

MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the
Antidumping Duty Administrative Review on Citric Acid and
Certain Citrate Salts from Canada

Summary

We have analyzed the comments of the interested parties on the preliminary results of the 2008 – 2010 administrative review of the antidumping duty order on citric acid and certain citrate salts (citric acid) from Canada. As a result of our analysis, we have made changes in the margin calculations for Jungbunzlauer Canada Inc. (JBL Canada). We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments from the interested parties:

- Comment 1: Currency Conversions*
- Comment 2: Post-Sale Billing Adjustments*
- Comment 3: Depreciation Expenses*
- Comment 4: Proposed Rules Regarding the Margin Calculation Methodology in Administrative Reviews*
- Comment 5: Corrections to the Dumping Margin Calculations*

Background

On February 2, 2011, the Department published in the Federal Register the preliminary results of the 2008 - 2010 administrative review of the antidumping duty order on citric acid from Canada. See Citric Acid and Certain Citrate Salts from Canada: Preliminary Results of Antidumping Duty Administrative Review, 76 FR 5782 (February 2, 2011) (Preliminary Results).

We invited parties to comment on the Preliminary Results. We received case briefs from the petitioners (i.e., Archer Daniels Midland Co., Cargill, Inc. and Tate & Lyle Americas LLC) and the respondent, JBL Canada, on March 4, 2011. We received rebuttal briefs from the petitioners and JBL Canada on March 9, 2011. Based on our analysis of the comments contained in these briefs, we have revised the margin for JBL Canada calculated in the Preliminary Results.

Margin Calculation

We calculated constructed export price (CEP) and normal value (NV) using the same methodology described in the Preliminary Results, except as follows below:

1. In the preliminary margin calculation program, we failed to deduct U.S. brokerage expenses from U.S. prices. We corrected this error by deducting U.S. brokerage expenses. See Comment 5.
2. In the preliminary comparison market program, we failed to use shipment date as the date of sale for certain home market sales in which the shipment date preceded the invoice date. We corrected this error. See Comment 5.

Discussion of the Issues

Comment 1: Currency Conversions

In the Preliminary Results the Department increased JBL Canada's home market prices and certain home market and U.S. expenses based on adverse facts available (AFA), because JBL Canada had not reported those prices and expenses in the currency in which they were incurred. The AFA adjustment factor was the highest difference between the Department's weighted-average monthly exchange rates and JBL Canada's monthly exchange rates.

The petitioners assert that, while the Department was correct to apply AFA, as it did in the less-than-fair-value (LTFV) investigation with respect to this issue, it was inappropriate for the Department to apply the same AFA as it used in the investigation (*i.e.*, an increase of all the affected variables by the same amount) because that methodology had been ineffective in prompting JBL Canada to cooperate in this review. For the final results, the petitioners submit that the Department should decrease home market billing adjustments, insurance, indirect selling expenses, and credit expenses by the largest negative exchange rate differential, and increase home market gross unit prices, and U.S. freight, insurance, indirect selling expenses and packing expenses by the highest positive exchange rate differential so as not to reward JBL Canada for not cooperating with the Department.

JBL Canada claims that the Department has misapplied AFA to the circumstances of this administrative review, as JBL Canada has cooperated with the Department's requests for information in all other respects. JBL Canada reiterates its assertions in the August 6, 2010, and October 29, 2010, questionnaire responses that its SAP data processing system automatically converts all foreign currency into the currency of the respective Jungbunzlauer entity at the moment of posting. JBL Canada states that the SAP exchange rates are the actual Interbank rates, and cannot be manipulated by any JBL entity. It adds that the SAP system maintains a record of the original currency in which expenses were incurred and the exchange rate used to convert foreign currency into the domestic currency; however, the value of the expense in its original currency is not readily accessible. JBL Canada claims that compliance with the Department's instructions would require retrieving each individual invoice from the SAP system, and conducting a manual review of every expense in order to determine which had been subject

to automatic currency conversion. JBL Canada maintains that such an exercise would be an extremely laborious and time-consuming undertaking, imposing an unreasonable and unnecessary burden on the company at the same time it was responding to other information requests from the Department. JBL Canada argues that the Department has the discretion to modify its requirements regarding the form or manner in which requested information is to be submitted “to the extent necessary to avoid imposing an unreasonable burden” on the responding party.¹ It urges the Department to accept the submitted information as a reasonable representation of the actual expenses, regardless of the currency in which they were incurred.

