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Expedited Reviews  
Group 2/Rounds 1 and 2  
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**MEMORANDUM TO:** James J. Jochum  
Assistant Secretary  
for Import Administration

**FROM:** Holly A. Kuga  
Acting Deputy Assistant Secretary  
for AD/CVD Enforcement II

**RE:** Countervailing Duty Expedited Reviews of Certain Softwood Lumber Products from Canada

**SUBJECT:** Issues and Decision Memorandum: Final Results of Expedited Review of 16 Group 2 Companies

## **SUMMARY AND BACKGROUND**

On November 24, 2003, the Department of Commerce (the Department) published the preliminary results of the expedited reviews of 16 Group 2 companies and rescinded the reviews of an additional five companies. See Preliminary Results and Partial Rescission of Countervailing Duty Expedited Reviews: Certain Softwood Lumber Products from Canada, 68 FR 65879 (November 24, 2003) (Preliminary Results). We invited parties to comment on our Preliminary Results. We received comments filed on behalf the Ontario Forest Industries Association, the Ontario Lumber Manufacturers Association, Aspen Planers Ltd., Downie Timber Ltd., Gorman Bros. Lumber Ltd., Haida Forest Products Ltd., Kenora Forest Products Ltd. (Kenora), Liskeard Lumber Limited, Mill & Timber Products Ltd., North Enderby Timber Ltd., Olav Haavaldsrud Timber Company Limited, Selkirk Specialty Wood Ltd., Tembec Inc., and Tyee Timber Products Ltd. (the B&H Group) and from the Coalition for Fair Lumber Imports Executive Committee (petitioner). We also received comments filed on behalf of the Gouvernement du Quebec (GOQ). In addition, we received rebuttal comments from Canadian Forest Products, Ltd. (Canfor) and Terminal Forest Products (Terminal), the Government of Canada (GOC), and the B&H Group. We also received ministerial error allegations from Federated Co-operatives Ltd. (Federated) and Kenora.

The following is a list of issues raised in the comments and rebuttal comments:

1. Use of Cross-border Benchmarks
2. Correction of Kenora's Ministerial Errors
3. Canfor Merger
4. Unprocessed Sales
5. Cash Deposit Rates
6. Verification
7. Lumber versus Log Inputs
8. Recalculated Country-Wide Rate
9. Countervailable Benefits of Certain Non-Stumpage Programs in Quebec

We recommend that you approve the positions we have developed in the "Analysis of Comments" section below. If approved, we intend to issue the final results of expedited review for the respondents based on these positions.

## **Analysis of Comments**

### **Comment 1: Cross-border Benchmarks**

Citing to reports by a Northern American Free Trade Agreement (NAFTA) binational panel and two World Trade Organization (WTO) panels, the B&H Group asserts that the Department's perpetuation of the use of unlawful cross-border benchmarks in these expedited reviews renders the Preliminary Results unsupported by substantial evidence and contrary to law.

**Department's Position:** We disagree with the B&H Group that these results are unsupported by substantial evidence and contrary to law. As noted in the Department's remand determination,<sup>1</sup> we continue to believe that our cross-border benchmark is consistent with the requirements of U.S. law.

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<sup>1</sup> In the Matter of Certain Softwood Lumber from Canada: Final Affirmative Countervailing Duty Determination, Secretariat File No. USA-CDA-2002-1904-03 NAFTA Binational Panel Review (January 12, 2004), at page 4.

Moreover, as the Department has previously stated, we do not intend to revisit methodological issues from the investigation in these expedited reviews. See Notice of Initiation of Expedited Reviews of the Countervailing Duty Order: Certain Softwood Lumber Products From Canada (the Initiation Notice), 67 FR 46955 (July 17, 2002). The purpose of these reviews is simply to use the analysis from the investigation to calculate a company-specific deposit rate or grant an exclusion, where appropriate.

Furthermore, the WTO does not purport to interpret the requirements of U.S. law. We note, however, that U.S. law, as implemented through the Uruguay Round Agreements Act, is fully consistent with our WTO obligations. See Statement of Administrative Action to the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, Vol. 1, at 669 (1994).

Finally, while not relevant to the discussion of the requirements of U.S. law, we note as a factual matter that the WTO Appellate Body, in its January 19, 2004 report, reversed the WTO Panel's determination with respect to the use of cross-border benchmarks. *United States - Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada*. WT/DS257/AB/R, Report of the Appellate Body (19 January 2004), at paras. 82-96.

