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Expedited Reviews/Round 1
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MEMORANDUM TO: Faryar Shirzad
Assistant Secretary
for Import Administration

FROM: Bernard T. Carreau
Deputy Assistant Secretary
for AD/CVD Enforcement II

SUBJECT: Issues and Decision Memorandum: Final Results of Expedited Reviews of 13 Companies Covered by the August 14, 2002 Notice of Preliminary Results, under the Countervailing Duty Order on Certain Softwood Lumber Products from Canada

SUMMARY:

This memorandum addresses the briefs and rebuttal comments submitted by interested parties to the Notice of Preliminary Results of Countervailing Duty Expedited Reviews: Certain Softwood Lumber Products from Canada[1] (Preliminary Results). Those preliminary results covered 18 companies. Five of those companies are not included in these final results: two companies requested pass through analysis and three companies required additional processing time because they were eligible for exclusion and, therefore, subject to verification.

We address here those comments that are either general in nature or specifically relevant to the issues covered in these 13 expedited reviews. Comments on such topics as pass-through analysis or Group 2 methodology will be addressed at a later date.

Below are the "Background" section and the "Analysis of Comments" section. Subsection I addresses the general issues; subsection II addresses the procedural issues; subsection III addresses the methodological issues; and subsection IV addresses company-specific issues. The issues covered are the following:

General Issues
Comment 1 Whether the Department should exclude companies from the CVD order as a result of expedited reviews
Comment 2 Whether the Department should verify all companies subject to expedited reviews
Comment 3: Whether the Department should allow companies purchasing inputs in arm's length transactions to request expedited reviews
Comment 4 Whether companies should be afforded the opportunity to self select the methodology to apply in the expedited review

[1] 67 FR 52945 (August 14, 2002).

Procedural Issues
Comment 1 Whether the timeline adopted by the Department for requesting rescission of an expedited review is in accordance with law
Comment 2 Whether the final results of expedited reviews should be issued sequentially or concurrently for all companies in Round 1
Comment 3 Whether non-compliant submissions should be removed from the record and companies that did not supply all documentation requested by the Department be ejected from the process

Methodological Issues
Comment 1 Expedited reviews may result in a diminishment of subsidy offset notwithstanding the intent of the Department to adjust the country-wide rate
Comment 2 Whether the Department should collect full information on cross-owned and affiliated entities
Comment 3 Whether non-subject softwood lumber products should be included in the company-specific subsidy calculations
Comment 4 Whether the same stumpage benefit should apply to logs and lumber
Comment 5 Whether the Department may lawfully recalculate the country-wide cash deposit rate by deducting the alleged benefit to and sales by the companies receiving individual rates from the country-wide calculation
Comment 6 Whether logs purchased from excluded companies and lumber produced from private forest timber should be excluded from the volume of subsidized inputs
Comment 7 Whether the Department should adopt a standardized conversion factor to convert board feet into cubic meters for lumber input
Comment 8 Whether the Department should calculate mill-specific rates

Company Specific Issues
Comment 1 Bois Daquaam Inc.
Comment 2 City Lumber Sales and Services Limited
Comment 3 Herridge Sawmills Ltd.
Comment 4 Jointfor
Comment 5 Lonestar Lumber
Comment 6 Maibec Industries Inc.

BACKGROUND:

On August 14, 2002, the Department of Commerce (the Department) published its Preliminary Results of 18 expedited reviews of the countervailing duty order on certain softwood lumber products from Canada for the period April 1, 2000 through March 31, 2001. Two of the 18 companies subsequently requested a pass-through analysis, Les Bois d'Oeuvre Beaudoin & Gauthier Inc. and Meunier Lumber Company Ltd., and are not included in the final results of these reviews. Three other companies, Interbois, Inc., Les Moulures Jacomau 2000, Inc., and Richard Lutes Cedar, Inc. are eligible for exclusion and require additional processing time. We received comments and rebuttal comments on the Preliminary Results, on September 6, 2002 and September 18, 2002, respectively, from petitioners and several respondents. We address here those comments that are either general in nature or specifically relevant to the issues covered in

these 13 expedited reviews. Comments on such topics as pass through analysis or Group 2 methodology will be addressed at a later date.

ANALYSIS OF COMMENTS

Section I: General Issues

Comment 1 Whether the Department should exclude companies from the CVD order as a result of expedited reviews

Petitioners argue that the Department should not exclude companies in expedited reviews because (1) the Department did not initiate the expedited reviews with the intention of excluding any company from the order; (2) the Department made it clear that it did not intend to revisit issues that were addressed in the investigation, such as company exclusions; and (3) the Department's Regulations call for zero rates, not exclusion, in administrative reviews of aggregate cases. Petitioners contend that if an exporter is assigned a zero rate, it has an incentive to avoid using subsidized wood because, if the exporter increases the use of subsidized inputs, the exporter could be assessed a higher duty rate as the result of an administrative review. In contrast, if the company is excluded from the order, that company would never be subject to an administrative review or the assessment of actual duties, no matter how much subsidized wood fiber it subsequently processes and exports to the United States.

Petitioners maintain that excluding companies from the CVD order as a result of an expedited review would be contrary to statements made by the Department in the amended final CVD determination and order[2], in the notice of initiation of expedited reviews[3], and in the Preliminary Results. In those documents the Department repeatedly stated that the purpose of conducting expedited reviews was to establish company-specific cash deposit rates and that it would not revisit issues already addressed in the investigation. Petitioners argue that the Department should not revisit the issue of company exclusions in expedited reviews.

Petitioners further assert that excluding a company from the CVD order is a final action equivalent to revocation of the order with respect to that company. In petitioners' view, the Department regulations provide that a CVD order can only be revoked with respect to a company after considering whether or not that company has not applied for or received any net subsidy for five consecutive years. Therefore, expedited reviews conducted less than a year after issuance of an order provide no basis for revoking the CVD order with respect to individual companies. In support of their position, petitioners cite to the case of respondents who stated that they have tenure but that they did not harvest timber during the period of review. Clearly at some point they would harvest, since provinces mandate a minimum harvest level. Therefore, petitioners argue that exclusion from the CVD order would free some subsidized imports from duty

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[2] Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products from Canada, 67 FR 36070, 36077 (May 22, 2002).

[3] Notice of Initiation of Expedited Reviews of the Countervailing Duty Order: Certain Softwood Lumber Products from Canada, 67 FR 46955 (July 17, 2002) (notice of initiation).

assessment which is in contrast to the statutory mandate that subsidized imports be subject to a full duty offset.

Finally, petitioners argue that the Department's regulations concerning reviews in aggregate cases provide for a zero rate, but not for the exclusion of companies. According to petitioners, a company may only be excluded as a result of an expedited review if the underlying investigation was conducted on a company-specific basis, i.e. under section 777A(c)(2)(A) of the Act. Because this investigation was conducted under section 777A(e)(2)(B) of the Act, a proceeding for which a country-wide subsidy rate is determined, there is no possibility of excluding companies through expedited reviews. Petitioners point out that the Department in fact expressly limited the application of 19 C.F.R. sec. 351.214(k) to reviews of investigations conducted on a company-specific basis. To do otherwise, i.e., to allow for the exclusion of companies in expedited reviews of aggregate cases, ignores and would conflict with 19 C.F.R. sec. 351.213 (b), which states that in administrative reviews of aggregate cases, the Department may consider and review requests for individual assessment and cash deposit rates of zero.

Moose River Lumber Co., Inc. (Moose River Lumber) also opposes company-specific rate reductions and outright exclusions. Moose River Lumber believes that under this scenario Canadian companies will continue to utilize subsidized fiber, no matter how small the amount used. Furthermore, if the Canadian producers want a reduction in their CVD duties, the foremost requirement should be to forswear the processing of logs or lumber originating from Canadian public lands.