If any adjustment to prices and/or expenses is warranted, JBL Canada contends, such an adjustment should be limited to home market prices for sales made through a particular sales channel so as not to apply AFA to prices that had not been converted. Second, JBL Canada argues, the Department should use an adjustment factor that is based either on the actual monthly exchange rate or on the month-specific variance, rather than applying the largest difference between JBL Canada’s monthly average exchange rates and the rates used by the Department. Specifically, JBL Canada suggests that the Department convert home market prices back to U.S. dollars (USD) at the applicable monthly JBL Canada rate, and either apply the appropriate daily rate from the Department’s exchange rate database or the month-specific variance based on the particular month of sale.

The petitioners contend that, as JBL Canada has not suggested that its SAP system has changed since the investigation, the Department should not change its response to JBL Canada’s continual refusal to access the data maintained by that system. The petitioners argue that the facts of this case do not warrant that the Department exercise its discretion to modify the reporting requirements, because JBL Canada admits that it maintains the required data, but is unwilling to dedicate the additional resources needed to identify and report that data. The petitioners add that many data requests made by the Department in an antidumping proceeding require a respondent to conduct manual reviews of its files, and a respondent may not decline to provide information simply because additional work is required to identify and report it. The petitioners argue that if JBL is permitted to disregard reporting requirements merely because the requested information is not immediately accessible, the Department would face an avalanche of requests for similar treatment from other respondents, undermining the Department’s ability to gather the necessary information to conduct antidumping proceedings in accordance with the statute.

The petitioners argue that JBL Canada’s suggestions for altering the AFA adjustment would undermine the adverse nature of the adjustment. Moreover, the petitioners contend, the AFA selected by the Department is not “unreasonably punitive,” but follows precisely the court-sanctioned formulation that any AFA adjustment or rate chosen by the Department must “be a reasonably accurate estimate of the respondent’s actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.”² The petitioners add that such an incentive is clearly required in this case, given that this is the second time that JBL Canada has failed to cooperate to

¹ See section 782(c)(1) of the Tariff Act of 1930, as amended (the Act).

² See F.Lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (de Cecco).

the best of its ability with the Department's examination of its prices and expenses. Accordingly, the petitioners argue, the Department should reject JBL Canada's proposed modifications to the AFA applied in this review. They maintain that the Department should adopt the modifications described above to ensure that the application of AFA is not beneficial to JBL Canada in any way.

JBL Canada counters that the likely impact of any "misconverted" home market sales was much smaller than what was implied by the Department's preliminary results calculation, as the average exchange rate difference was well under 0.5 percent. It adds that a manual search of original currencies for a few affected transactions would have been burdensome to provide and would likely have resulted in no greater accuracy in the margin calculations.

Department's Position:

The Department's antidumping questionnaire instructs respondents to report sales and expense data in the currency in which they were incurred.³ In our October 7, 2010, supplemental questionnaire, we noted that JBL Canada had converted some home market data into Canadian dollars (CAD) and some U.S. data into USD, irrespective of the currency in which the data was originally denominated or incurred. We requested that JBL Canada revise its response to report all values in the original currencies, and referenced our decision in the LTFV investigation to apply AFA to JBL Canada for non-compliance with respect to currency reporting.⁴

JBL Canada declined to comply with the Department's request. It responded that because its SAP accounting system makes automatic currency conversions, to retrieve the requested data from the system would be an extremely laborious and time-consuming undertaking.⁵ Therefore, JBL Canada failed to provide information in the manner requested by the Department.