## **Comment 2: Correction of Kenora's Ministerial Errors**

The B&H Group asserts that it is the Department's standard practice to correct in its final results errors incurred in its Preliminary Results even when those errors were the result of a clerical error on the part of the respondent. Specifically, Kenora claims that in its May 7, 2003, submission it inadvertently reported the same data for "purchases of logs" and "volume of softwood sawlogs harvested on Crown lands." However, Kenora states that it did not purchase logs during the period April 1, 2000 through March 31, 2001.

The B&H Group further points out that this particular error was brought to the Department's attention in plenty of time. Thus, the B&H Group urges the Department to correct that error in the final results.

Petitioner argues that the Department correctly calculated a preliminary rate based on certified data provided by the respondent. Petitioner further argues that it is inappropriate to rely on revised data, submitted after the Preliminary Results and not subject to verification.

The B&H Group counter that the Department should reject petitioner's unfounded allegations; a revised questionnaire response was not submitted after the Preliminary Results were issued. Kenora merely submitted a revised version of its calculation template as an attachment to its letter explaining the misunderstanding in its questionnaire response and pointing to the information already on the record to confirm and correct the error. Therefore, the B&H Group argues that there is no reason for the Department not to correct an error that occurred in the Preliminary Results. The GOC supported the arguments of the B&H Group.

**Department's Position:** We agree with the B&H Group that it is the Department's standard practice to correct in its final results errors in its Preliminary Results even when those errors were the result of a clerical error on the part of the respondent.

A review of the May 7, 2003, submission shows that Kenora did, in fact, report the same amount for "purchases of logs in Ontario," Table 3 and "total harvest volume from Ontario," Tables 4 and 11. The Department reviewed the information presented by Kenora and accepted Kenora's explanation of its inadvertent error regarding "purchases of logs." Therefore, we have recalculated Kenora's company-specific rate to reflect that it did not have any log purchases during the period April 1, 2000 through March 31, 2001.

### **Comment 3: Canfor Merger**

Petitioner claims that, in light of the agreed-upon merger of Canfor and Slocan, the Department must postpone the issuance of final results for Canfor until the Department can calculate the consolidated benefit for the two cross-owned companies. In support of its position, petitioner refers to the Department's determination to postpone the calculation of an individual rate for Selkirk until the completion of the analysis of its cross-owned company, which requested a pass-through analysis.

Canfor argues that the Department should not delay issuing final results. Canfor further alleges that the merger, if it takes place, did not occur during the period of review (POR) and may not occur until March 2004 or later. Canfor further asserts that the Department's longstanding practice is to confine its review results to events that occur during the POR. Canfor further asserts that the Department must issue Canfor's final results in this expedited review in the time frame set out in the November 24 Preliminary Results. The GOC supports the position argued by Canfor and asserts that petitioner's argument that the Department should delay the issuance of the final results for Canfor is groundless.

**Department's Position:** We agree with the GOC, Canfor. The merger in question did not occur during the POR. In reviews, our normal practice is to limit our examination to events that occur during the POR. Furthermore, we note that there is no evidence on the record that the merger has yet taken place. Consequently, there is no basis to accede to petitioner's claim.

Our determination regarding Selkirk was consistent with this practice. That determination was based on events that occurred during the POR. Finally, if and when Canfor's merger takes place, the petitioner may request a changed circumstances review under section 751(b) of the Act (see also 19 CFR 351.216).

### **Comment 4: Unprocessed Sales**

Petitioner contends that the Department's determination not to attribute to a review applicant the subsidy on Crown logs and lumber that it sells without processing does not appear to represent a

proper implementation of the countervailing duty law. However, if the Department adheres to its announced methodology, at a minimum, it must scrupulously ensure that the sales values of the logs and lumber at issue are omitted from the calculation of the denominators.

The GOC argues that the Department should maintain consistency with its approach in the underlying investigation by continuing to exclude from the numerator of the company-specific rate calculations the benefit from the volume of logs that did not enter companies' sawmills. In addition, the GOC points to the Department's statements that its practice is to match the numerator and denominator when calculating the subsidy rate, arguing that since the Department has limited the denominator of its calculations to the softwood products produced by sawmills, it must exclude from the numerator any logs that do not enter those sawmills.

**Department's Position:** We agree with petitioner in part, and the GOC in part. In the underlying investigation, where applicable, we sought to include the volume of logs that were processed by sawmills in the numerator and include the sales revenue of the products produced from those logs in the denominator. In this segment of the proceeding, the Department is maintaining consistency with the investigation and, where possible, excluding the volume of logs that did not enter a company's sawmill from the numerator of the company-specific rate calculation. Additionally, we will, where possible, exclude the company's sawmill sales revenue from logs that do not enter the sawmill from the denominator of the company-specific rate calculation.