Idaho Timber Corporation (Idaho Timber) also urges the Department to deny any and all requests for exclusions/exemptions or reductions in the CVD rate by or on behalf of Canadian remanufacturers. Idaho Timber expresses concern that reduced rates or exclusions for Canadian remanufacturers will allow them to purchase subsidized lumber at low cost and then escape all or most duties on their remanufactured products when those products enter the United States, thereby putting U.S. companies at a competitive disadvantage. In support of its position, Idaho Timber has submitted a letter dated August 20, 2001, which is on the investigation record, in which it explains that U.S. suppliers are not providing adequate amounts of low-grade softwood lumber.

Alternatively, should the Department grant exclusions, exemptions, or other relief to the Canadian remanufacturers, Idaho Timber requests an offsetting exclusion or exemption for all low grades of softwood lumber that it purchases from Canadian mills. Petitioners support Idaho Timber's position with respect to denying exclusions or reduced rates to remanufacturers, arguing that the Department's methodology has severely underestimated the stumpage benefit to remanufacturers (see "Methodological Issues" section, Comment 6).

The Government of Canada (GOC) supports the Department's preliminary decision to exclude companies that are assigned a zero or de minimis rate. According to the GOC, excluding a company in an expedited review is equivalent to excluding a company in the underlying investigation, since expedited reviews occur in lieu of determining company-specific rates in an investigation. Therefore, the applicable regulations are not those governing administrative reviews but the regulations that are applicable to expedited reviews, which the Department has not yet promulgated.

Department Position

In the notice of initiation the Department stated that section 751(a) of the Act provides the authority for the conduct of expedited reviews. We also recognized that we had few guideposts in developing a procedural approach to these reviews, since aggregate cases are rare and the Department had not promulgated specific regulations for this particular type of expedited review.

In developing our approach, we relied primarily on the existing regulations for expedited reviews of orders arising from investigations conducted on a company-specific basis. As we explained in Preliminary Results, in the Department's view there is no relevant difference for purposes of the de minimis rule between expedited reviews of orders resulting from investigations conducted on an aggregate basis and expedited reviews of orders resulting from investigations conducted on a company-specific basis. In addition to following the treatment of de minimis issues in section 351.214(k), we have also adopted the period of investigation as the period of review (see sec. 351.214(k)(3)(I)); we do not permit the posting of a bond in lieu of cash deposits (see sec. 351. 214(k)(3)(ii)); and we have stated all along that the final results of these reviews would not be the basis for assessment (see sec. 351. 214(k)(3)(iii)). Clearly, it was the intent of the Department from the beginning to maintain reasonable consistency, to the extent possible, with the most similar type of proceeding, i.e., sec. 351. 214 (k) expedited reviews. Thus, contrary to petitioners' argument, section 351.214(k) is the first regulation we consider in resolving procedural issues in these reviews. Based upon such consideration, where we find in these reviews that a company's rate during the period of investigation was zero or de minimis, we will exclude the company from the order.

Regarding whether the Department has previously stated an intention not to grant exclusions in these expedited reviews, we would point out that none of the statements cited by Petitioners indicates such an intention. First, our clear intention in stating that we would not revisit issues from the investigation was to preclude the reconsideration of issues that had been resolved in that segment of the proceeding. During the investigation, the Department granted exclusions based upon findings of zero or de minimis subsidy rates; we continue to apply that principle to exporters subject to these reviews. Second, our clear intention in stating that the purpose of these reviews is to calculate cash deposit rates was to underscore that we are not calculating assessment rates.

Moreover, Petitioners' arguments against exclusions that hinge on an analogy to annual assessment reviews ignore the fact that these expedited reviews, like reviews under sec. 351.214(k) of our regulations, are based on the behavior of the company during the period of investigation. Thus, the regulations governing annual assessment reviews, including those specifically applicable to annual assessment reviews of orders based on investigations conducted on an aggregate basis under section 777A(e)(2)(B) of the Act, are of limited relevance here.

Furthermore, Petitioners' argument regarding the impact of exclusions on companies' behavior would apply to any exclusion granted at any point during a proceeding, including exclusions granted during the investigation. Because we believe that exclusions are explicitly provided for by our regulations and practice, we do not accept this argument.

Idaho Timber is requesting that the Department not grant exclusions to a specific subgroup of exporters covered in these reviews, the remanufacturers. In these proceedings, we have not drawn any distinction between companies based on the type of manufacturing process that they

are engaged in. To the extent that exclusion is available to companies if they meet a de minimis threshold, remanufacturers, as well as primary mills, are eligible to take advantage of this opportunity. With regard to the request for exclusion from the scope of the order for softwood lumber products imported from Canada by this company, such a request should be filed separately, as appropriate, under the Department regulations. No scope exclusion request is being entertained in these expedited proceedings.

Comment 2 Whether the Department should verify all companies subject to expedited reviews

Petitioners contend that the Department should verify all companies before issuing final results of expedited reviews because (1) section 782 of the Act requires it, and (2) the Department's practice has established that company-specific reviews of this type require company-specific verification (see Lumber III[4]). Petitioners assert that in this case "good cause" for undertaking verification of all respondents exists. When the Department was evaluating companies for purposes of exclusion in the investigation, only when detailed information was requested about the company's organizational structure and about the benefits received (whether under the stumpage or other government programs), the Department obtained the true amount of subsidies received. Petitioners maintain that in these expedited reviews the companies have not followed the Department's procedures and requirements. Therefore, the Department should be concerned about whether these companies have accurately reported all requested information.

The GOC rebuts that the language of the statutory provision relied upon by petitioner clearly indicates that the provision was meant to apply to administrative reviews ("if no verification was made under this subparagraph during the 2 immediately preceding reviews...."). The GOC contends that exemption of expedited reviews from verification is appropriate because of the expedited nature of these proceedings and because these reviews will result in a cash deposit, not in an assessment rate. There is therefore no good cause to verify every respondent. In support of its position, the GOC cites to a decision of the Court of International Trade (Taiwan Semiconductor Mfg. Co. v. United States, 143 F. Supp. 2d 958, 969) and to Department practice.

Department position

For reviews conducted under section 751(a) of the Act, section 782(I) of the Act requires the Department to verify the information relied upon in the final results provided that two conditions are met: (1) that the verification is timely requested; and (2) that no verification was conducted during the two immediately preceding reviews, "except that this clause shall not apply if good cause for verification is shown." In this case, the first condition is met. With regard to the second condition, since these expedited reviews are the first reviews subsequent to the investigation, we cannot say that no verification was conducted during the two immediately preceding reviews. We must therefore consider the exception to the second condition, i.e., whether there is "good cause" for verification.

As already indicated above, in establishing the procedures for expedited reviews in aggregate cases, the Department was guided, to the extent deemed appropriate, by section 351.214(k) of the Department's Regulations, the regulations governing the most similar type of proceeding. Where section 351.214(k)(3)(iv) is satisfied, we find that there is "good cause" for verification, i.e.,

[4]See Decision Memorandum, Company Exclusions, January 17, 1992, on file in the CRU.

where there is a possibility of exclusion. Given the resource constraints of the Department, the exceptionally short timelines set for these proceedings, and the fact that we are calculating a cash deposit, not an assessment rate, however, we find that there is not "good cause" for verification of every single company subject to these expedited reviews. As we stated in the notice of Preliminary Results, however, we intend to determine whether to verify additional exporters on a case-by-case basis.

We note that in these reviews, out of 13 companies, eight companies were verified during the investigation. That translates into a high percentage (62 percent) of verified companies.

Comment 3: Whether the Department should allow companies purchasing inputs through arm's length transactions to request expedited reviews

The GOC argues that because there was no indication in the investigation or in the expedited review application form that the Department would consider conducting pass-through analyses, the Department should allow companies that purchase their inputs at arm's length to now request an expedited review to demonstrate that they are not benefitting from subsidies. The GOC asserts that this would not extend the schedule for conducting expedited reviews, because all of these companies would be in the group receiving pass-through analyses. Moreover, the analysis for arm's-length transactions is not complex and would not require an extensive analysis for most companies as the Department could rely on certified questionnaire responses.

Petitioners counter that when the Department invited Canadian producers and exporters to request an expedited review, no methodology of any kind was announced. Therefore there is no basis for further complicating these unauthorized reviews by throwing open the door to new requesters.