Because it was possible for JBL Canada to have provided sales and expense data in the currency in which they were denominated or incurred, we find that JBL Canada withheld information requested by the Department. Therefore, we find it is appropriate to apply partial facts available under section 776(a)(2)(A) and (B) of the Act in the final results. In selecting from among the facts otherwise available, section 776(b) of the Act authorizes the Department to use an adverse inference if the Department finds that an interested party failed to cooperate by not acting to the best of its ability to comply with a request for information. The requested data were in its possession, yet JBL Canada decided not to provide them. Even in spite of the application of AFA in the LTFV investigation for failure to cooperate, JBL Canada once again chose not to report all price and expense values in the currency in which they were incurred. By so doing, JBL Canada again did not act to the best of its ability in reporting this information to the Department. Therefore, we find it is appropriate to apply AFA to the prices and expenses that

³ See Antidumping Duty Questionnaire at C-17; See also section 773A of the Act and 19 CFR 351.415(a).

⁴ See Comment 4 of the Issues and Decision Memorandum accompanying the Notice of Final Determination of Sales at Less Than Fair Value: Citric Acid and Certain Citrate Salts from Canada, 74 FR 16843 (April 13, 2009) (LTFV Investigation); and October 7, 2010, Supplemental Questionnaire at page 2.

⁵ See October 29, 2010, First Supplemental Questionnaire Response for Sections A, B, and C.

JBL Canada reported as having been converted from their original currencies into either CAD or USD (i.e., home market prices, billing adjustments, insurance and indirect selling expenses, and its U.S. inland freight, insurance, indirect selling, inventory carrying, and packing expenses). As in the Preliminary Results, we increased these prices and expenses by 3.29 percent.⁶ This adjustment represents the largest difference between the monthly weighted-average exchange rates the Department normally uses, and the monthly exchange rates JBL Canada used to make its own currency conversions in the sales data.

JBL Canada argues that the Department should, consistent with its AFA adjustment in the LTFV final determination, limit the application of its adjustment to certain sales. Unlike in the investigation, however, the record in this review lacks the information that would allow us to differentiate between converted and unconverted home market prices. Moreover, as demonstrated above, even after the Department's application of AFA in the LTFV investigation for the same failure to cooperate with respect to this issue, JBL Canada again decided not to cooperate to the best of its ability in this administrative review. Therefore, apparently, the adjustment the Department used as AFA in the LTFV investigation was not an incentive to induce cooperation.^{7, 8} Accordingly, the Department has selected a different AFA adjustment as an incentive for the respondent to cooperate in future reviews.

JBL Canada also proposes alternative conversion rate adjustments. However, its proposed modifications do not reflect the adverse nature of the AFA adjustment, more closely reflecting facts available rather than AFA.

We acknowledge the petitioners' objection that by increasing the value of all affected variables, the AFA adjustment may work to JBL Canada's benefit in some instances. However, we believe it is more appropriate to apply the adjustment consistently to all the affected variables than to use a "cherry picking" methodology that could create unnecessary distortions in the margin calculation. Furthermore, we believe that the overall effect of the AFA adjustment is sufficiently adverse to encourage JBL Canada's future cooperation.

Therefore, based on the forgoing analysis, we have made no changes to the AFA adjustment for JBL Canada in the final results.

Comment 2: Post-Sale Billing Adjustments

The petitioners assert that the record establishes the existence of an agreement that may result in post-sale billing adjustments with respect to certain U.S. sales during the period of review

⁶ See Memorandum to the File from Rebecca Trainor and Katherine Johnson, "Preliminary Results Margin Calculation for Jungbunzlauer Canada Inc., January 26, 2011.

⁷ In the LTFV investigation, we increased both the affected home market prices and U.S. freight expenses by the percentage difference between the Department's weighted-average period of investigation (POI) exchange rate and JBL's POI average exchange rate (1.16 percent). See Comment 4 in the LTFV Investigation.

⁸ See de Cecco, 216 F.3d at 1032 ("... the purpose of section {776(b) of the Act} is to provide respondents with an incentive to cooperate, ...").

(POR). JBL Canada argues that this assertion is incorrect because no billing adjustments were made during the POR pursuant to the agreement.

