A-122-857
Investigation
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November 1, 2017

MEMORANDUM TO: Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance

FROM: James Maeder
Senior Director
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances of Certain Softwood Lumber Products from Canada

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I. SUMMARY

We analyzed interested party comments in the less-than-fair-value (LTFV) investigation of certain softwood lumber products from Canada. Based on our analysis of the comments received, we recommend adopting all of the positions described in the "Discussion of the Issues" section of this memorandum. If this recommendation is accepted, we will publish the final determination of this investigation and the final weighted-average dumping margins for Canfor Corporation (Canfor), Resolute FP Canada Inc. (Resolute), Tolko Marketing and Sales Ltd. (Tolko), and West Fraser Mills Ltd. (West Fraser), the mandatory respondents in this investigation, in the *Federal Register*. Below is the complete list of the issues in this investigation for which we received comments from interested parties:

Scope Issues

Comment 1: Definition and Examples of Finished Products in Scope Language
Comment 2: Exclusions Requested for Certain Types of Lumber Harvested from Western

II. BACKGROUND

On June 30, 2017, the U.S. Department of Commerce (Department) published the *Preliminary Determination* of certain softwood lumber products from Canada at LTFV.[1] The period of investigation (POI) is October 1, 2015, through September 30, 2016. In July 2017, we conducted verification of the sales and cost of production (COP) data reported by Canfor, Tolko, West Fraser, and Resolute, pursuant to section 782(i) of the Tariff Act of 1930, as amended (Act).[2] On July 31, 2017, we requested, based on findings at verifications, that the mandatory respondents refile sales and cost databases where necessary, which they did on August 3, 2017 and August 4, 2017.[3] On July 28, 2017, we invited parties to comment on the *Preliminary Determination*.[4] In response, on or before August 7, 2017, the Department received case briefs from: the

[1] *See Certain Softwood Lumber Products from Canada: Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 82 FR 29833 (June 30, 2017) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, "Verification of the Sales Response of Canfor Corporation, Canadian Forest Products Ltd., and Canfor Wood Products," dated July 25, 2017 (Canfor Sales Verification Report); Memorandum, "Verification of the Cost Response of Canfor Corporation in the Antidumping Duty Investigation of Certain Softwood Lumber from Canada," dated July 28, 2017 (Canfor Cost Verification Report); Memorandum, "Verification of the Sales Response of Tolko Marketing and Sales Ltd. and Tolko Industries Ltd.in the Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada," dated July 27, 2017 (Tolko Sales Verification Report); Memorandum, "Verification of the Cost Response of Tolko Industries Ltd. in the Antidumping Duty Investigation of Certain Softwood Lumber from Canada," dated July 28, 2017 (Tolko Cost Verification Report); Memorandum, "Verification of the Sales Response of West Fraser Mills Ltd.," dated July 26, 2017 (West Fraser Sales Verification Report); Memorandum, "Verification of the Cost Response of West Fraser Timber Co. Ltd. in the Antidumping Duty Investigation of Certain Softwood Lumber from Canada," dated July 27, 2017 (West Fraser Cost Verification Report); Memorandum, "Verification of the Sales Responses of Resolute FP Canada Inc. in the Antidumping Investigation of Certain Softwood Lumber Products from Canada," dated July 28, 2017 (Resolute Sales Verification Report); Memorandum, "Verification of the Cost Response of Resolute FP Canada Inc. in the Antidumping Duty Investigation of Softwood Lumber from Canada," dated July 27, 2017 (Resolute Cost Verification Report).

[3] *See* Letter, "Certain Softwood Lumber Products from Canada, Case No. A-122-857: Response to Post-Verification Request for Revised Databases," dated August 4, 2017 (Canfor Revised Databases Response); Letter, "Certain Softwood Lumber Products from Canada: Submission of Updated Sales and Cost Databases," dated August 3, 2017 (Tolko Revised Databases Response); Letter, "Certain Softwood Lumber Products from Canada: Submission of Revised Sales and Cost Databases," dated August 3, 2017 (West Fraser Revised Databases Response); Letter, "Softwood Lumber from Canada: Response of Resolute FP Canada Inc. to the Department's Post-Verification Request for Revised Databases," dated August 3, 2017 (Resolute Revised Databases Response); Letter, "Softwood Lumber from Canada: Response of Resolute FP Canada Inc. to the Department's Post-Verification Request for Revised Databases," dated August 4, 2017 (Resolute Revised Databases Response Clarification).

[4] *See* Memorandum, "Due Dates for Case and Rebuttal Briefs," dated July 28, 2017.