Department Position

We agree with petitioners that, on May 22, 2002, when the Department published its amended final affirmative countervailing duty determination, the Department opened the door to requests for company-specific expedited reviews, and gave no indication of the methodology that would be employed to determine cash deposit rates in such reviews. Thus, there was no basis for potential requesters to conclude that pass-through issues would not be considered in these reviews.

Moreover, opening up the opportunity once again to request expedited reviews would no doubt complicate and delay an already elaborate and cumbersome process. We are already reviewing an extraordinary number of companies, many more than we process in a typical administrative review. We are far enough into the proceeding to have devised an overall approach which is based on the analysis of the information so far provided by the companies; should we accept additional applications, that approach would have to be reconsidered. Furthermore, our experience in these reviews has shown that a large number of requesters are companies acting pro-se. For this reason, they require more than normal support and direction from the Department (see Comment 3 in the Procedural Issues section). In sum, we disagree with the GOC that we should provide an additional opportunity to request expedited reviews. This would seriously interfere with our ability to complete these reviews within the timeline that we have established, or within a period reasonably close to that time frame.

Comment 4 Whether companies should be afforded the opportunity to self-select the methodology applied in expedited reviews

Tembec Inc., Downie Timber Ltd., Selkirk Specialty Woods Ltd., Mill and Timber Products Ltd., R. Fryer Forest Products Limited, and Liskeard Lumber Limited (collectively, the B&H group of companies) argue that the Department should allow Group 2 companies to request the simplified methodology and accelerated schedule announced for Group 1. These companies contend that the cost method proposed for Group 2 is unduly complicated, that it would produce the unintended effect to encourage inefficiency and promote market distortions by rewarding higher cost producers with lower CVD rates, and that it imposes an unreasonable and unequal reporting burden on respondents (vis-à-vis respondents in Group 1). Furthermore, the application of such a methodology would impose such a burden on the Department's ability to reach fair and lawful results.

Petitioners oppose permitting companies to select a methodology in these expedited reviews. They cite to the letter of Terminal Forest Products Ltd. (Terminal), dated July 26, 2002, in which Terminal also advocates allowing exporters to choose whether to be reviewed under the Group 1 or Group 2 methodology. Terminal requests to be processed in Group 1 because the amount of fiber originating from its own tenure is less than 10 percent of the wood used in its sawmills. Petitioners assert that the Department should reject this proposal, which is obviously seeking to emphasize speed over accuracy. With regard to the arguments set forth by the B&H group, petitioners argue (1) that the Department cannot simplify the Group 2 methodology without making it even less accurate; (2) that the undesired result of rewarding inefficient producers with lower rates is a consequence of the Department's willingness to adjust benchmark prices for more than the inescapable costs mandated by the government methodology; and (3) that cross-owned companies, where at least one company is listed in Group 2, should all be reviewed in Group 2.

The B&H group of companies responds that these expedited reviews were created to provide parties with the most expeditious results with minimum burden. If there is a choice between speed and accuracy, that choice should belong to the companies, not to the Department.

Terminal, on the other hand, explains that the inevitable result of the Department's proposed methodology is that the stumpage benefit from more than 90 percent of its log input will be calculated the same way regardless of whether Terminal is finally included in Group 1 or Group 2. Since the purpose of the expedited reviews is to calculate cash deposit rates, not assessment rates, and since the Department has repeatedly noted that it seeks to balance its dual mandates of expeditiousness and accuracy, Terminal submits that its being treated as a Group 1 company would satisfy both mandates and the Department would be spared the extra work of conducting a Group 2 review of Terminal.

Department Position

We disagree with the statement by the B&H group of companies that the exporter should be permitted to choose between expeditiousness and accuracy. Instead, the challenge in this case is for the Department to devise a review process that, given the available resources, maximizes both accuracy and expeditiousness.

In the notice of initiation, we clearly described the criteria governing the selection of the companies assigned to the two Groups. Those criteria were adopted as an efficient way to conduct a large number of reviews in an expedited manner, and at the same time to respond to the concerns expressed by the interested parties. We intend to adhere to those criteria, because we have concluded that creating exceptions would open up new procedural issues the examination of which would detract from the time and resources available to conduct subsidy analyses. Therefore, we will continue to process the companies in the groups to which they were originally assigned. The arguments concerning the burden imposed by Group 2 methodology, its accuracy, and its unforeseen effects on the market, will be addressed in the context of Group 2 reviews.

Section II: Procedural Issues

Comment 1 Whether the timeline adopted by the Department for requesting rescission of an expedited review is in accordance with law

Petitioners argue that the Department's changed timeline for requesting the rescission of its expedited review (from 60 days after the notice of initiation to 30 days after the issuance of the company's preliminary results) is unfair, because it allows a company to withdraw from the proceeding after its preliminary results are issued. Petitioners assert that the Department did not reference any authority for requesting rescission of an expedited review. The closest analogous proceeding addressed in the Department regulations is the new shipper review. According to petitioners, the Department should apply in these reviews the new shipper review regulations which allow a company to withdraw its request for review no later than 60 days after publication of the notice of initiation of the requested review.

The GOC rebuts that the Courts have long recognized the discretion of the Department to modify its procedural rules when required by the circumstances of the case. The GOC points out that the 30-day deadline reduces the administrative burden of the Department, as no further action, such as verification or issuing final results, would be required for those companies that withdraw their request for review. More importantly, the GOC emphasizes that, as the Department stated in Preliminary Results, the current rule gives each respondent an informed opportunity to request rescission of their expedited review, without causing any unfairness to petitioners or any other interested parties.

Department Position

In the notice of initiation, the Department acknowledged the absence of statutory or regulatory guidelines for the conduct of these reviews. In the application form, before having knowledge of how many companies would apply for expedited reviews, the Department followed exactly petitioners' suggested approach and announced a 60-day-from-initiation timeline for withdrawal from these reviews. As more information became available on the number of applicants and as the procedural approach to these reviews began to coalesce, it became apparent that such a deadline would not work, because in expedited reviews, unlike new shipper reviews, we would be issuing preliminary results consecutively (group by group), rather than concurrently. Under this scenario, the 60-day-from-initiation deadline would allow some companies, but not all companies, the opportunity to withdraw from the review having knowledge of their preliminary results. In order to provide the same access to information to all respondents, we changed the

timeline for rescission of expedited reviews to 30 days after the preliminary results for the relevant company.

Comment 2: Whether the final results of expedited reviews should be issued sequentially or concurrently for all companies in Round 1

Petitioners argue that the Department should be consistent with its practice for investigations and other types of reviews and issue final results for all 73 companies at the same time. According to petitioners, if the Department issues the final results for the 18 companies, it will have to recalculate the country-wide cash deposit rate at the same time. Should the Department issue final results for other groups of companies at a later date, it would have to adjust the country-wide cash deposit again. Petitioners contend that if the Department issues final results in a piece-meal basis, the repeated change in the cash deposit rates for the reviewed companies as well as the constant change in the country-wide cash deposit rate would create enforcement problems for the U.S. Customs Service (Customs). Petitioners argue that the Department should not change any cash deposit rates until all company-specific rates and a new country wide rate are established.

In contrast, the GOC asserts that the Department should issue the first final results of these expedited reviews by the end of September as was set out in the notice of initiation. According to the GOC, it would be unfair to delay the implementation of the rate for the companies that have demonstrated their entitlement to a company-specific rate and have complied with the procedures set forth by the Department. However, if the Department intends to recalculate the cash deposit rate for all companies as a result of the issuance of company specific rates, the GOC makes the assumption that such adjustment would occur only at the conclusion of the entire expedited review process and not at the issuance of each group's final results. In the GOC's view, repeated revision of the country-wide rate would cause confusion in the market and add to the administrative burden of the Department and of Customs.

Petitioners rebut that if the GOC agrees that the country-wide cash deposit rate should be changed only once, assigning lower individual rates at prior dates without simultaneously raising the country-wide rate would violate the statutory provisions which do not permit any period during which the average rate of cash deposit is not equal to the full amount of the estimated subsidy rate.