Department's Position:

We have made no adjustment to U.S. sales prices for post-sale billing adjustments in the final results. Because many of the details pertaining to this issue are business proprietary information, we have addressed the parties' arguments in their respective briefs in more detail in a separate memorandum to James Maeder, Director, AD/CVD Operations Office 2, from the Team entitled "Billing Adjustment for Potential Antidumping Duty Refunds," dated contemporaneously with this notice.

Comment 3: Depreciation Expenses

For the preliminary results, the Department in accordance with section 773(f)(2) of the Act (i.e., commonly referred to as the "transactions disregarded" rule) increased JBL Canada's reported fixed manufacturing overhead costs for transactions that occurred between related parties.⁹ According to JBL Canada, the Department examined the agreement between JBL Canada and Jungbunzlauer Technology GmbH & Co KG (JBLT), whereby JBL Canada assumed legal title to all of the assets of JBLT, and incorrectly concluded that this transaction was an "asset purchase between JBL Canada and JBLT" and that the purchase was not at an arm's-length price. JBL Canada contends that the Department misunderstood the nature of the transaction and maintains that this transaction was a change in legal organization where the parent company shifted its equity position from JBLT to JBL Canada. Therefore, JBL Canada argues that the transactions disregarded rule is not applicable in this instance. Moreover, JBL Canada asserts that its books and records are kept in accordance with Canadian, U.S., and international generally accepted accounting principles (GAAP) and they reasonably reflect the costs associated with the production and sale of the merchandise. Thus, according to JBL Canada, the reported costs need not be adjusted for this transaction.

JBL Canada points out that the Department, in accordance with section 773(f)(2) of the Act, may disregard transactions that are direct or indirect between affiliated persons. In determining whether transaction prices between affiliated persons fairly reflect the market, the Department compares the transaction prices with market prices charged by unaffiliated parties. To determine whether prices have been manipulated, the Department examines affiliated transactions involving raw material inputs, labor, inland freight, and leases. See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia 75 FR 24885, 24891 (May 6, 2010) (application of transactions disregarded rule to purchases of pulp from affiliated parties). JBL Canada further points out that the Department has applied section 773(f)(2) of the Act to transactions with affiliated parties to prevent respondents

⁹ See the Memorandum to Neal M. Halper, Director, Office of Accounting, through Taija A. Slaughter, Lead Accountant, from Sheikh M. Hannan, Senior Accountant, entitled "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – Jungbunzlauer Canada Inc." dated January 26, 2011 (Preliminary Cost Memo).

from decreasing their reported costs or from increasing their cost offsets through non-arm's-length prices. See Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber from Canada 70 FR 73437 (December 12, 2005), and accompanying Issues and Decision Memorandum at Comment 12. However, JBL Canada argues that section 773(f)(2) of the Act cannot be applied to the transaction at issue because this transaction involves the movement of equity from one commonly controlled entity to another, and was properly recorded at book value in accordance with Canadian GAAP. JBL Canada asserts that the simultaneous change in the JBL Group's equity in JBL Canada and JBLT does not result in any manipulation of prices that would affect production costs.

Further, JBL Canada asserts that in determining whether the foreign like product is sold at prices below the cost of production (COP), section 773(f)(1)(A) of the Act directs the Department to calculate the COP based on the records of JBL Canada, provided: (1) the underlying books and records are kept in accordance with the GAAP of the exporting country; and (2) those records reasonably reflect the costs associated with the production and sale of the merchandise. JBL Canada states that the Department has taken the position that normal GAAP accounting practices provide both respondents and the Department with a reasonably objective and predictable basis to compute costs for the merchandise. See Notice of Final Results of Antidumping Duty Administrative Review: Certain Preserved Mushrooms from India 68 FR 41303 (July 11, 2003), and accompanying Issues and Decision Memorandum at Comment 1. JBL Canada argues that the Court of International Trade (CIT) has also upheld the Department's reliance on a firm's expenses as recorded in its books and records if the firm's financial statements are prepared in accordance with the home country's GAAP and they do not significantly distort the firm's actual costs. See Cinsa, S.A. de C.V. v. United States, 966 F. Supp. 1230, 1235 (CIT 1997) (citing FAG U.K. Ltd. v. United States, 945 F. Supp. 260, 271 (CIT 1996)).