Government of Canada (GOC) which consolidated comments from the GOC, the Governments of Ontario and Québec, the BCLTC, the Ontario Forest Industries Association, and the Conseil de l'industrie forestière du Québec (GOC *et al.*); West Fraser; Canfor; Resolute; Tolko; and the petitioner (COALITION).[5] On August 14, 2017, the Department received rebuttal case briefs from: the GOC *et al.*; West Fraser; Canfor; Resolute; Tolko; and the petitioner.[6] On July 31, 2017, several parties requested a hearing, and on August 17, 2017, the Department held a public hearing limited to issues raised in the case briefs and the rebuttal briefs, including comments on scope, as described below. On September 1, 2017, the Department published a postponement fully extending the due date of the final antidumping (AD) determination until November 13, 2017.[7]

III. SCOPE OF THE INVESTIGATION

The product covered by this investigation is certain softwood lumber from Canada. For a full description of the scope of this investigation, as amended in this final determination, *see* the accompanying *Federal Register* notice for this final determination at Appendix I.

On August 11, 2017, the Department issued a memorandum outlining certain revisions made to the scope of the instant investigation, pursuant to a request made by United States Customs and Border Protection (CBP) to eliminate certain erroneous Harmonized Tariff Schedule of the United States (HTSUS) subheadings and replace them with the correct HTSUS subheadings. Specifically, CBP requested that the Department add HTSUS numbers 4421.99.7040 and 4421.99.9780 to the Automated Commercial Environment (ACE) module, and remove HTSUS numbers 4421.91.7040 and 4421.91.9780 from the module. These updates were

[5] *See* Letter, "Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada: Canadian Parties' Joint Case Brief," dated August 7, 2017 (Canadian Parties Joint Case Brief); Letter, "Certain Softwood Lumber Products from Canada: Case Brief of West Fraser Mills Ltd.," dated August 7, 2017 (West Fraser Case Brief); Letter, "Certain Softwood Lumber Products from Canada, Case No. A-122-857: Case Brief," dated August 7, 2017 (Canfor Case Brief); Letter, "Softwood Lumber from Canada: Resolute's Case Brief," dated August 7, 2017 (Resolute Case Brief); Letter, "Certain Softwood Lumber Products from Canada: Initial Case Brief," dated August 7, 2017 (Tolko Case Brief); Letter, "Certain Softwood Lumber Products from Canada: Case Brief," dated August 7, 2017 (Petitioner Case Brief). The petitioner or COALITION is an ad hoc association whose members are: Collum's Lumber Products, L.L.C., Hankins, Inc., Potlatch Corporation, Rex Lumber Company, Seneca Sawmill Company, Sierra Pacific Industries, Stimson Lumber Company, Swanson Group, Weyerhaeuser Company, Carpenters Industrial Council, Giustina Land and Timber Company, Sullivan Forestry Consultants, Inc., and the U.S. Lumber Coalition, Inc.

[6] *See* Letter, "Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada: Canadian Parties' Joint Rebuttal Brief," dated August 14, 2017 (Canadian Parties Joint Rebuttal Brief); Letter, "Certain Softwood Lumber Products from Canada: Rebuttal Brief of West Fraser Mills Ltd.," dated August 14, 2017 (West Fraser Rebuttal Brief); Letter, "Certain Softwood Lumber Products from Canada, Case No. A-122-857: Rebuttal Brief," dated August 14, 2017 (Canfor Rebuttal Brief); Letter, "Softwood Lumber from Canada: Resolute's Rebuttal Brief," dated August 14, 2017 (Resolute Rebuttal Brief); Letter, "Certain Softwood Lumber Products from Canada: Rebuttal Case Brief," dated August 14, 2017 (Tolko Rebuttal Brief); Letter, "Certain Softwood Lumber Products from Canada: Rebuttal Brief," dated August 14, 2017 (Petitioner Rebuttal Brief).

[7] *See Certain Softwood Lumber Products from Canada: Postponement of Final Determination of Less-Than-Fair-Value Investigation and Extension of Provisional Measures*, 82 FR 41609 (September 1, 2017).

made for the scope of the AD and the companion countervailing duty (CVD) investigations of softwood lumber from Canada.[8]

IV. SCOPE COMMENTS

On July 28, 2017, the Department invited interested parties to submit comments on scope issues that had been raised on the record of this proceeding and the concurrent CVD investigation. In response, on or before August 7, 2017, the Department received scope briefs from: Oregon-Canadian Forest Products Inc. (OCFP); the Government of the Province of New Brunswick (GNB); Canfor; the Retail Industry Leaders Association (RILA); BarretteWood, Inc. (BarretteWood); EACOM Timber Corporation (EACOM); Ontario Forest Industries Association and the Conseil de l'industrie forestiere du Quebec (Central Canada); New Brunswick Lumber Producers[9] (NBLP); the Government of Nova Scotia (GNS); J.D. Irving Limited (J.D. Irving); W.I. Woodtone, Inc. (Woodtone) and Maibec Inc. (Maibec); North America Forest Products Ltd. (NAFP); the GOC, and the petitioner.[10]

On August 14, 2017, the Department received scope rebuttal comments from: UFP Western Division, Inc. and UFP Eastern Division, Inc. (UFP); IKEA Supply AG and IKEA Distribution Services Inc. (IKEA); Central Canada; RILA; and the petitioner.[11]

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[8] *See* Memorandum, "Update AD/CVD Module," dated August 11, 2017 (barcodes: 3606939-01 (AD) and 3606894-01 (CVD)).