In response, the GOC counters that there is no reason to delay the issuance of the final results, since the Department will have determined rates that are far more accurate than the country-wide rate, and those rates should be applied as soon as possible. Similar views were proffered by Bois Daquaam Inc., Bois Omega, Limitee, J.A. Fontaine et fils Inc., Maibec Industries Inc., Materiaux Blanchet Inc., and Scierie West Brome Inc. (collectively, the Verified Border Mills), who emphasize how the Department's intention to publish the results of the expedited reviews of the first batch of companies by the end of September was made clear already in the July 17, 2002 notice of initiation. According to the Verified Border Mills, the entire point of this exercise is to obtain reduced rates quickly. If the Department were to hold all final results until all reviews were completed, the Department would be issuing a decision that was "final" in name only. It is entirely consistent with the purpose of expedited review process to issue revised deposit rates for a group of companies and implement those rates as soon as the review is completed.

Landmark Truss & Lumber Inc. (Landmark) also argues that the Department should adhere to its previously announced schedule for the issuance of the results of those Group 1 companies that did not ask for pass-through analysis. If the Department deviates from this schedule by deciding to issue all the results at the same time, then the Department should allow Group 1 companies to reassess and elect a pass-through analysis.

Department Position

As the Department has repeatedly emphasized, one of the two primary goals in conducting these reviews is to reach the final results in an expeditious manner. We explained in the Preliminary Results that we identified 24 companies that required only minimal supplemental data to complete our calculations. We requested the information, and the majority of those companies provided the supplemental data in a timely manner; we believe that it would be inappropriate now to hold back the final results of review for the companies that supplied the data in a timely manner and did not require verification. For this reason, we are issuing the final results for 13 companies (the first subgroup of Group 1). While we are not adjusting the country-wide rate as a consequence of these final results, we will assess the cumulative effect of the expedited reviews in the future.

With regard to the final results of the remaining companies in Group 1 and of the companies in Group 2, the Department is considering all arguments presented by the parties. At this time the Department has not yet reached a final decision on whether the final results will be published consecutively or concurrently.

Comment 3 Whether non-compliant submissions should be removed from the record and companies who failed to provide all information requested by the Department should be ejected from the process

Petitioners object to continued expedited reviews of companies that have failed to submit information to the Department in compliance with statutory and regulatory requirements. They contend that parties' failure to observe rules as basic as service requirements is resulting in the denial of other parties' ability meaningfully to participate in this proceeding. Petitioners also contend that 12 of the 18 respondents have failed to provide source data as requested by the Department. In petitioners' view, such a blatant failure to provide needed documentation is grounds for ejection from the expedited review process. At the very least, the Department must verify information submitted in connection with these 12 companies.

Department Position

Section 782©)(2) of the Act requires the Department to take into account the difficulties experienced by interested parties, particularly small companies, in supplying the information requested and to provide such interested parties any assistance that is practicable in supplying such information. The information presented in the applications received on June 21, 2002, indicated that 56 out of the 100 requesters had no counsel. For this reason, the Department has made every effort to permit parties requesting expedited review to perfect their submissions. Several of the smaller companies have now retained counsel and others have become somewhat more proficient in following the requirements governing these proceedings.

With regard to the source data issue raised by Petitioners, we find that the 12 respondents in question did not fail to provide requested source data to the Department. Consequently, we do not agree that ejection from the expedited review process, or additional verification, is either required or appropriate. In addition, we note once again that almost 65 percent of the companies in this group have undergone verification.

Section III - Methodological Issues

Comment 1 Expedited reviews may result in a diminishment of subsidy offset notwithstanding the intent of the Department to adjust the country-wide rate

Petitioners assert that if the Department continues to conduct these ultra vires expedited reviews, it should agree that these reviews do not result in a reduction in the overall subsidy rate found in the investigation. Although the Department has stated that it will adjust the country-wide rate in a manner commensurate with the company-specific, expedited review outcomes, petitioners still believe that the adjusted country-wide rate may not necessarily ensure that the overall subsidy offset on imports of subject merchandise is not undermined if the methodology applied in these reviews is not accurate. Because relatively low-rate producers may increase their share of exports to the United States, inaccurate results for such producers would have a disproportionately pronounced adverse impact on the overall level of subsidy offset.

Specifically, petitioners argue that the Group 1 methodology – which applies an average, provincial subsidy rate to the calculation of the stumpage subsidy – should not be used because it underestimates the subsidy rate for any requester that pays relatively low stumpage rates for relatively high quality timber. Petitioners contend that a minimally adequate methodology would be comprehensive (more comprehensive than that contemplated for Group 2 requesters) and would account for the actual species, grade, and quality of fiber inputs, as well as the actual market value of the timber produced.

Furthermore, in petitioners' view, company-specific rates will present enormous evasion challenges, because traders will be motivated to characterize the output of relatively high-rate companies as that of relatively low-rate companies. While similar challenges are present in administering antidumping duty (AD) orders, such challenges are less pronounced since the AD margins are generally established based on the sales practices of the exporters, not on the level of subsidization of the producers.

Department Position

We certainly agree with petitioners that the accuracy of the calculations of company-specific rates is critical to ensure that the full subsidy offset is maintained as we assign individual rates to the reviewed companies. We do not agree, however, that any expedited review should be based on a methodology that would be more comprehensive than that planned for Group 2 requesters. In the notice of initiation we stated that ideally we would conduct full-scale reviews involving the analysis of individual companies' data; however, we also stated that this was not possible given the large number of companies involved and the time constraints. We therefore proposed, and subsequently adopted, a streamlined methodology that would allow us to process as many companies as possible in a relatively short period of time.

We recognize that the Group 1 methodology is based on province-wide averages and therefore it may not precisely measure the level of subsidization of each company. We expect that while some companies may receive, under this methodology, a lower rate, other companies may receive a higher rate than that which they would have received had they been reviewed strictly on the basis of their own data. The ultimate adjustment to the country-wide rate, commensurate with the company-specific reviews' outcomes, will ensure a reasonable balance. We expect that the greater the number of companies that receive lower individual rates, the larger will be the increase in the country-wide rate.

It is also important to remember that as a result of these reviews, most companies will be assigned a cash deposit rate. This rate does not represent the definitive assessment of duties. The assessment rate will be established in the first administrative review, if a review is requested. Such administrative review will be conducted in accordance with the normal statutory and regulatory deadlines, which allow for a full analysis of the issues affecting the calculation of the rates.

Comment 2 Whether the Department should collect full information on cross-owned and affiliated entities

Petitioners argue that subsidies to a cross-owned entity should be accounted for in company-specific reviews. Petitioners state that the verification report seems to indicate that during the investigation the Department exercised its discretion to treat affiliates the same way as cross-owned companies and that there is no reason to depart from this practice. For this reason, the Department should seek and analyze information on cross-owned and affiliated companies, such as the financial statements and the accounting records relating to entities that are affiliated or cross-owned with requesters.

The GOC counters that the Department's regulations explicitly provide that mere affiliation does not allow attribution of benefits to a company that did not receive the subsidy. The Department therefore must distinguish between applicants affiliated with companies that received alleged subsidies and applicants cross-owned with companies that received alleged subsidies.

Department Position

We agree with the GOC that mere affiliation does not allow attribution of benefits between separate companies. The Department's regulations clearly indicate that the attribution of subsidies between separate companies is based on cross-ownership and not on affiliation. Therefore, in these reviews, we are asking for minimal information on affiliation and will determine on a case-by-case basis whether additional information is required.

The group of companies covered in the Preliminary Results did not include any cross-owned company that had not been fully verified during the investigation. For this reason, our questionnaire did not include specific questions on cross-ownership. We plan, however, to ask for all the information on cross-owned companies in future questionnaires and to conduct the analysis in compliance with section 351.525 (b)(6) of our regulations.