According to JBL Canada, in determining if a respondent's books and records are a reasonable reflection of costs, the Department often compares home country GAAP to U.S. and international GAAP. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia 75 FR 59223 (September 27, 2010), and accompanying Issues and Decision Memorandum at Comment 2. In these instances, JBL Canada proffers that Canadian and U.S. GAAP both view the transaction between JBL Canada and JBLT in an identical manner and require the valuation of the assets acquired and liabilities assumed to be recognized at book value.

JBL Canada asserts that both Canadian and U.S. GAAP treat transactions between entities under common control, like the transaction between JBL Canada and JBLT, as a change in the legal organization, and not as an asset purchase. See Canadian GAAP 3840.34; U.S. GAAP FAS 141(R) Appendix D. Moreover, International Accounting Standard ("IAS") Number 22 of 1995 and International Financial Reporting Standard ("IFRS") Number 3 of 2004 state that these standards do not apply to transactions of entities under common control, and therefore, prohibit the recognition of assets acquired or liabilities assumed at fair value.

Accordingly, JBL Canada argues that both Canadian and U.S. GAAP require the entity under common control that receives the net assets or the equity interests (such as JBL Canada) to recognize the assets and liabilities at their carrying amounts (*i.e.*, book value) in the accounts of

the transferring entity (such as JBLT) at the date of transfer.¹⁰ JBL Canada asserts that the recognition of the assets and liabilities at the carrying amounts of the transferring entity in this case confirms that this transaction was a movement of equity from JBLT to JBL Canada. Thus, the substance of the transaction is a change in legal form (equity), and not an acquisition of assets.¹¹ JBL Canada requests that the Department not elevate form over substance in analyzing this issue. JBL Canada claims that the substance of the transaction between JBL Canada and JBLT was a change in legal organization (a change in equity) and not an acquisition of assets. Thus, while the legal title to the assets shifted from JBLT to JBL Canada, this movement of assets is merely the form of the transaction. The substance of the transaction is the movement of the parent's equity investment from JBLT to JBL Canada, as there was no substantive change in the equity ownership interests of the assets.

Finally, JBL Canada contends that if the Department persists in treating this transaction as an asset purchase, the Department must make a correction to the calculation of the selling, general and administrative (SG&A) and financial expense ratios. If the Department increases JBL Canada's depreciation expenses, as it did for purposes of the preliminary results, then it must also reflect this increase in the cost of goods sold, which is used to calculate the SG&A and financial expense ratios. According to JBL Canada, this correction will reduce the SG&A and financial expense ratios.

The petitioners assert that the Department properly applied the "transaction disregarded rule" to the asset transfer transaction between JBL Canada and JBLT, and correctly adjusted the depreciation expenses reported by JBL Canada. The petitioners claim that this asset transfer was a transaction between two affiliates and not a shift in the equity position of JBL Canada's parent company with respect to these two affiliates. The petitioners contend that JBL Canada's recording of this transaction in accordance with Canadian GAAP does not absolve the Department of its obligation to ensure that the amounts reported in JBL Canada's books and records reasonably reflect its costs.

The petitioners contend that this transaction was an asset sale between two affiliated parties because JBL Canada in its original response to section A of the questionnaire stated that "[a]s of December 31, 2008, JBL Canada purchased all of the assets and liabilities of JBLT at fair market value." See JBL Canada's August 6, 2010 Section A Response at page 7. Accordingly, the petitioners reiterate that the Department properly applied the "transaction disregarded rule." See Preliminary Cost Memo at page 1. The petitioners maintain that this adjustment was appropriate

¹⁰ Canadian GAAP 3840.34; U.S. GAAP SFAS 141(R) Appendix D; IFRS 3 and IAS 22.

