id.* (citing, *e.g.*, *Certain Crystalline Silicon Photovoltaic Products from Taiwan: Final Results of Antidumping Duty Administrative Review; 2014-2016*, 82 FR 31555 (July 7, 2017), and accompanying IDM at Comment 18 ("In the instant case, we find that Motech's auditors classified the net loss related to the fire under non-operating expenses in accordance with Taiwanese GAAP, rather than as an extraordinary loss, and we find no record evidence to indicate that this treatment is unreasonable. Therefore, for the final results, we have continued to include the shutdown losses at issue, which were connected to the factory fire in 2015, in Motech's G&A expense ratio calculation.")).

<sup>240</sup> *Id.* at 52 (citing Canfor's Case Brief at 21).

<sup>241</sup> See Canfor's Case Brief at 20, n. 60.

<sup>242</sup> *Id.* at n. 61.

<sup>243</sup> See *Lumber Investigation IDM* at Comment 31.

<sup>244</sup> See *Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products from Canada*, 70 FR 73437 (December 12, 2005) (*Softwood Lumber IV 2005*), and accompanying IDM at Comment 8.

Vavenby sawmill . . . mill closure and severance costs . . . have been recognized in 2019.”<sup>245</sup> Canfor provided a schedule identifying the expenses it recorded during the year related specifically to the closure of this facility.<sup>246</sup>

However, we disagree that it is appropriate to exclude restructuring expenses and other costs related to the various line closures and curtailments at Canfor’s Isle Pierre, Mackenzie, and other facilities. Commerce has previously held that line closures do not constitute the permanent closure of a facility.<sup>247</sup> With respect to the restructuring and other expenses related to the line closures which Canfor seeks to exclude, these costs were not incurred in connection with the shutdown of a complete facility. The facilities at issue continued operating during the POR, albeit at a reduced capacity, and any expenses associated with the line closures are thus properly included in the reported costs. Regarding the Mackenzie sawmill, although Canfor explains that activities at the mill were “indefinitely curtailed” during the POR, there is no evidence on the record indicating that the mill was permanently closed or sold, or that the company could not resume production at the facility at some point in the future. Consequently, for the final results, we find that the related expenses for these curtailments should likewise be included in G&A costs.

#### **Comment 15. Whether Commerce Should Adjust Canfor’s Reported Net Interest Expense**

##### *Petitioner*

- Two adjustments to Canfor’s cost calculation should be made.
- One, in reporting its net interest expense, Canfor included an offset to interest expense, the nature of which is proprietary,<sup>248</sup> for which it did not provide any explanation or justification.<sup>249</sup> Accordingly, Commerce should reject Canfor’s claimed offset.
- Two, Canfor excluded losses on one particular type of derivative, the nature of which is proprietary,<sup>250</sup> that should be included in the calculation of Canfor’s net interest expense.<sup>251</sup>

##### *Canfor*

- With regard to the first offset to interest expense, the petitioner has made no allegation, and can point to no record evidence, that this reported offset to interest expense is distortive or otherwise incorrect. As it has in all previous reviews, Canfor excluded interest income related to long-term financing from its reported offset amount. At no

<sup>245</sup> See Canfor’s Section A Response at Exhibit A-16 (describing the circumstances surrounding the Vavenby closure and subsequent sale and the various other line closures and curtailments at additional mills); see also Canfor’s Letter, “Second Supplemental Sections A-D Questionnaire Response,” dated May 10, 2021 (Canfor’s 2<sup>nd</sup> Sections A-D Supp Response) at Exhibit D-49 (showing the Vavenby closure costs recorded in Canfor’s general ledger in FY2019).

<sup>246</sup> See Canfor’s 2<sup>nd</sup> Sections A-D Supp Response at Exhibit D-49.

<sup>247</sup> See *Softwood Lumber IV 2005* IDM at Comment 8.

<sup>248</sup> The proprietary version of Petitioner’s Case Brief at 57 identifies the nature of the offset in question.