[9] The member companies of the NBLP are: Chaleur Sawmills Assoc.; Delco Forest Products Ltd.; Devon Lumber Co. Ltd.; Fornebu Lumber Co. Ltd.; H.J. Crabbe & Sons Ltd.; J.D. Irving, Limited; Marwood Ltd.; MP Atlantic Wood Ltd.; North American Forest Products Ltd.; and Twin Rivers Paper Co., Inc.

[10] *See* Letter from OCFP, "Certain Softwood Lumber Products from Canada (Case No. A-122-857): Case Brief of Oregon-Canadian Forest Products, Inc. on Scope Issues," dated August 7, 2017 (OCFP Scope Brief); Letter from GNB, "GNB's Scope Case Brief Certain Softwood Lumber Products from Canada," dated August 7, 2017 (GNB Scope Brief); Letter from Canfor, "Certain Softwood Lumber Products from Canada. Case Nos. A-122-857. C-122-158: Case Brief on Scope-Related Matters," dated August 7, 2017 (Canfor Scope Brief); Letter from RILA, "Certain Softwood Lumber Products from Canada: RILA Case Brief on Scope Issues," dated August 7, 2017 (RILA Scope Brief); Letter from BarretteWood, Inc. and EACOM Timber Corporation, "Softwood Lumber from Canada: Case Brief - Scope Issues," dated August 7, 2017 (BarretteWood and EACOM Scope Brief); Letter from Central Canada, "Softwood Lumber from Canada: Central Canada's Case Brief On Scope Issues," dated August 7, 2017 (Central Canada Scope Brief); Letter from NBLP, "Certain Softwood Lumber from Canada: NBLP Case Brief on Scope Issues," dated August 7, 2017 (NBLP Scope Brief); Letter from GNS, "Certain Softwood Lumber Products from Canada: Case Brief Concerning Product Scope Issues," dated August 7, 2017 (GNS Scope Brief); Letter from J.D. Irving, "Softwood Lumber from Canada: Scope Comments," dated August 7, 2017 (J.D. Irving Scope Brief); Letter from Woodtone, "Certain Softwood Lumber from Canada; Scope Brief of W.I. Woodtone, Inc. U.S. Origin Wood Subject to Minor Processing," dated August 7, 2017 (Woodtone Scope Brief); Letter from NAFP, "Certain Softwood Lumber from Canada; Scope Brief of North America Forest Products Ltd.," dated August 7, 2017 (NAFP Scope Brief); Letter from Woodtone and Maibec, "Certain Softwood Lumber from Canada; Scope Brief of Woodtone and Maibec," dated August 7, 2017 (Woodtone/Maibec Scope Brief); Letter from GOC, "Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada: Canadian Parties' Joint Case Brief on Scope," dated August 7, 2017 (Canadian Parties Joint Scope Brief); Letter from the petitioner, "Certain Softwood Lumber Products from Canada: Petitioner's CVD Case Brief (Scope)," dated August 7, 2017 (Petitioner Scope Brief).

[11] *See* Letter from UFP, "Certain Softwood Lumber Products from Canada: Refiling of Rebuttal Comments on Scope Bed Frame/Box Spring Components and Kits Submitted by UFP Western Division, Inc. and UFP Eastern

V. DISCUSSION OF THE ISSUES

Scope Issues

The comments below address arguments provided by interested parties concerning scope coverage, scope exclusion requests, class or kind analyses, and several miscellaneous scope-related issues. These decisions apply with respect to the scope of both the AD and CVD investigations.

To the extent that no party challenged the preliminary scope determinations as set forth in the Department's Preliminary Scope Memorandum,[12] those particular scope determinations, and the Department's prior analysis of those issues, are considered final and are incorporated into these final determinations. For the remaining issues, we address the parties' comments, below.