Comment 3 Whether non-subject softwood lumber products should be included in the company-specific subsidy calculations

Petitioners claim that the Department has departed from the calculation methodology used in the investigation in calculating the company-specific subsidy rate. Specifically, petitioners argue that in the investigation the Department included in the denominator only the value of items that result from the lumber production process (e.g., chips). In Preliminary Results, the Department included the value of residual[5] products, such as shingles, derived from logs that petitioners claim are never milled by sawmills. Petitioners contend that the volume of logs corresponding to the value of residual products is not included in the numerator figures reported by companies in the expedited reviews. Therefore, the value of these residual products should not be included in the sales denominator.

The Verified Border Mills point out that petitioners are incorrect when they state that the numerator does not match the denominator. In the case of Maibec, for instance, the denominator included sales of non-subject merchandise, but the numerator also included the stumpage subsidy attributed to the logs used to produce the non-subject merchandise (e.g., shingles and mulch). The Verified Border Mills, however, concur with petitioners' argument. They claim that petitioners agree that the denominator should only include products milled from softwood logs at sawmills, and that products made from logs that are never milled by sawmills (the so-called residual products) such as shingles and mulches, should not be included. Therefore, the Verified Border Mills claim that petitioners' position is consistent with Maibec's request for a mill-specific rate.

The GOC points out that the Department has not changed methodology from the investigation and that such methodology is correct. The GOC refers to a case brief filed in the investigation, in which the GOC had stated that the total value of shipments used by the Department in the denominator must include the value of all shipments, since the numerator consisted of the alleged benefit to all logs entering sawmill establishments, some of which were used to make softwood poles, posts, ties, etc., and were not processed into lumber and its co-products.

Department Position

As the Verified Border Mills and the GOC confirm, the Department has not changed its methodology from the investigation with respect of the analysis of individual companies. In the verification report we clearly indicated that we verified "the total quantity of inputs (logs and lumber) purchased by the company during the POI."[6] The volume of all inputs was multiplied by the province-wide benefit to obtain the stumpage benefit to the company. Therefore, in order to match numerator with denominator, as petitioners are asking the Department to do, it is appropriate that we include in the denominator all the sales of the products derived from those inputs. This is consistent with section 351.525 (b)(5)(ii), which states that if a subsidy is tied to production of an input product, then the Secretary will attribute the subsidy to both the input and downstream products of the corporation. (See also Comment 8 below)

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[5] Petitioners use the word "residual products" with two different meanings. In page 18 of their September 6, 2002 brief, for instance, residual products is used to refer to the by-products (or co-products) of lumber production, such as sawdust, etc. In this case, petitioners seem to refer instead to finished products. We understand "residual products" in this case to refer to softwood lumber products not covered by the scope of the order.

[6] Memorandum to The File from the Team concerning Verification of the Information Provided in Support of the Company Exclusion Requests in the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada dated March 13, 2002, on file in the CRU (Verification Report) at 2.

We disagree with the Verified Border Mills' contention that petitioners' argument supports the request for mill-specific rates. On the contrary, petitioners are on the record as opposing such a request (see Comment 8 below).

Comment 4 Whether the same stumpage benefit should apply to logs and lumber

Petitioners assert that the Department's methodology in calculating the stumpage benefit on lumber purchases underestimates the amount of subsidy received by remanufacturers. Petitioners argue that one cubic meter of logs never produces one cubic meter of lumber, because only a portion of the log will become lumber while the remainder will be processed into residual products. Petitioners claim that it is theoretically possible to convert the per-unit log benefit to per-unit-of-lumber benefit, using company-specific recovery rates. Alternatively, the Department could also calculate and use an average recovery rate for a given province calculated by comparing total cubic meters of logs entering provincial sawmills to total cubic meters of lumber produced during the POI. Another methodology would utilize the province-specific ad valorem subsidy rates and the share of provincial wood fiber being used by sawmills. Whatever the method, petitioners argue that the subsidy benefit for Bois Omega, City Lumber, Interbois, Jointfor, Les Moulures Jacomau, Les Products Forestier Dube, Lonestar Lumber, Maibec Industries, M.F. Bernard, Richard Lutes Cedar, Scierie Nord-Sud and Scierie West Brome should be recalculated with respect to lumber purchases.

The GOC rebuts that the petitioners' proposal is unsound. In the GOC's view, any benefit to that portion of a log which was used in the lumber production process, but becomes chips, sawdust, pulp, paper, or other products, would be attributable to those co-products and could not be attributed to the lumber purchased by the remanufacturers. The GOC also claims that this was established methodology in the investigation and that a change in methodology at this point would prejudice applicants that declined to request a pass-through analysis in reliance on the Department's use of the methodologies set up in the notice of initiation. The B&H group of companies supports the GOC position, adding that any change in methodology would unduly burden the Department at this point.

The Verified Border Mills also concur with the GOC, adding that the Coalition did not question the methodology in the original investigation and that the time for raising questions is not two weeks before the final is due on the 12 companies listed by petitioners. They also state that the results of these reviews are cash deposits. Methodological issues, as well as other issues of concern to petitioners, can be addressed in the context of an administrative review, when greater precision in the calculations can be achieved in the normal statutory and regulatory framework for such an evaluation.

Department Position

We agree with respondents that the application of the province-wide rate to lumber as well as logs is appropriate for two reasons. First, it is consistent with the methodology applied in the investigation, not only in the calculation of the level of subsidies of the companies participating in the exclusion process, but also in the calculation of the benefit in the aggregate case. In fact, to calculate the country-wide benefit, we attributed the value of the subsidy (in the numerator) to the total sales of lumber and co-products (in the denominator). This demonstrates that the Department made no distinction between the amount of subsidy attributed to one cubic meter of lumber and the amount of subsidy attributed to one cubic meter of sawdust.

Second, if petitioners were concerned about the accuracy of this methodology, they had ample time to comment during the investigation. In the notice of initiation of these expedited reviews, we again provided an opportunity to comment. We received no comment on this aspect of the methodology. Therefore, we proceeded with issuing the preliminary results for the first 18 companies.

Because we consider our methodology reasonably accurate and in accordance with our practice, and because preliminary results of reviews have already been issued and companies have relied on the current methodology to make major decisions (such as whether to apply for an expedited review and whether to apply for pass through analysis), we will continue to apply the province-wide stumpage benefit to a unit of lumber, as in the Preliminary Results.

Comment 5 Whether the Department may lawfully recalculate the country-wide cash deposit rate by deducting the alleged benefit to and sales by companies receiving individual rates from the country-wide rate calculation.

The GOC argues that the country-wide cash deposit rate should not be recalculated. Instead, the country-wide cash deposit rate found in the underlying investigation should be the rate applied to all unreviewed companies. The GOC contends that there is no legal basis for the recalculation of the country-wide rate and there is no prior practice (e.g., following a new shipper review) in which the Department has recalculated a cash deposit rate applicable to all other companies when issuing a cash deposit rate for an individual company. In addition, the GOC asserts that a recalculation to the country-wide rate without notice to potential applicants for expedited reviews is unfair. More Canadian companies may have chosen to apply if they had known that the country-wide rate might have been recalculated. The GOC further argues that recalculation is unnecessary, because these reviews are only setting cash deposit rates and assessment rates will be determined in the first administrative review.

Additionally, the GOC argues that the methodology proposed by petitioners[7] to recalculate the country-wide cash deposit rate is unlawful. Such a methodology involves subtracting the amount of subsidies received by the reviewed companies from the numerator and the value of their sales from the denominator. The GOC contends that sales by all companies exporting subject merchandise, including excluded companies, must be included in the denominator used in the country-wide rate calculation. In support of its argument, the GOC cites to decisions by the Court of Appeals for the Federal Circuit and the Court of International Trade which have repeatedly held that the calculation of a country-wide rate must include sales by all producers and exporters of subject merchandise in the country under investigation.

The GOC further argues that, even if sales by excluded companies need not be included in the denominator, the country-wide rate calculation must include the alleged benefit to and sales by all allegedly subsidized exporters and producers of the subject merchandise. According to the GOC, the Department has recognized that as soon as at least one company is removed from the country-wide rate average, the Department no longer uses the country-wide rate for duty deposit or assessment purposes. The GOC recognizes that the Department has asserted exceptions to this rule for excluded companies but maintains that the Department has never claimed an exception for companies given individual rates that are not zero or de minimis.