#### **Comment 5: Cash Deposit Rates**

Petitioner requests that the Department make clear that the results of these reviews are company-specific cash deposit rates, not assessment rates, that apply only to future entries. Further, for any previously collected deposits, no adjustment will be made for any difference between the country-wide and the company-specific rates.

**Department's Position:** We agree with petitioner that these expedited reviews are not for the purpose of establishing assessment rates. In a prior final results of expedited review,<sup>2</sup> the Department stated that it is calculating a cash deposit rate, not an assessment rate. As stated in the Preliminary Results, the company-specific cash deposit rates are effective on the date of publication of the final results of these expedited reviews. In accordance with 19 CFR 351.212(b)(2), after the first administrative review has been completed, the Department will instruct the U. S. Customs and Border Protection (CBP) to assess countervailing duties by applying the rates included in the final results of the first administrative review to entries for the period May 22, 2002 through March 31, 2003.

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<sup>2</sup> Final Results and Partial Rescission of Countervailing Duty Expedited Reviews: Certain Softwood Lumber Products From Canada, 67 FR 67388, (November 5, 2002) and accompanying decision memorandum at section 1, comment 2. Also see the Initiation Notice.

## Comment 6: Verification

Petitioner requests that the Department conduct verifications of at least 60 percent of all expedited review requesters. Petitioner notes that in the “Issues and Decision Memorandum” at General Issues Comment 2, regarding Certain Softwood Lumber Products from Canada, that accompanied the Final Results and Partial Rescission of Countervailing Duty Expedited Reviews: Certain Softwood Lumber Products from Canada, 67 FR 67388 (November 5, 2002) (November Final Results), the Department indicated that it had verified 62 percent of the first 13 companies for which final results were issued. In addition, the petitioner claimed that major producers and exporters, such as Canfor, should automatically be verified because review results for a company of that size cannot broadly be viewed as credible without verification. Further, failure to verify a company of Canfor’s magnitude could adversely affect all other companies subject to the country-wide rate. Finally, petitioner argues that companies that provided conflicting record evidence must be verified, otherwise, there is no reasonable basis to disregard discrepancies between answers provided during the exclusion process of the investigation and these expedited reviews.

Canfor and Terminal argue that the Department has already established that it is not necessary, and there is no statutory or regulatory obligation, to conduct verification of companies that are not subject to a zero rate or exclusion. Further, given that it has already taken more than a year and a half to reach this point in the expedited review, it would be unconscionable to undertake verifications at this point where there is no statutory obligation to do so. Finally, Canfor and Terminal suggest that verifications of individual companies can take place during the first administrative review, as necessary, if the Department carries out its legal obligation to provide assessment rates for expedited review companies.

The B&H Group argues that the exercise and manner of the Department’s verifications in these expedited reviews has been reasonable and appropriate. The GOC argues that the Department should continue its practice of verifying only those companies that will be excluded from the order as a result of an expedited review. Contrary to petitioner’s argument that the largest lumber producers must be verified for their information to be viewed as credible, the GOC asserts that a company’s size is irrelevant to the credibility of the information it provides to the Department. Finally, the GOC asserts that, given the Department’s position to date that the results of these expedited reviews are for cash deposit purposes only, and will not be used for assessment rates, there is no “good cause” to conduct verification.

**Department’s Position:** As the Department has previously stated, given the resource constraints as well as the fact that we are calculating a cash deposit rate, not an assessment rate, we find that there is not “good cause” for verification as requested by petitioner. See, e.g., Section I, Comment 2 of the Issues and Decision Memorandum that accompanied the November Final Results. Rather, we have decided to verify companies on a case-by-case basis. For this particular tranche of companies we limited verification to those companies with zero or de minimis cash deposit rates. No new information has been submitted that would warrant a reconsideration of this approach.

### **Comment 7: Lumber versus Log Inputs**

Petitioner argues that the Department has, again, erroneously treated lumber inputs as being subsidized with the same intensity as log inputs. Petitioner noted that it has consistently highlighted this mistake and explained why the approach is without factual basis beginning immediately after the Department's first use of the approach in the expedited reviews. Petitioner suggests that continued use of this methodology is manifestly indefensible.

Canfor and Terminal argue that the Department has consistently applied its methodology from the original investigation and should not, at this stage of the proceeding, change its methodology and produce results inconsistent with the original investigation.