Comment 1: Definition and Examples of Finished Products in Scope Language

In the Preliminary Scope Memorandum, the Department determined that finished products are outside the scope of these investigations, and proposed additional scope language to provide interested parties guidance as to what constitutes a finished product.[13] Canfor, the GOC, RILA and IKEA do not oppose the Department's decision to adopt a definition for finished products, but request that the Department add additional language to the scope identifying particular finished products.[14] The petitioner agrees that finished products are outside the scope of these investigations, and supports the Department's proposed definition. However, the petitioner does not agree that it is appropriate or necessary to list all finished goods that have been determined to be out of scope in the language of the scope itself.[15]

Department's Position:

In the Preliminary Scope Memorandum, the Department preliminarily determined that "finished products" are outside the scope of these investigations.[16] Of those who commented on the administrative record regarding this issue, each party agreed with the conclusion that "finished products" are not subject to the scope of these investigations. In determining the appropriate

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Division Inc. (A-122-857; C-122-858)," dated August 25, 2017 (UFP Scope Rebuttal) (refiling UFP's August 14, 2017 scope comments at the direction of the Department); Letter from IKEA, "Certain Softwood Lumber Products from Canada: IKEA Rebuttal Brief on Scope Issues," dated August 14, 2017 (IKEA Scope Rebuttal); Letter from Central Canada, "Softwood Lumber from Canada: Central Canada's Rebuttal Brief On Scope Issues," dated August 14, 2017 (Central Canada Scope Rebuttal); Letter from RILA, "Certain Softwood Lumber Products from Canada: RILA's Letter in lieu of Rebuttal Case Brief on Scope Issues," dated August 14, 2017 (RILA Scope Rebuttal); Letter from the petitioner, "Certain Softwood Lumber Products from Canada: Scope Rebuttal Comments," dated August 14, 2017 (Petitioner Scope Rebuttal).

[12] *See* Memorandum, "Certain Softwood Lumber Products from Canada: Preliminary Scope Decision," dated June 23, 2017 (Preliminary Scope Memorandum).

[13] *See* Preliminary Scope Memorandum at Comment 6.

[14] *See* Canfor Scope Brief at 2; Canadian Parties Joint Scope Brief at 6; RILA Scope Brief at 2; IKEA Scope Rebuttal at 2.

[15] *See* Petitioner Scope Rebuttal at 17-18.

[16] *See* Preliminary Scope Memorandum at Comment 6.

language to include in the scope of the investigations to define a finished product, we proposed the following language be added directly to the scope:

> Finished products are not covered by the scope of these investigations. For the purposes of this scope, finished products contain, or are comprised of, subject merchandise and have undergone sufficient processing such that they can no longer be considered intermediate products, and such products can be readily differentiated from merchandise subject to these investigations at the time of importation. Such differentiation may, for example, be shown through marks of special adaptation as a particular product. The following products are illustrative of the type of merchandise that is considered "finished," for the purpose of this scope: I-joists; assembled pallets; cutting boards; assembled picture frames; garage doors.[17]

No interested party opposed the inclusion of such clarifying language. First, the language explains clearly our understanding of what characteristics describe such products: 1) they contain, or are comprised of, subject merchandise and have undergone sufficient processing such that they can no longer be considered intermediate products; and 2) such products can be readily differentiated from merchandise subject to these investigations at the time of importation.

Second, recognizing that differentiation of finished products from other products might not always be obvious, we added language that explained that "such differentiation may, for example, be shown through marks of special adaption as a particular product." There are many different types of finished products, and we fully recognize that not all finished products will be identified through unique "marks of special adaption," but nonetheless, we have provided this language to further clarify the scope.

Finally, we identified several products that fall within the category of "finished products," and emphasized that this list is simply illustrative: I-joists; assembled pallets; cutting boards; assembled picture frames; garage doors.

No party challenges the Department's proposed descriptive characteristics or "differentiation" example. With respect to the illustrative list, however, RILA and IKEA request that various additional terms and language be added to the scope to prevent confusion regarding the scope status of particular products.[18] Specifically: 1) RILA and IKEA request that furniture kits be added to the list of illustrative out-of-scope products;[19] and 2) RILA further requests that butcher-block countertops, assembled wood toys, assembled wood blinds, clothes hangers, tableware, trays, wall art, and marquetry be added to the list.[20]

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[17] *Id.*

[18] *See* RILA Scope Brief at 2; IKEA Scope Rebuttal at 2. Canfor and Central Canada also request that the language of the scope be modified to address a particular specification of I-joists. *See* Canfor Scope Brief at 2; Central Canada Scope Brief at 12. However, we address those comments separately below.

[19] *See* IKEA Scope Rebuttal at 2; RILA Scope Brief at 2.

[20] *See* RILA Scope Brief at 5. RILA also requests that "craft kits" be excluded from the scope of these investigations as finished goods. We address this request separately, below.

We agree with the parties' arguments that one of the Department's goals in defining the scope of an investigation is to make the scope clear and administrable. We also agree that if we included the list of finished goods proposed by RILA and IKEA, it might provide a greater amount of certainty upon importation *for those products specifically*. However, we also believe that adding even more products to the scope could result in a greater degree of confusion with respect to *all other finished products* not listed in the scope.