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[7] Letter from Dewey Ballantine to U.S. Department of Commerce, dated July 26, 2002 at 22-23.

Finally, the GOC claims that, if the Department determines to recalculate the cash deposit rate applicable to unreviewed companies at the conclusion of the expedited review process, that new rate will be not be a country-wide rate, but an all-others rate. Consequently, the GOC asserts that the Department must perform the recalculation using the mandated method for calculating all-others rates.

The Ontario Forest Industries Association (OFIA) and the Ontario Lumber Manufacturers Association (OLMA) fully support and adopt the arguments presented by the GOC on this issue.

Petitioners respond that the GOC is effectively asking the Department to disregard the subsidy benefit found in the investigation. According to petitioners, the statute requires, as a result of a final affirmative determination in an aggregate case, that the Department determine a country-wide subsidy rate and order posting of a cash deposit for entries of subject merchandise in an amount based on the rate. Petitioners argue that cash deposit rates must always be equivalent to the subsidy rate found in the investigation. Establishing individual company rates does not affect the mandate that cash deposit rates capture the full extent of subsidization. Furthermore, in petitioners' view, new shipper practice has no relevance to this issue because new shipper reviews entail a separate investigation of companies not party to the original investigation; nothing that occurred during the POI can be attributed to a new shipper, and the circumstances of a new shipper entering the market after the POI have no bearing on the circumstances of companies that shipped during the POI.

Petitioners claim that the recalculation of the country-wide rate is not unfair and that to speculate on what companies may or may not have done had they known that the rate would change represents unsubstantiated conjecture. Petitioners further argue against reliance on the court cases cited by the GOC for the proposition that the calculation of the country-wide rate must include the sales of all producers and exporters; petitioners point out that those cases were pre-Uruguay Round and were explicitly not relied upon by the Department in the investigation.

Finally, Petitioners maintain, citing 19 U.S.C. § 1671d(c)(1)(B)(i)(I) & 1671d(c)(5)(A)(i), that there is no basis for establishing an all-others rate here because such rates must be calculated by averaging rates determined through examinations of individual companies during the investigation phases of the proceeding.

Department Position

We agree with petitioners that the issue of whether or not an adjustment of the country-wide rate is warranted as a result of the exclusion from the order of certain companies was briefed and argued during the investigation.[8] There, the Department concluded that "it is appropriate to exclude from the denominator the sales of companies granted company-specific exclusions." In these reviews, respondents have not presented any new evidence or arguments concerning this issue that were not already addressed in the investigation. Therefore, we will not revisit our prior determination. Moreover, we find that the rationale for adjustment of the country-wide rate in the event of

[8] See Memorandum to Faryar Shirzad, Assistant Secretary for Import Administration, from Bernard T. Carreau, Deputy Assistant Secretary for AD/CVD Enforcement II, concerning Issues and Decision memorandum: Final Results of the Countervailing duty Investigation of Certain Softwood Lumber Products from Canada, dated March 21, 2002, on file in the Central Record Unit in Commerce's Main Building, at 11.

exclusion applies to the issue of whether to adjust the country-wide rate as a result of company-specific rate calculations. As Petitioners point out, such adjustment does not in any way entail the establishment of an all-others rate and is analytically unrelated to the Department's practice in new shipper reviews.

Comment 6 Whether logs purchased from excluded companies and lumber produced from private forest timber should be excluded from the volume of subsidized inputs

The GOC claims that the Department should allow companies to demonstrate the volume of their lumber inputs that are produced from timber harvested on private Canadian lands and their purchases of logs from excluded companies. These inputs should be deducted from the quantity used to determine the alleged benefit amount.

Domtar concurs with the GOC. According to Domtar, the attribution regulations hold that any subsidy tied to the production of an input product should be attributed to both the input, which in this case is logs, and to downstream products, in this case softwood lumber. The respondent argues that there is no basis in the regulations that an alleged subsidy provided with respect to logs harvested on crown lands must be allocated to the softwood product based on logs harvested on private lands in the U.S. and Canada.

Petitioners counter that the vast bulk of Canadian lumber production derives from government timber, so there would be no significant difference in overall review results. Additionally, private timber is subject to export restrictions and thus a subsidy benefit is attached to private timber and lumber manufactured therefrom. With regard to the volume of logs, it is surely minuscule. And finally, it would be extremely difficult to trace lumber back to its particular timber inputs.

Department Position

With regard to the lumber produced from private-land timber, we considered this issue in the investigation when we devised the methodology to apply in the exclusion process. In the Exclusion Memorandum the Department stated: "[w]e will also apply the province-specific rate to all purchases of Canadian lumber made by the applicants, since, as a practical matter it is impossible to distinguish lumber produced from private-land logs and lumber produced from Crown timber, once it is processed in potentially subsidized mills." Neither the GOC nor Domtar provides a practical way to make that distinction. Therefore, while we agree theoretically with Domtar on the requirements of the attribution regulations, we will continue to apply the same benefit to all lumber because we do not see a practical way to segregate private forest lumber from Crown lumber. The best that the Department can do, and is doing, is to exclude all lumber produced by excluded companies, because in that case there is no intermingling of unsubsidized with subsidized products.

With regard to logs purchased from excluded companies, the Department has received no information concerning such transactions. We agree with petitioners that such transactions are probably quite rare and, in most cases, not significant.

With regard to petitioners' claim that private forest timber is also subsidized because of the log export restriction, this issue was raised in the investigation and was addressed in the Decision Memorandum (page 9). At that time the Department responded that the Department's calculation

methodology was designed to measure the full amount of subsidy provided by the Province. As in the exclusion process, in these expedited reviews we are applying the average province-wide benefits found in the investigation.

Comment 7 Where necessary, the Department should use the industry standard average conversion factor to convert lumber from board feet to cubic meters

The GOC points out that contrary to a statement made by the Department in Preliminary Results the predominant unit of measure for lumber in Canada is thousand board feet (MBF), not cubic meters. Because in these reviews the per-unit stumpage benefit is calculated in cubic meters, most if not all companies will have to convert the quantity of lumber input from MBF to cubic meters. The GOC explains that an MBF equals to 1.57 cubic meters on an actual basis and 2.36 cubic meters on a nominal basis and that many companies would have used the standard average conversion factor of 1.57 cubic meters per MBF. The GOC recommends that, where necessary, the Department instruct the companies participating in this proceeding to use the standard average conversion factor of 1.57.

Department Position

We take note of the clarification provided by the GOC concerning the predominant unit of measure in Canada for lumber (thousand board feet). Because companies may book their lumber input purchases either in actual or nominal board feet, we have concluded that it would be inappropriate for the Department to mandate the use of one standard conversion factor, as originally requested by Woodtone Industries (see comment 6 in Preliminary Results). Instead, we rely on the respondent companies to convert the volume of their lumber inputs, whether booked in actual or nominal board feet, into cubic meters, as requested by the Department, using the appropriate conversion factor. We will continue to examine this issue in future reviews of this order and, where appropriate, we will ensure at verification that the conversion is accurate.

Comment 8: Whether the Department should calculate mill-specific rates

The Verified Border Mills and Domtar Inc. (Domtar) argue that the Department should reconsider its preliminary decision not to calculate mill-specific rates for Maibec Industries Inc. (Maibec), Materiaux Blanchet Inc. (Materiaux Blanchet), and Domtar (which although not included among these 18 companies covered in the Preliminary Results, had also requested mill-specific rates for two border mills). In support of their request, these respondents present additional legal argument and considerations.

With regard to Maibec, the Verified Border Mills argue that the Department should conduct an expedited review on a product and mill-specific basis because (1) the mill in St. Pamphile, Quebec, is the only one of its mills that can and does produce the subject merchandise and it is therefore unlawful for the Department to calculate a rate based on saw logs used in the operations that produce non-subject merchandise; (2) over 90% of the fiber used in its St. Pamphile sawmill operations comes from U.S. and private Canadian land, and (3) all of the company's non-softwood lumber production is carried out at facilities other than the St. Pamphile sawmill, using a different kind of softwood fiber input (cedar).