<sup>249</sup> See Petitioner’s Case Brief at 57 (citing Canfor’s 2<sup>nd</sup> Sections A-D Supp Response) at 4 and Exhibits D-50-D-52).

<sup>250</sup> The proprietary version of Petitioner’s Case Brief at 57-58 identifies the nature of the offset in question.

<sup>251</sup> See Petitioner’s Case Brief at 57-58 (citing Canfor’s 2<sup>nd</sup> Sections A-D Supp Response at 4 and Exhibit

point during this review did Commerce or the petitioner request that Canfor provide additional documentation supporting the interest income offset.

- With regard to derivatives, during this POR, Commerce has specified that derivative transactions be excluded from reported costs,<sup>252</sup> and Canfor complied.<sup>253</sup> In the investigation, Commerce disallowed derivatives from Canfor's financial expense because the derivatives did not relate to Canfor's general production operations.<sup>254</sup>
- The petitioner argues that the derivatives should be included in Canfor's interest expense, without citation to any authority or any other reason why Canfor's derivatives should be included in its interest expense.

**Commerce's Position:** We disagree with the petitioner regarding the first proposed adjustment to Canfor's financial expense rate. In its financial expense calculation worksheet, Canfor itemized each of the individual components of the total interest income recorded on the 2019 audited financial statements of the highest consolidated entity.<sup>255</sup> The company excluded the majority of this amount from the financial expense rate calculation on the basis that such income was long-term in nature, in line with Commerce's practice in this regard. The remaining portion of the interest income was included by Canfor as an offset to financial expenses.<sup>256</sup> Based on our review of the record, we find that Canfor has adequately explained all elements of its financial expense rate calculation and has responded in full to our requests regarding the nature of the calculation in the initial and supplemental responses. There is no evidence to suggest that Canfor's classification of the various components of total interest income as either long-term or short-term is not accurate. Therefore, for the final results, we have continued to allow Canfor's claimed offset to financial expenses for short-term interest income.

We agree with the petitioner that the financial expense rate should be revised to include certain losses on derivative instruments. Canfor notes that for purposes of the less-than-fair-value investigation, Commerce did include net gains and losses related to derivatives because the underlying instruments related to speculative investment activity. In the instant case, however, the derivative transactions at issue were unrelated to investment activity.<sup>257</sup> Moreover, a review of the audited 2019 financial statements upon which the calculation is based demonstrates that these items are typical of the types of transactions Commerce regularly considers to be a component of financial expenses.<sup>258</sup> Canfor is correct that Commerce initially requested that amounts related to derivative transactions be excluded from the financial expense rate calculation. However, as noted, the record evidence pertaining to the losses in question indicates that they are properly included, and we have revised the financial expense ratio accordingly for the final results.<sup>259</sup>

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<sup>252</sup> *Id.* at 3 (citing Commerce Letter, "Sections A-D Supplemental Questionnaire," dated September 3, 2020 at Question 25).

<sup>253</sup> See Canfor's Rebuttal Brief at 2-3 (citing Canfor's Supplemental Sections A-D Response at 3).

<sup>254</sup> See Canfor's Rebuttal Brief at 2-3 (citing *Lumber Investigation* IDM at Comment 32).

<sup>255</sup> See Canfor's 2<sup>nd</sup> Sections A-D Supp Response at Exhibit D-51.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at Exhibit D-52 (Note 23 (d) and (e) of 2019 Financial Statement). The proprietary version of Petitioner's Case Brief at 57-58 identifies the nature of the offset in question, and Canfor has not objected to the petitioner's description of the nature of the derivative transactions.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

### **Comment 16. Whether Commerce Committed a Ministerial Error in the Calculation of Canfor's Margin**

#### *Canfor*

- In its preliminary comparison market program, Commerce inadvertently filtered sales reflecting the arm's length test from the calculation of normal value based on the customer code (CUSCODH) rather than the consolidated customer code (CCUSCODH).
- The customer code is not an appropriate variable for identifying customers that failed the arm's-length test because, in Canfor's system, the customer code identifies a delivery location, rather than the customer as a legal entity. In rare cases, multiple customers may use the same delivery location and, thus, share the same CUSCODH, which resulted in the exclusion of some sales transactions that did not actually fail the arm's-length test.
- Using the consolidated customer code eliminates this error and is consistent with Commerce's stated intention in its analysis memo.<sup>260</sup>
- No other interested party provided comments.