The products listed above, which are highlighted by RILA were explicitly considered by the Department in our Preliminary Scope Memorandum, and were determined to be out-of-scope.[21] We explained that:

> The Department finds that the majority of the products identified as "finished goods" by the parties – including assembled pallets; assembled trusses; assembled garage doors; assembled door frames; assembled window frames; assembled I-joists, open-webbed floor joists; edge-glued wood; cross-laminated timber; assembled furniture; butcher block countertops; cutting boards; assembled wood toys; assembled wooden frames for paintings, photographs and mirrors; assembled wood blinds; clothes hangers; tableware; trays; wall art; and marquetry – have all been processed to such an extent that they are individually identifiable as "finished products."[22]

The Department's position with respect to the products identified above remains unchanged from the *Preliminary Determination*. Accordingly, we have determined that these products are out-of-scope and therefore no further clarification is necessary. To the extent that RILA is concerned that there is any ambiguity in the scope because its products are not specifically enumerated in the list of "illustrative examples," we are expressly determining in this final determination that those products meet the finished products exclusion and should be excluded from the scope of these investigations. We believe such a determination provides sufficient certainty with respect to those products.

We provided five illustrative examples in the proposed scope which we believe are sufficiently diverse to provide a wide-range of examples of finished products. The petitioner supported those examples, and we continue to believe those five examples are appropriate. If we added additional examples, we are concerned that the list would begin to appear less like an illustrative list, and more like a comprehensive summary of all the finished products excluded from the scope – which is not our intention in providing a few illustrative examples in the scope language. For obvious reasons, given the number and variety of finished products, the Department cannot list every conceivable finished product in the scope of the investigation itself.

In addition, with respect to RILA's and IKEA's request that furniture kits be added to the list of illustrative out-of-scope products, we preliminarily determined, as stated in the Preliminary Scope Memorandum that "finished furniture kits are not covered by the scope of these investigations."[23] Again, we are expressly determining in this final determination that these kits

[21] *See* Preliminary Scope Memorandum at Comment 6.
[22] *Id.* (internal citations omitted).
[23] *Id.* at Comment 15.

also are covered by the finished products exclusion and conclude that such a determination provides sufficient certainty with respect to these products. Accordingly, we determine that it is unnecessary to add these products to the list of illustrative examples in the language of the scope itself.

In addition to RILA's and IKEA's arguments that the Department should add to its illustrative list products which we had already preliminarily determined to be finished goods in the Preliminary Scope Memorandum, the GOC argues that the Department should also expand the list to include additional products which the Department did not preliminarily determine to be finished goods. Specifically, the GOC asserts that "{u}nassembled parts or components – if sufficiently processed so that they may be used solely for their intended purposes – also qualify as 'finished products' under the reasoning articulated by the Department"[24] and should be included in the illustrative example list. We disagree. As a preliminary matter, the GOC's proposed interpretation of the finished products provision contradicts the plain language of the scope, which states that "{c}omponents or parts of semi-finished or unassembled finished products made from subject merchandise that would otherwise meet the definition of the scope above are within the scope of these investigations." Furthermore, the GOC misstates the Department's reasoning with respect to finished products. We stated that products are "finished" when they have "undergone sufficient processing such that they can no longer be considered intermediate products, *and such products can be readily differentiated from merchandise subject to these investigations at the time of importation*."[25] The GOC's argument ignores the second portion of this sentence: to constitute a finished good, merchandise must be readily differentiable from subject merchandise at the time of importation. Furthermore, as the Department has noted, there are numerous types of components which fall squarely within the scope of these investigations.[26]

Finally, the GOC also asserts that, pursuant to the General Rules of Interpretation that govern the HTSUS, an "incomplete or unfinished article" may be classified under the heading for a finished product if it "has the essential character of the complete or finished article."[27] However, the Department is not required to follow the HTSUS General Rules of Interpretation in defining the scope of its investigations, and indeed, in defining the scope of our investigations, the HTSUS categories are provided for guidance only. As the Department explained in the language of the preliminary scope, "{a}lthough these HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of these investigations is dispositive."[28]

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[24] Canadian Parties Joint Scope Brief at 6. The GOC also summarily asserts that numerous additional products constitute finished goods which were not preliminarily determined by the Department to be finished goods in the Preliminary Scope Memorandum, and asserts that they should be included in the illustrative list of finished products. Specifically, the GOC claims that fence pickets and fencing materials, truss kits, pallet kits, window and door frame components, flooring products, tongue and grooved products that are end-matched, tongue and grooved paneling, certain siding, pre-cut bridging, pre-finished products of a certain thickness, ripped and chopped softwood lumber items, and landscape ties are finished products. We address those arguments separately, below.

[25] *See* Preliminary Scope Memorandum at Comment 6 (emphasis added).

[26] *See, e.g.*, Preliminary Scope Memorandum at Comments 16 (window and door frame components), 21 (notched stringers) and 34 (bed-frame components).

[27] Canadian Parties Joint Scope Brief at 8.