The Verified Border Mills argue that the cedar logs used to make non-subject merchandise should be removed from the calculation because the Department may not lawfully calculate a subsidy rate based on inputs used to produce non-subject merchandise. They state that this principle was applied in the underlying investigation where the Department calculated provincial stumpage rates using only the percentage of harvested softwood logs shipped to sawmills, rather than all harvested softwood logs. In their view, this policy is consistent with Art. 19.4 of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) which states that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product." They disagree with the Department's interpretation of section 351.525(b)(5)(i) and argue that the corollary of 351.525(b)(5)(i) is that if an alleged subsidy is tied to the production or sale of a product which is not subject merchandise, then the Department will not attribute that subsidy to subject merchandise. Accordingly, the subsidy for Maibec should relate only to the subject merchandise and should not include cedar logs.

With regard to Materiaux Blanchet, the Verified Border Mills claim that, contrary to what the Department stated in the preliminary notice, the Department has the flexibility to apply mill-specific rates based on its inherent discretion in interpreting and applying the countervailing duty statute. On this basis, the Department should conduct an expedited review of Materiaux Blanchet on a mill-specific basis because (1) unusual circumstances support a mill-specific rate, including the production of different softwood lumber products at the two company mills and certification by different grading agencies, which in combination allow the stumpage used by the company to be readily matched with the specific mill that uses and benefits from the stumpage, (2) over 90 % of Materiaux Blanchet fiber used in the St. Pamphile mill comes from U.S. and private Canadian land, and (3) these and other distinctive conditions of operation and trade between the border mill and the company's other mill in the interior of Quebec ensure that the company could not switch logs or lumber in circumvention of a lower border mill rate.

The Verified Border Mills disagree with the Department's statement that section 351.525 of the regulations bars the assignment of separate rates to individual sawmills. They claim that neither the statute nor this regulation prohibits assigning separate countervailing duty rates to different components of a company, nor requires that a rate be assigned on a company-wide basis. In their view, this regulation not only does not bar a mill rate, but logically requires that one be applied in those instances when the allegedly subsidized input can accurately and easily be matched with the production benefitting from those subsidies and no circumvention is likely to occur. Furthermore, the Department has already demonstrated its discretion to apply different subsidy rates to different production units within a company in the exclusion calculations for Materiaux Blanchet in the investigation. They claim that the Department excluded at least one unincorporated Quebec mill (J.D. Irving) based on that mill's own stumpage sourcing, and not because it was part of a Maritime-based company.

Domtar maintains that establishing separate cash deposit rates for two of its mills (border mills) which would reflect all relevant subsidies on the products produced at those mills is not contrary to the Department's regulations. Domtar concurs with the Verified Border Mills claiming that there are no provisions in the attribution regulations which prohibit (or are inconsistent with) the calculation of mill-based rates. Domtar also points out that in the underlying investigation the Department concluded that it had authority to conduct mill-based reviews since it acknowledged in the Preliminary Results to have calculated the subsidy rate for Materiaux Blanchet on a mill

specific base in the exclusion process. Domtar asserts that the two Domtar mills requesting individual rates were excluded in Lumber III and were treated differently from Domtar's other sawmills under the Softwood Lumber Agreement. Domtar concludes that it would be appropriate to establish a separate rate for those mills given their circumstances in terms of geographic location, type of operation, degree of interdependence, and the fact that it is easy to track the lumber produced by these border mills.

Petitioners generally support the position of the Department in the Preliminary Results that subsidy rates are to be calculated on the basis of the whole company. Petitioners rebut that if the Department decides, incorrectly, to review individual mills, it must review all mills owned by that company, so as to ensure that the subsidy is attributed "to all products sold by a firm" as required by the attribution section of the regulations.

Petitioners claim that Domtar's position is inconsistent, in that Domtar on the one hand agrees that the Department's regulations direct that a domestic subsidy be attributed to all products sold by a firm, but on the other hand asserts that nothing in the attribution regulations prevents the Department from establishing separate mill rates. Petitioners also point out that Domtar provides no relevant authority for conducting mill-specific reviews. With regard to Maibec and Materiaux Blanchet, petitioners claim that although during the investigation those mills may have been examined on a mill-by-mill basis, the Department has no grounds to deviate from the current company-specific review process and examine only certain mills. Petitioners also discount the relevance of the geographical distance between mills with respect to potential cross-over of inputs between subsidized and unsubsidized mills within the same company.

Department Position

The Department has carefully examined the legal and policy arguments submitted by the parties. Those arguments, however, do not provide a sufficient basis to change the Department's interpretation of the attribution provisions of the regulations and consequently do not result in a change of the position of the Department as described in the Preliminary Results. Our position remains that neither the statute nor the regulations provide for the attribution of a domestic subsidy to a specific entity within a firm. We will only address here arguments and considerations that were not addressed in Preliminary Results.

With regard to the calculation of the subsidy rate, the Verified Border Mills argue that only one of Maibec's mills can and does produce subject merchandise, therefore, the input into the other mills that do not produce subject merchandise should not be included in the calculations of the benefit rate. We disagree.

The attribution section of the regulations, section 351.525 (a), "Calculation of ad valorem subsidy rate", clearly states: "The Secretary will calculate an ad valorem subsidy rate by dividing the amount of the benefit allocated to the period of investigation or review by the sales value during the same period of the product or products to which the Secretary attributes the subsidy under paragraph (b) of this section." Under paragraph (b), subpagraph 5 (ii), the regulations state that, when the subsidy is bestowed on an input product, "then the Secretary will attribute the subsidy to both the input and the downstream products produced by the corporation."

In the case of Maibec, the input into all its mills is either SPF or cedar. Both types of wood are covered by the scope of this order; both types of wood (for purposes of these expedited reviews) carry the same amount of subsidy. Therefore, it is appropriate that, to calculate the subsidy rate, we include in the numerator both types of inputs, cedar and SPF. Nothing in the regulations directs the Department to trace the input to the downstream output and to ascertain that the output is an in-scope product before determining whether the input carries a subsidy. Therefore, the inclusion of both SFP and cedar logs in the numerator (total amount of the subsidy received by the company) is in accordance with the Department's regulations.

The Verified Border Mills maintain that, in the investigation, the Department considered only the portion of the harvested softwood logs shipped to sawmills and that the Department's practice in that segment of the proceeding, therefore, indicates a general refusal to consider inputs used to produce non-subject merchandise. Although it is true that, in the investigation, the Department analyzed only the portion of the harvested softwood logs shipped to sawmills, we would also point out that many of the sawmills produce both subject and non-subject merchandise, and the Department did not make an adjustment to reflect the portion of the sawmill production that was not in-scope. Thus, the Department's practice in the investigation does not support the existence of a general requirement that the Department not consider inputs used to produce non-subject merchandise.

With regard to the denominator, the Department, in accordance with the regulations, properly includes the sales of all the downstream products derived from the subsidized input. See Industrial Phosphoric Acid from Israel: Final Results of Countervailing Duty Administrative Review, 63 FR 13626, 13633 (March 20, 1998). Contrary to respondents' assertions, the regulations do not require the Department to draw a distinction between sales of in-scope and sales of out-of-scope downstream products. Having determined the numerator and the denominator, we derive the subsidy rate from the ratio of these two values (total amount of subsidies received divided by total sales of all downstream products).

The Verified Border Mills also state that if an alleged subsidy is tied to the production or sale of non-subject merchandise, then the Department must not attribute that subsidy to subject merchandise. They argue that the SCM Agreement states that no countervailing duty shall be levied on any imported product in excess of the amount of subsidy found to exist. U.S. law, however, as implemented through the URAA and the Department's regulations, is fully consistent with WTO obligations. See SAA at 669.