**Commerce's Position:** We agree with Canfor that the consolidated customer code is the only field in the sales database that specifies that each customer will be assigned a unique code.<sup>261</sup> Therefore, in calculating the final results, we have relied on Canfor's reported consolidated customer code (CCUSCODH) in performing the arm's-length test.

### **Comment 17. Whether Commerce Should Include the Total Amount of Restructuring and Impairment Charges in West Fraser's General and Administrative Expense Ratio**

#### *Petitioner*

- Commerce should include the total amount of restructuring and impairment charges in West Fraser's G&A expense ratio, because West Fraser failed to provide twice-requested documentation demonstrating that certain excluded charges were related to the permanent shutdown of a sawmill.
- The petitioner acknowledges that it is Commerce's practice to exclude costs related to permanent closures. However, West Fraser only provided a narrative explanation, with no documentation, to support its claim that the excluded impairment and restructuring charges were related to the permanent shutdown of a sawmill.

#### *West Fraser*

- Commerce has a long-standing practice of excluding restructuring and impairment costs from the calculation of G&A expenses when those costs are related to the permanent closure of a production facility. Accordingly, West Fraser properly excluded the amount of restructuring and impairment costs related to the permanent closure of its Chasm sawmill.

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<sup>260</sup> See Canfor's Case Brief at 22 (citing Canfor Analysis Memo at Attachment 3).

<sup>261</sup> See Canfor's Sections B-D Response at B-23 and Exhibits B-8; see also Canfor's Supplemental Sections A-D Response at Exhibit C-18.

- West Fraser fully responded to Commerce’s requests for information and documentation related to its restructuring and impairment costs.

**Commerce’s Position:** We agree with West Fraser. First, as acknowledged by both parties, Commerce’s long-standing practice is to exclude costs or gains that are related to the permanent closure or sale of entire production facilities, as they no longer relate to the normal, ongoing operations of a company.<sup>262</sup> Second, we find that West Fraser adequately responded to Commerce’s request for information. Specifically, in its initial section A response, West Fraser stated that the “West Fraser’s Chasm mill in British Columbia closed permanently in September 2019.”<sup>263</sup> West Fraser also provided a copy of a press release, dated June 17, 2019, that announced its decision to permanently close the sawmill.<sup>264</sup> Further, West Fraser’s financial statements reflect West Fraser’s decision to permanently close one of its sawmills. Specifically, West Fraser’s financial statement noted that “[i]n 2019, we announced the permanent closure of our Chasm, B.C. lumber mill. This closure resulted in the curtailment of the defined benefit pension plan for the Chasm hourly employees.”<sup>265</sup> Additionally, West Fraser’s financial statements contained the following note regarding its impairment expenses: “As disclosed in note 16, we recorded asset impairment charges totaling (sic) \$24 million, with \$16 million related to the permanent closure of our Chasm, B.C. lumber mill and \$8 million related to certain B.C. lumber mill assets. Of the total, \$23 million of this impairment was recorded against manufacturing plant, equipment and machinery, with the remaining \$1 million recorded against inventory.”<sup>266</sup> Further, West Fraser’s financial statement again noted that “[o]n June 17, 2019, we announced the permanent closure of our Chasm, B.C. lumber mill and recorded impairment charges of \$16 million. In addition, we recorded an impairment charge of \$8 million related to certain B.C. lumber mill assets in the fourth quarter of 2019.”<sup>267</sup>

The petitioner argues that West Fraser did not provide requested documentation in response to Commerce’s request to explain why only a portion of its restructuring and impairment expenses were included in G&A. Commerce issued a supplemental questionnaire to West Fraser asking it to explain why it excluded a portion of expenses from its G&A calculation and to provide documentation to explain its reasons for doing so.<sup>268</sup> In response, West Fraser explained that the excluded portion of restructuring and impairment expenses related to the permanent closure of one of its sawmills and noted that these types of expenses are not included in the calculation of G&A expenses.<sup>269</sup> West Fraser then cited to its press release and audited financial statements as evidence that it had permanently closed one of its sawmills.<sup>270</sup> Given Commerce’s practice of not including expenses related to permanent closures in the calculation of G&A, we find this to

<sup>262</sup> See *Lumber Investigation IDM* at Comment 31.