[28] Preliminary LTFV Determination, 82 FR 39833, 29836.

Here, the written description of the scope is clearly intended to cover components. The fact that such goods might be classified in a certain manner under the HTSUS does not alter our analysis.

For the reasons stated, we continue to find that finished products are outside the scope of these investigations. Additionally, the Department will not modify the language regarding finished products in the manner requested by RILA, IKEA, or the GOC.

However, in light of parties' expressed concerns regarding CBP's administration of this scope, in addition to our standard CBP instructions, we will provide CBP with a list of products which we have determined are finished goods, and thus not covered by the scope of these investigations.

Comment 2: Exclusions requested for Certain Types of Lumber Harvested from Western Red Cedar, Douglas Fir, and Hemlock Trees

In the *Preliminary Determination,* the petitioner did not agree to, and the Department did not grant, OCFP's request to exclude certain types of high-value, fine-grain lumber harvested from Western Red Cedar, Douglas Fir, and Hemlock trees and based on "minimum dollar values."[29]

OCFP argues that the Department should grant its exclusion request because the imports described in OCFP's narrowly-defined scope exclusion request do not compete with U.S. production in commercially meaningful quantities. Also, despite the petitioner's assertion that allowing this exclusion raises circumvention concerns, OCFP argues that its scope exclusion request is highly similar to the exclusion for wood harvested and produced in the Atlantic Provinces to which the petitioner has agreed. OCFP notes that judicial precedent established that the Department retains the ultimate responsibility for determining the scope of these investigations, and that the circumstances of this case warrant that the Department grant OCFP's request.

The petitioner notes that the products for which OCFP seeks an exclusion are types of softwood lumber that fall within the scope of these investigations, and no party has argued otherwise. The petitioner acknowledges that it has stated that it would be willing to consider a scope exclusion from OCFP if such an exclusion were administrable and sufficient to address issues of circumvention. However, the petitioner asserts that OCFP's proposed exclusion does not currently meet either of those criteria and is different from the exclusion of lumber certified by the Atlantic Lumber Bureau. The petitioner therefore opposes OCFP's request.

Department's Position:

We have not granted OCFP's exclusion request. As noted, the alleged "fine-grain" softwood lumber for which OCFP seeks an exclusion is lumber produced from Douglas Fir, Western Red Cedar, and Hemlock -- all species of softwood lumber. The scope does not provide for exclusions based solely on species of softwood lumber. Likewise, the scope provides no exceptions for softwood lumber based on price. Thus, all products for which OCFP has requested an exclusion are covered by the scope of these investigations.

[29] OCFP's Scope Brief at 1-10.

With respect to OCFP's argument that, despite opposition from the petitioner, the Department has the authority to exclude products from the scope, we do not disagree that there are specific situations in which the Department can modify a proposed scope over a petitioner's objections. However, we do not find that such a situation exists with respect to OCFP's merchandise.

The Court of Appeals for the Federal Circuit (CAFC) has explained that a "purpose of the petition is to propose an investigation," while a "purpose of the investigation is to determine what merchandise should be included in the final order."[30] In defining the scope of an order, the CAFC has explained that the Department has a "large" amount of discretion to determine "the appropriate scope" of an order to ensure that it "will be effective to remedy" the dumping or CVD subsidies determined to exist during an investigation.[31]

While the Department possesses the authority to determine the scope of an investigation, the Department's standard practice is to provide ample deference to the petitioner with respect to the definition of the product(s) for which it seeks relief during the investigation phase of an AD or CVD proceeding. Thus, in establishing the scope of an investigation, the Department strives to craft a scope that both includes the specific products for which the injured party, the petitioner, has requested relief, and excludes those products which would otherwise fall within the general scope physical description, but for which the petitioner does not seek relief.[32] Thus, the Department generally defers to the intent of the petition, fulfills the Department's statutory mandate to provide, where appropriate, the relief requested by the petitioning industry,[33] and, "absent an overarching reason to modify the scope in the petition, the Department accepts {the scope}" as written.[34]

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[30] *Duferco Steel, Inc. v. United States*, 296 F. 3d 1087, 1089 (Fed. Cir. 2002).