The B&H Group submitted that petitioner's proposed methodology (in which the further downstream product is from the allegedly subsidized input, the greater the subsidy) would overestimate the margin for remanufactured lumber by improperly attributing subsidies on fiber used to produce non-subject merchandise to fiber used in lumber production. Therefore, the Department should continue to reject petitioner's argument. Similarly, the GOC argues that there is no basis for modifying this practice and, therefore, the Department should again reject petitioner's erroneous argument.

**Department's Position:** As in the Preliminary Results and November Final Results, we continue to disagree with petitioners' assertions on this point. Thus, we continue to find that the calculation methodology used by the Department throughout the expedited review process is reasonably accurate and in accordance with our practice. See, Comment 2 of the Preliminary Results and Section III, Comment 4 of the Issues and Decision Memorandum that accompanied the November Final Results.

### **Comment 8: Recalculated Country-Wide Rate**

Petitioner claims that, despite recognizing its obligation to recalculate the country-wide rate as it finalizes lower rates for individual companies through the expedited review process, the Department has failed to comply with the statutory mandate to offset completely the net countervailable subsidy. The petitioner adamantly protests this disregard of a controlling legal requirement and urges the Department to correct the legal defect no later than the issuance of one or more final results for the companies subject to the November 24, 2003, Preliminary Results.

The B&H Group asserts that the Department may not lawfully recalculate the country-wide cash deposit rate as a result of the expedited reviews. Further, the B&H Group argues that if the Department were to recalculate the country-wide rate, it should do so at the conclusion of the entire process. Similarly, the GOC argues that the Department has no authority to recalculate the country-wide cash deposit rate. Further, the GOC suggests that there is no requirement that the cash deposit rate exactly offset the subsidy, merely that the Department order the posting of cash deposits based on the estimated country-wide rate, which the Department has done. The GOC also notes the NAFTA

and WTO panel determinations and argues that recalculating an unlawful cash deposit rate can only lead the Department further from the accurate results it is charged with producing. Finally, the GOC suggests that recalculation of the country-wide rate at the issuance of each set of final results will only introduce needless confusion into the market and create an undue administrative burden on both the Department and the CBP. Therefore, if the Department were to unlawfully recalculate the country-wide rate, it should wait until the conclusion of the entire expedited review process.

**Department's Position:** The Department has determined that it is not practical or appropriate to adjust the country-wide rate in these final results of expedited reviews. We note, as we have noted before, that it would be both administratively burdensome and inequitable to make multiple adjustments to the country-wide rate. Indeed, petitioners have indicated that multiple revisions to the country-wide rate could create enforcement problems. See Section II, Comment 2 of the November Final Results. Consequently, we do not intend to address the country-wide rate until we have issued final results for all of the ongoing expedited reviews.

#### **Comment 9: Countervailable Benefits of Certain Non-Stumpage Programs in Quebec**

The Gouvernement du Quebec (GOQ) claims that in the Preliminary Results, the Department erroneously states that the GOQ conferred countervailable benefits on softwood lumber under the following three non-stumpage programs: Loans issued by Investissement Quebec, lending under Article 28 of the Society for the Industrial Development of Quebec (SDI), and loans issues by the Society for the Recuperation and Development of Quebec Forests (Rexfor), collectively the “three non-stumpage programs.”

Citing to the “Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada, Issues and Decision Memorandum” dated March 21, 2001, the GOQ asserts that the Department has concluded in the underlying investigation that no benefit was provided by each of the “three non-stumpage programs” because the interest rate charged under each of these three non-stumpage programs were equal to or higher than the interest rates charged on comparable commercial loans. For purposes of these final results, the GOQ urges the Department to delete any reference to the GOQ having provided “countervailable benefits under the three non-stumpage programs.”

**Department's Position:** The Department agrees with the GOQ, in part. In the Preliminary Results, the Department incorrectly stated that in the underlying investigation the province of Quebec provided countervailable benefits under the three non-stumpage programs. In fact, the Department found that no benefits were provided under the three non-stumpage programs in the underlying investigation. For purposes of these final results, the Department has slightly modified the language referring to the three non-stumpage programs. See the Methodology - Other Programs section of these final results.

However, we note that the Department's finding in the underlying investigation regarding the three programs was based on the information collected during the period of investigation (POI). As the

interest rates paid under the three non-stumpage programs and interest rates charged on comparable commercial loans may vary from year to year, the Department will continue to examine the countervailable benefits under the three non-stumpage programs in subsequent segments of this proceeding.

Recommendation:

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting all related subsidy calculations accordingly. If these recommendations are accepted, we will publish the final results of the review.

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Agree

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Disagree

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James J. Jochum  
Assistant Secretary  
for Import Administration

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Date