<sup>263</sup> See *Certain Softwood Lumber Products from Canada*, Case No. A-122-857: Response to Section A of the Initial Antidumping Questionnaire, dated June 18, 2020 (West Fraser’s Section A Response), at A-8.

<sup>264</sup> *Id.* at Exhibit WF-AR2-A-4.

<sup>265</sup> *Id.* at Exhibit WF-AR2-A-22.

<sup>266</sup> *Id.* at Exhibit WF-AR2-A-22.

<sup>267</sup> *Id.*

<sup>268</sup> See *Antidumping Duty Administrative Review of Certain Softwood Lumber Products from Canada: West Fraser Mills Ltd. Sections A-D Supplemental Questionnaire*, dated January 7, 2021, at 7.

<sup>269</sup> See *Certain Softwood Lumber Products from Canada*, Case No. A-122-857: Response to Sections A-D Supplemental Antidumping Duty Questionnaire, dated January 25, 2021, at 24.

<sup>270</sup> *Id.*



be sufficient documentation to support its explanation of why these charges were not included in the G&A calculation.

Next, the petitioner notes that Commerce requested additional information from West Fraser regarding these restructuring and impairment charges in a subsequent supplemental questionnaire. Specifically, Commerce asked West Fraser to further explain why an additional amount (in addition to the \$16 million referenced above) was being excluded from its G&A calculation and to explain to which type of impairment and restructuring expenses the amount was related.<sup>271</sup> West Fraser complied with this request and explained that this additional amount was related to restructuring expenses for the closed sawmill, specifically severance pay, lease obligations, decommissioning obligation, and insignificant miscellaneous expenses.<sup>272</sup> Commerce did not request that West Fraser provide documentation to substantiate the actual number figures that comprised the restructuring and impairment expenses. We also note that the amount of the impairment expenses, *e.g.*, \$16 million, was included in West Fraser's audited financial statements.<sup>273</sup> Therefore, given that West Fraser explained the nature of the expenses and documentation to substantiate that its sawmill had permanently closed, we find the relative impairment and restructuring expenses should remain excluded from the calculation of West Frasers G&A expenses for the final results of administrative review.

#### **Comment 18. Whether Commerce Made Certain Ministerial Errors With Respect to West Fraser's Byproduct Offset**

##### *Petitioner*

- Commerce made a ministerial error by failing to make certain adjustments noted in West Fraser's preliminary analysis calculation memorandum in the excel spreadsheet calculation used to calculate the byproduct offset for wood hog, wood chips, and sawdust/shavings.
- Commerce made a ministerial error when transcribing data from West Fraser's questionnaire responses into the excel spreadsheet used to calculate the byproduct offset for wood hog.
- No other interested party provided comments.

**Commerce's Position:** We agree with the petitioner and we have corrected these ministerial errors for the final results of this administrative review.<sup>274</sup>

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<sup>271</sup> See Antidumping Administrative Review of Certain Softwood Lumber Products from Canada: West Fraser Mills Ltd. Section D Supplemental Questionnaire, dated March 23, 2021, at 3.

<sup>272</sup> See Certain Softwood Lumber Products from Canada, Case No. A-122-857: Response to March 23, 2021 Section D Supplemental Antidumping Questionnaire, dated April 2, 2021, at 7-8

<sup>273</sup> See West Fraser's Section A Response at Exhibit WF-AR2-A-22.

<sup>274</sup> See Memorandum, "Calculation Adjustments for the Final Results – West Fraser Mills, Ltd.," dated concurrently with this memorandum (Final Analysis Memo for West Fraser).