[31] *Mitsubishi Electric Corporation v. United States*, 700 F. Supp. 538, 556 (CIT 1988) (*Mitsubishi I*), *aff'd* by *Mitsubishi II*, 898 F.3d at 1583 (finding that the Department "has the authority to define and/or clarify what constitutes the subject merchandise to be investigated as set forth in the petition … taking into consideration such factors as … the known tactics of foreign industries attempting to avoid a countervailing duty order"); s*ee also* Senate Report on Trade Agreements Act of 1979, S. Rep. No. 96-249 (1979), at 45 (stating that "domestic petitioners and the administrators of the law have reasonable discretion to identify the most appropriate group of products for purposes of both the subsidy and injury investigations"); *Smith Corona Corp. v. United States*, 796 F. Supp. 1532, 1535 (CIT 1992) (Smith Corona); *Allegheny Bradford Com. v. United States*, 342 F. Supp. 2d 1172, 1187-88 (CIT 2004) (Allegheny); *Torrington v. United States*, 745 F. Supp. 718, 721 (CIT 1990), *aff'd* 938 F.2d 1276 (Fed. Cir. 1991) (holding that in certain circumstances the Department may "narrow" the definition of the scope as proposed in a petition as long as such that modification is based on record evidence and not "unreasonable"; finding the existence of five classes or kinds of merchandise, rather than one, as alleged in the petition).

[32] *See, e.g., Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances,* 73 FR 33977, 33979 (June 16, 2008); *Initiation of Antidumping Duty Investigations: Spring Table Grapes from Chile and Mexico*, 66 FR 26831, 26832-33 (May 15, 2001) (*Spring Table Grapes*).

[33] *See, e.g., Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 75 FR 7244, 7247 (February 18, 2010), *unchanged in Notice of Final Determination of Sales at Less Than Fair Value: Narrow Woven Ribbons with Woven Selvedge from Taiwan,* 75 FR 41804 (July 19, 2010) (*Narrow Woven Ribbons*).

[34] *See, e.g., Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 73 FR 51788, 51789 (September 5, 2008), *unchanged in Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 74 FR 4913 (January 28, 2009).

There are, however, as OCFP argues, situations in which public policy requires that the Department modify the petitioner's proposed scope. In those occasions, the leading reasons for such modification are to ensure that the scope can be sufficiently administered and to prevent the scope from being susceptible to circumvention and evasion.[35]

The petition scope did not exclude "fine-grain" lumber harvested from Douglas Fir, Hemlock, and Red Cedar trees; nor did it exclude certain products based on dollar value. Furthermore, the petitioner has continuously stated on this record that due to difficulty in identifying species, grade and value,[36] there are significant circumvention concerns which would accompany such an exclusion, and neither OCFP, nor any other party, has provided sufficient evidence that there exists a method for both instituting such an exclusion, and ensuring that the threat of circumvention through such an exclusion is extinguished. Thus, we determine that this is not an appropriate situation in which to modify the proposed scope, especially in light of the petitioner's legitimate circumvention concerns.

The Department received numerous comments in this investigation requesting that the Department modify the proposed scope against the expressed intentions of the petitioner. Tellingly, however, no party, including OCFP, cited to examples in which the Department made a modification outside of the context of concerns of administration or evasion. To be clear, however, the Department's practice is only to modify the scope as proposed by the petitioner if that proposed scope cannot be administered without difficulty or there are evasion concerns *as a result of the proposed scope language*. The Department's practice is not, as it appears some parties have argued, to allow for an exclusion not supported by the petitioner simply because the hypothetical exclusion of a product could be administered with little difficulty and the possibility of evasion is allegedly low. In other words, in the vast majority of cases, the Department will defer to the petitioner's proposed language, and only consider modifying that language when the proposed scope, itself, raises certain concerns with the Department and CBP.[37] As that is not the situation in this case, we agree with the petitioner that OCFP's merchandise is covered by the scope of these investigations, and an exclusion is not warranted.

Comment 3: Previous Scope Determinations

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[35] *See, e.g., Certain Steel Wheels from the People's Republic of China: Notice of Final Determination of Sales at Less Than Fair Value and Partial Affirmative Final Determination of Critical Circumstances*, 77 FR 17021 (March 23, 2012), and accompanying Issues and Decision Memorandum at Comment 1.

[36] As noted by the petitioner, grade, value, and species are all difficult characteristics to confirm. This was attested to by the association on which OCFP wanted to rely to verify these characteristics for the purpose of administering this exclusion. *See* Letter, "Canadian Softwood Lumber Exclusion Request by Oregon-Canada Forest Products," May 5, 2017 at 2-4.

[37] *See, e.g., Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 75 FR 7244, 7247 (February 18, 2010), *unchanged in Notice of Final Determination of Sales at Less Than Fair Value: Narrow Woven Ribbons with Woven Selvedge from Taiwan,* 75 FR 41804 (July 19, 2010) (*Narrow Woven Ribbons*); *see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 FR 15539 (April 2, 2002) (*Lumber IV Final Determination*), and accompanying Issues and Decision Memorandum at "Scope Issues."