¹¹ Generally accepted accounting principles treat transactions and other events and conditions in accordance with the substance of the transaction, and not merely the legal form of the transaction. Accounting professionals are directed to ask the question "what is the economic substance of the transaction, irrespective of the matter in which it appears to be structured" to determine the proper accounting treatment under GAAP. See, e.g., Wiley GAAP 2010, Interpretation and Application of Generally Accepted Accounting Principles, by Barry J. Epstein, Ralph Nach, and Steven M. Bragg; Chapter 1, Researching GAAP Matters, at 23; International Accounting Standards Board, IFRS for SMEs at 2.8. Thus, the substance of the transaction under consideration must first be determined in order to assess the proper accounting treatment.

because these assets were inputs used in the production of the subject merchandise during the POR.

The petitioners claim that JBL Canada is essentially arguing that the Department should allow a respondent to value depreciable assets for dumping purposes in the same manner as it values these assets for accounting purposes. The petitioners contend that the Department is not bound by the accounting laws of other jurisdictions. The petitioners point out that in calculating costs the statute authorizes the Department to rely on local GAAP only to the extent that it is not distortive.¹² The petitioners maintain that in this case the independent appraiser's valuation of the purchased assets demonstrates that the Canadian GAAP compliant valuation does not result in the fair market value, and thus, distorts JBL Canada's true COP. Thus, the petitioners request that the Department continue to adjust JBL Canada's reported depreciation expenses in accordance with the "transactions disregarded rule."

Department's Position:

Contrary to JBL Canada's arguments, the Department's treatment of this issue was not form over substance. The record shows that the affiliated transaction was a "purchase" of fixed assets by JBL Canada from JBLT, not a movement of equity. No party has argued that JBL Canada and JBLT are not affiliates. See generally the August 6, 2010 Section A Response. Furthermore, in its submissions, JBL Canada stated that it purchased all the fixed assets of JBLT at fair market value.¹³ The notes accompanying JBL Canada's audited financial statements state that the company entered into an "asset purchase agreement" with JBLT.¹⁴ Further, prior to and consistent with the sale of these assets, JBLT (*i.e.*, the seller of these assets) appointed a professional appraiser to determine the fair market value of these assets and received the appraisal report and the fair market values.¹⁵ Moreover, the asset transfer agreement refers to JBLT as the "vendor" and JBL Canada as the "purchaser, which is not reflective of a change in legal organization."¹⁶ Accordingly, we continue to consider the transaction between JBL Canada and JBLT a fixed asset purchase between affiliated parties.

¹² See 19 U.S.C. § 1677b(f)(1)(A) ("Costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.") (emphasis added); Hynix Semiconductor Inc. v. United States, 424 F.3d 1363, 1369 (Fed. Cir. 2005) ("The statute and our prior pronouncements are clear. The company has the responsibility of showing that its records are kept in accordance with its home country's GAAP. If the company meets this burden, {the Department} may counter with substantial evidence that the records do not comply with the home country's GAAP. If the records withstand this scrutiny, {the Department} may show, by substantial evidence, that the costs do not reasonably reflect the costs of production and should not, therefore, be used.").

¹³ See JBL Canada's August 6, 2010 Section A Response at page 7.

¹⁴ See JBL Canada's 2009 Fiscal Year Audited Financial Statements submitted in Exhibit 20 of its August 6, 2010 Section A Response.

¹⁵ See JBL Canada's December 16, 2010 Second Supplemental Section D Response at page 3 and Exhibits 6 and 7.

¹⁶ See JBL Canada's December 16, 2010 Second Supplemental Section D Response at page 4 and Exhibit 8.

We agree with the petitioners with respect to our application of the transactions disregarded rule to the affiliated transaction between JBL Canada and JBLT. Section 773(f)(2) of the Act (*i.e.*, the transactions disregarded rule) addresses how the Department will treat certain affiliated party transactions in its calculation of COP and constructed value (CV). Specifically, a transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of the merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been had the transaction occurred between persons who are not affiliated.