**Comment 19. Whether Commerce Made Certain Methodological Errors With Respect to West Fraser's Byproduct Offset**

*Petitioner*

- Commerce's preliminary results SAS programming incorrectly applied the intended byproduct adjustment which resulted in an incorrect amount for the byproduct offset being applied to West Fraser's total cost of manufacturing (TOTCOM).
- Commerce applied the incorrect value in the calculation of West Fraser's byproduct offset which led to an inaccurate byproduct adjustment. By using a different value, Commerce will ensure that all prices in the calculation are on the same level.
- No other interested party provided comments.

**Commerce's Position:** We agree with the petitioner regarding these two methodological issues. First, for the final results, Commerce corrected the application of the byproduct adjustment in the SAS programming. Second, for the final results, Commerce used a different value to calculate the byproduct offset to ensure that all prices are on the same level. Given that these matters contain business proprietary information, *see* West Fraser's Final Results Analysis Memorandum for further discussion and further details.

**Comment 20. Whether Commerce Should Make an Adjustment to West Fraser's Seed Purchases**

*Petitioner*

- West Fraser purchased seeds from a joint venture that it partially owns. The joint venture's financial statements show a loss from operations. Commerce should make an adjustment to West Fraser's cost of manufacturing to reflect this loss from operations.

*West Fraser*

- As a joint venture partner, West Fraser receives a proportionate amount of the joint venture's seeds and pays a proportionate amount of the joint venture's expenses. As a result, adjusting West Fraser's cost of manufacturing would be inappropriate because West Fraser's proportional share of the joint venture's expenses has already been reflected in its cost of manufacturing as an element of its log and harvest costs.
- The loss calculated for 2019 was not an element of these expenses in 2019, but rather an amount that will have to be covered in expenses for which West Fraser will be proportionately responsible in 2020.

**Commerce's Position:** We agree with the petitioner and will adjust West Fraser's cost of manufacturing to include the loss from the joint venture financial statements for the final results. Given that the joint venture owners were responsible for covering the costs associated with the seeds, and the joint venture financial statements showed a loss, it is reasonable to conclude that the joint venture owners did not reimburse for all costs incurred by the joint venture that were associated with the seeds. Furthermore, there is no record evidence that the loss will be covered in the subsequent year.

**Comment 21. Whether Commerce Should Use West Fraser’s Alternative Grade Group Information**

*Petitioner*

- In the *Preliminary Results*, Commerce relied on West Fraser’s reporting of the NLGA Grade Group product characteristic reported by West Fraser in the “GRDGRPH/U” field. This is inconsistent with the prior administrative review and should be corrected in the final results by using the ALTGRDGRPH/U fields.

*West Fraser*

- West Fraser has no objection to Commerce using the ALTGRDGRPH/U fields for the final results, as this would be consistent with Commerce’s past practice in the first administrative review.

**Commerce’s Position:** We agree with both the petitioner and West Fraser and will use the ALTGRDGRPH/U fields for model matching purposes. In the first administrative review of the order, Commerce found that West Fraser’s alternative grade characteristic led to a more accurate comparison for model matching purposes.<sup>275</sup> Given that neither the petitioner nor West Fraser has presented any record evidence to dispute this finding from the first administrative of review, we used the ALTGRDGRPH/U fields in our calculations for the final results.<sup>276</sup>

**V. RECOMMENDATION**

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results in this administrative review and the final weighted-average dumping margins in the Federal Register.

\_\_\_\_\_  
Agree

\_\_\_\_\_  
Disagree

11/23/2021

X



Signed by: RYAN MAJERUS

\_\_\_\_\_  
Ryan Majerus  
Deputy Assistant Secretary  
for Policy & Negotiations,  
performing the non-exclusive functions and duties of the  
Assistant Secretary for Enforcement and Compliance

<sup>275</sup> See *Lumber ARI Final IDM* at 51-52.

<sup>276</sup> See *Final Analysis Memo for West Fraser* at 3-6.