Both the Verified Border Mills and Domtar claim that the Department has the flexibility to assign mill-specific rates, yet they fail to point to a specific authority. The Department indeed has flexibility in establishing procedures in those instances where there is no specific statutory and regulatory guidance. The attribution of a subsidy, however, is not unchartered territory. There is clear regulatory guidance and ample precedent, and, therefore, the Department's flexibility is limited.

In their request for mill-specific rates, both the Verified Border Mills and Domtar place significant emphasis on their claim that the circumstances affecting these companies make circumvention most unlikely. Even assuming this is true, the first obligation of the Department is to apply the law, including the Department's regulations. The circumstances described by respondent do not warrant creating an exception to the normal attribution rules.

Based on the above considerations, the Department determines that company-specific rates are properly applied to companies (firms, corporations) and not to individual production units.

Section IV: Company-specific issues

As a general comment, petitioners state that the data used by the Department in calculating subsidy rates for the 18 companies reveals many inconsistencies in calculations and inaccuracies in reporting. Petitioners highlight the following "most egregious" problems. We will address them individually.

Comment 1: Bois Daaquam Inc. (Bois Daquaam)

Petitioners argue that the subsidies associated with all timber sales of Bois Daaquam's cross-owned timber company Produits Forestier Anticosti Inc. (Anticosti) should be attributed to Bois Daaquam, in accordance with section 351.525(6) of the Department's regulations.

The Verified Border Mills argue that because Anticosti produces only timber and not softwood lumber, the only applicable section under 19 C.F.R. section 351.525(b)(6) is subsection (iv). Under this subsection, if there is cross-ownership between an input supplier and a downstream producer of the subject merchandise and the production of that input is primarily dedicated to the production of the downstream product, the Department attributes subsidies received by the input supplier to the combined sales of the input and the downstream products manufactured by both companies. The respondents assert that less than 30 percent of Anticosti's timber sales are made to Bois Daaquam; all other sales are made to unrelated customers. Moreover, the respondent argues that the Department verified this information and concluded that Anticosti's timber sales are not "primarily dedicated" to Bois Daquaam production of lumber. The Department, however, did assume pass-through for Anticosti's sales to Bois Daaquam and the alleged stumpage benefit on these sales is included in the rate calculated for the preliminary results.

Department's Position
In the underlying investigation, we verified the information related to Bois Daaquam, including its cross-ownership with Anticosti. Indeed, as the verification report indicates, we found that Anticosti's log production was not primarily dedicated to Bois Daquaam softwood lumber production. Therefore, we found no basis under section 351.525(b)(6)(iv) to attribute benefits received by Anticosti to Bois Daaquam and included Bois Daquaam purchases from Anticosti in the volume of subsidized input. Petitioner has provided no new information that would require us to reassess this determination.

Comment 2: City Lumber Sales and Services Limited (City Lumber)

Petitioners assert that City Lumber reported that it had tenures to harvest Crown timber in British Columbia, but did not harvest during the POR. According to petitioners, City Lumber's tenures should be accounted for in the company's subsidy rate because the company, to meet its obligations as a tenure holder in British Columbia, will have to cut 90 to 110 percent of the annual allowable cut for tenure over five years. Moreover, petitioners contend that City Lumber should be removed from the expedited review process because the company did not serve on petitioner's counsel a confidential version of its response to the Department's supplemental questionnaire.

In response, City Lumber asserts that it has never held or been awarded Crown tenure in any form. City Lumber explains that, in their initial application, it provided an incorrect answer because it believed that the word "timber" could also mean "lumber". Subsequently, the company realized that it should have responded that it had not acquired any Crown timber. City Lumber further asserts that this can be verified with the Government of British Columbia which already certified that the company had no provincial Crown stumpage or tenure in the underlying investigation.

With regard to petitioners assertion that City Lumber should be ejected from these proceedings for failing to serve the confidential version of their supplemental questionnaire response on petitioners, the company asserts that they took steps to correct this deficiency once they understood when and how to serve parties on the APO service list. Moreover, City Lumber argues that petitioners ability to file case briefs or rebuttals was not impaired, because the Department had served City Lumber's proprietary information on petitioners at an earlier date. Therefore, City Lumber asserts that it should not be ejected from this proceeding because of procedural issues.

Department's Position

Given the information provided in the application, there is some basis for petitioners' concern. However, City Lumber is not being excluded from the order. Therefore, even in the instance of an inactive tenure (for the period of review), future benefits accrued through tenured timber would have been accounted for in future reviews.

In this case, the inactive tenure does not exist; City Lumber's explanation appears reasonable. As a result, no changes will be made to the calculation of the cash deposit rate for this company. With respect to procedural issues, we already addressed petitioners' comments in comment 3 of the Procedural Issues section above.

Comment 3: Herridge Sawmills Ltd (Herridge)

Petitioners state that Herridge did not account for 634 cubic meters of its log purchases and that the Department incorrectly assumed that these purchases were not subsidized. Petitioners assert that the Department's assumption that these purchases have no subsidy has no basis and is counter to the purpose of these expedited reviews.

Department's Position

On October 3, 2002, upon request by the Department, Herridge submitted information with respect to the 634 cubic meters of its log purchases. Those purchases were made from private land owners. We have incorporated this information in our final calculations.

Comment 4: Jointfor

Petitioners assert that although this company reported affiliation with another company in its initial submission, the Department has not requested any additional information to determine the relationship of Jointfor with its affiliate. Petitioner argues that the Department needs to examine this affiliated company relationship to ensure that the subsidy benefit for acquired wood fiber is appropriately attributed.

Department's Position

As explained in detail in comment 2 of the Section on Methodological Issues above, affiliation alone is not a basis for the attribution of subsidies. During verification, we typically examine the relationships between the respondent company and its affiliated and cross-owned companies. In instances in which we do not conduct verification, as in the case of Jointfor, we rely on the information submitted in the questionnaire response.

Comment 5: Lonestar Lumber (Lonestar)

Petitioners argue that the data provided by Lonestar contains many errors and inconsistencies which indicate that all of the information submitted by this company is likely to be inaccurate. Petitioners point out that Lonestar reported greater U.S. sales of subject merchandise than total sales of non-subject merchandise. Furthermore, the sum of the company's sales of subject merchandise, softwood by-products, and out-of-scope softwood lumber products do not match the total sales amount reported. Also, Lonestar's total sales of subject merchandise decreased from that reported in its initial request to that reported in its subsequent questionnaire response.

Department's Position

We recognize that the data provided by Lonestar raise some questions. However, there are other explanations than those suggested by petitioners. We also recognize that the value of the exports of subject merchandise submitted in the application is greater than the value of total sales of subject merchandise. However, (1) because this is an expedited proceeding, (2) because we are merely adjusting a cash deposit rate (we are not issuing an exclusion), and (3) because the value of the exports of subject merchandise is used not to calculate the rate of the company but to weight-average the country- wide rate and this amount will make no significant difference, we are estimating the value of the exports of subject merchandise to the United States. We are deriving the value of total exports of subject merchandise by taking the ratio between total sales of subject merchandise and exports of subject merchandise submitted in the application and applying that ratio to the total value of subject merchandise submitted in the questionnaire response.

Comment 6: Maibec Industries inc.

Petitioners contend that because company 9012-1039 is cross-owned with Maibec, its subsidy benefit associated with all timber sales should be attributed to Maibec.

The Verified Border Mills argue that 9012-1039 Quebec Inc. has no Crown tenure. Therefore, none of 9012-1039 Quebec Inc.'s timber benefitted from subsidies on Crown stumpage and there is no subsidy to attribute. 9012-1039 Quebec Inc.'s benefits under the Private Forest Development Program have already been attributed to Maibec.

Department's Position

We verified Maibec in the underlying investigation and found that 9012-1039 Quebec Inc.'s timber was sourced from Canadian private lands. Therefore, we are not attributing a stumpage subsidy to this company's timber, and no adjustment to Maibec's net subsidy rate is necessary.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of the determination in the Federal Register.

_____ _____
Agree Disagree

_____
Faryar Shirzad
Assistant Secretary
For Import Administration

_____
Date

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