The Department considers transactions between persons who are not affiliated to occur at market value and uses such market values as a benchmark for the transactions disregarded rule.¹⁷ In this case, JBL Canada calculated and reported its depreciation expenses based on the book value of the fixed assets held by JBLT and sold to JBL Canada, not the fair market value of the fixed assets. For purposes of calculating an antidumping duty margin, the book value of the assets does not fairly reflect the amount that normally would be reflected, as evidenced by the results of the independent appraisal of these assets. The fair market value of the purchased fixed assets exceeds the transfer price for such fixed assets. See Preliminary Cost Memo at page 2. Therefore, for the final results we have adjusted the value of the purchased assets used to calculate depreciation expenses to reflect the fair market value of the purchased assets in accordance with section 773(f)(2) of the Act.

As noted in the comments from JBL Canada, section 773(f)(1)(A) of the Act directs the Department to follow, normally, the records of a producer if those records are kept in accordance with the producer's home country GAAP and reasonably reflect the costs associated with the production and sale of the merchandise. While we agree that in its normal books and records, JBL Canada recorded the purchased fixed assets at the carrying value (*i.e.*, the book value) from JBLT's records in accordance with Canadian GAAP,¹⁸ we disagree that this valuation reasonably reflects the costs associated with the production of the subject merchandise. In fact, Canadian GAAP, similar to section 773(f)(2) of the Act, recognizes that related party transactions are generally not at arm's length. See Canadian GAAP 3840 paragraph 10 which states the reasons for recording related party transactions at the carrying values:

In a historical cost, transaction-based accounting model, transactions are generally recognized at the amount of cash and cash equivalents paid or received or at the fair value ascribed to them when they took place. Generally, it is presumed that the transaction amount arrived at by parties dealing at arm's length represents the fair value of the items exchanged. Conversely, as related parties do not deal at

¹⁷See Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Antidumping Duty Order in Part, 75 FR 50999 (August 18, 2010), and accompanying Issues and Decision Memorandum at Comment 8.

¹⁸ JBL Canada submitted the Canadian GAAP Accounting Standards 3840 Paragraphs 8 to 50 Applicable to Related Party Transactions in Exhibit 2 of its December 16, 2010 Second Supplemental Section D Response.

arm's length, a transaction between related parties cannot be presumed to have been entered into at "fair value."

Indeed both the Canadian GAAP and section 773(f)(2) of the Act were prescribed to address concerns about the arm's-length nature of a related party transaction. Therefore, it is important to address the risk that each pronouncement was intending to eliminate. Specifically, Canadian GAAP requires that affiliated party fixed asset purchase transactions be valued at their carrying value for the purposes of preparing financial statements, which eliminates the risk of a company artificially overstating its assets on the balance sheet. Conversely, the purpose of section 773(f)(2) of the Act is to eliminate the risk of understating the costs associated with producing the merchandise under consideration that stems from related party transactions and, thereby, understating the reported COP and CV. Consequently, in the instant case, both Canadian GAAP and section 773(f)(2) of the Act eliminate the risks associated with the possible distortion that could occur with the improper valuation of the related party transaction. Under Canadian GAAP, the purchased assets from a related party transaction are recorded at the carrying value (i.e., book value) in the audited financial statements to ensure the assets on the balance sheet are not overstated and to allow the person or persons relying on the financial statements to make an informed decision (e.g., investors, management, etc.). On the other hand, for purposes of conducting antidumping duty proceedings and section 773(f)(2) of the Act in particular, the transfer price related to the purchased fixed assets from the related party is compared to the fair market value to ensure that the valuation used to calculate depreciation expenses fairly reflects the amount usually reflected in sales of the merchandise under consideration in the market under consideration.

With regard to JBL Canada's argument that the Department is prohibited from applying the transactions disregarded rule to the transaction at issue, we disagree. Section 773(f)(2) of the Act does not list or specify the types of related party transactions that are covered by this rule. In this instance, the related party transaction is associated with the purchase of capital assets that affect the reported depreciation expense and would fall under the purview of the transactions disregarded rule. See, e.g., Notice of Final Determinations of Sales at Not Less Than Fair Value: Low Enriched Uranium From the United Kingdom, Germany and the Netherlands 66 FR 65886 (December 21, 2001), and accompanying Issues and Decision Memorandum at Comment 14, where the Department applied the transactions disregarded rule to capital asset transactions between related parties.

With respect to comparing Canadian and U.S. GAAP, although we acknowledge that the Statement of Administrative Action states that the Department will consider U.S. GAAP in determining whether a respondent's costs are reasonable (see Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1 (1994), at 834), the simple fact that treatment under U.S. GAAP is the same or different does not determine the appropriateness of relying on a respondent's reporting that is consistent with the GAAP practiced in a respondent's home country. In both Notice of Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above ("DRAMs") from Taiwan, 64 FR 56308, 56321 (October 19, 1999) and Static Random Access Memory Semiconductors from Taiwan, 63 FR 8909, 8923 (February 23, 1998), for example, the Department did not find the treatment of a stock bonus to be unreasonable simply because the treatment of these items was different under U.S. GAAP than under GAAP of the

exporting country, but rather because treatment of stock bonuses under the GAAP of the exporting country was distortive and did not reasonably reflect the cost of subject merchandise. Moreover, the treatment under both sets of accounting principles may be reasonable, as is the case here, but as demonstrated above, the GAAP provisions relied upon by JBL Canada are intended to deal with a different type of distortion than does section 773(f)(2) of the Act—namely, those GAAP provisions address potential overvaluation, whereas section 773(f)(2) addresses potential undervaluation. Additionally, the Department is obligated under the statute to first consider costs as they are recorded in a respondent's normal books and records and then consider whether those costs are reasonable. See section 773(f)(1)(A) of the Act. U.S. GAAP is merely one tool for the Department to use in its analysis, and is not dispositive of whether the reported costs are reasonable.

Finally, we agree with JBL Canada that if we continue to treat this transaction as an asset purchase, we have to properly account for the adjustment to ensure we do not overstate the SG&A and financial expenses applied to each product. In lieu of an adjustment to the denominator of the SG&A and financial expense ratios, we have accounted for this possible distortion by applying the SG&A and financial expense ratios to each CONNUM's cost of manufacture, prior to the application of the affiliated party asset purchase adjustment discussed above.

Comment 4: Proposed Rules Regarding the Margin Calculation Methodology in Administrative Reviews

JBL Canada argues that the Department's proposed changes regarding the margin calculation methodology in administrative reviews (including the proposals to provide offsets for non-dumped comparison sales and to use average-to-average comparisons instead of the current average-to-transaction method) should be applied to this review if they are implemented prior to the scheduled date for the Department's final results. JBL Canada notes that the Department indicated in its December 28, 2010, notice that "{a}ny changes in methodology will be applicable . . . in all reviews pending before the Department for which a preliminary results is issued more than 60 business days after the date of publication of the Department's Final Rule and Final Modification." See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 FR 81533 (December 28, 2010) (Proposed Rule).

The petitioners argue that the Department should not modify its weighted-average dumping margin and assessment rate calculation methodology in this review, maintaining that the Department should treat the Proposed Rule as exactly what it is, a proposed agency rulemaking with no force of law. Accordingly, the petitioners urge the Department not to apply its new methodology in this administrative review.

Department's Position:

JBL Canada's argument is moot because, at the time of these final results, the Department has not implemented changes that were proposed in the Proposed Rule. Accordingly, it would be premature to apply any changes to the Department's margin calculation methodology with respect to zeroing at this time.

Comment 5: Corrections to the Dumping Margin Calculations

The petitioners argue that the Department should use JBL Canada's shipment date as the date of sale for home market sales in which the shipment date preceded invoice date, in accordance with the Department's standard practice.

The petitioners also argue that, although the Department indicated its intention in the Preliminary Results to deduct U.S. brokerage expenses from U.S. price in the calculation of CEP, this deduction was not made. Accordingly, for the final results, the petitioners submit that the Department should correct this clerical error by deducting U.S. brokerage expenses from U.S. price.

JBL Canada did not comment on either of these issues.

Department's Position:

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

Recommendation:

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

Agree _____

Disagree _____

 Ronald K. Lorentzen
 Deputy Assistant Secretary
 for Import Administration

 (Date)