In the *Preliminary Determination*, the Department stated that it would not adopt scope exclusions simply based on a product's status in the earlier softwood lumber proceedings or under the *2006 SLA*[38] and noted that the scope coverage of *Lumber IV* and the *2006 SLA* is not determinative of the scope of these investigations.[39]

While acknowledging that the Department's prior scope determinations in *Lumber IV* are not dispositive of the scope issues in these investigations, the GOC claims that the Department is still required to explain its reasoning for deviating from prior scope determinations and cites to several decisions by the Court of International Trade (CIT) that it claims supports its contention.[40]

The petitioner states that the Department did not err in its preliminary scope determinations for the simple reason that the scope of these investigations is different from that in earlier softwood lumber proceedings and under the SLA 2006, and as such, the factual findings of these proceedings are not directly applicable to the current investigation.

Department's Position:

The GOC's arguments are legally incorrect. Section 19 CFR 351.225(k)(1) of the Department's regulations require that after an investigation is completed, and the scope of an order has been defined, if a party requests a scope ruling, the Department will consider as part of that scope ruling "prior determinations" of the agency. Accordingly, in the bevy of cases cited by the GOC, the CIT held repeatedly that the Department must look to its prior scope determinations and rulings arising out of the same AD or CVD order and consider those determinations to "either conform to its prior norms and decisions or explain the reason for its departure from such precedent."[41] The Court has *not* held, however, that the Department "must consider its prior scope rulings," as the GOC claims, arising out of former, differently-worded scopes from different investigations with different petitioners and different injury determinations, and "articulate why" it is making a determination "departing from those rulings."[42] The GOC claims that the Department "contravenes substantial CIT precedent," without understanding what that

[38] *See* 2006 Softwood Lumber Agreement Between the Government of the United States of America and the Government of Canada Extending the Softwood Lumber Agreement Between the Government of the United States of American and the Government of Canada, As Amended (Jan. 23, 2012) *(2006 SLA*). *See* Letter, "Petition for the Imposition of Antidumping and Countervailing Duties on Imports of Certain Softwood Lumber Products from Canada," November 25, 2016, Volume I, Exhibit 63.
[39] *See* Preliminary Scope Memorandum at Comment 4.
[40] *See Springwater Cookie & Confections, Inc. v. United States*, 20 C.I.T. 1192 (1996) where the CIT stated "Commerce has not expressed any intention of or rational reasons for deviating from its method of analysis in similar cases." *See also Allegheny Bradford Corp. v. United States*, 342 F. Supp. 2d 1172 (CIT 2004) where the CIT explained that the Department has a "general obligation to follow prior, similar scope determinations," and noted that adherence to prior scope determinations "is premised in part on the fact that the prior decisions are indeed determinations, with formal procedures to ensure reliable results."
[41] *See Russ Berrie & Co. v. United States*, 57 F. Supp. 2d 1184 (Ct. Int'l Trade 1999) where the CIT determined that the Department's analysis of its prior similar scope determinations "satisfi{ed} the principle of administrative law that an agency must either conform to its prior norms and decisions or explain the reason for its departure from such precedent."
[42] Canadian Parties Joint Scope Brief at 11-12.

precedent means or the basis for that precedent in the first place.[43] It is simply not true that the Department "reversed course" from prior lumber scope rulings or "departed" from "prior scope determinations,"[44] because these are new investigations with a new petitioner, and the products allegedly causing harm differ from the products allegedly causing harm in previous lumber investigations.

Put another way, the underlying facts in *Lumber IV* are not the facts before us in these investigations, just as the facts in the *2006 SLA* were not the same as the facts before us in these investigations. Thus, the GOC is incorrect in claiming that the Department is required to distinguish between its treatment of certain products in the context of the scope of these investigations when compared to the treatment of such products in *Lumber IV* and the *2006 SLA*.

In any case, in the Preliminary Scope Memorandum, we set forth the reasons why each of the following products in question are covered by the scope of these investigations. Primarily, the reason was simple: the merchandise falls within the description of the scope of these investigations, and the party alleged to be harmed by dumping and subsidization, the petitioner, has not agreed to an exclusion for these products:

- Fence Pickets and Fencing Materials (discussed in detail in the Preliminary Scope Memorandum at Comment 11),
- Truss Kits (Comment 12),
- Pallet Kits (Comment 13),
- Home Package Kits (Comment 14),
- Notched Stringers (Comment 21) and
- Box-spring frame components (Comment 34).[45]

In *Lumber IV*, the petitioner proposed a scope in the underlying investigations and agreed to modifications to the scope that resulted in exclusions for each of the products listed above that are now covered by the scope of these current investigations.[46] While at times, the stated reason for the non-coverage of certain products in *Lumber IV* is stated to be that the scope does not cover the merchandise in question[47] and at other times the merchandise is stated to be excluded,[48] what is clear is that the petitioner articulated that it had no interest in covering that merchandise in *Lumber IV* and that the Department ultimately stated that it was excluding each of these products in line with the petitioner's wishes. However, here, the petitioner has explicitly stated

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[43] *Id.* at 12.
[44] *Id.* at 14, 17.
[45] *See* Preliminary Scope Memorandum at Comments 11-14, 21, and 34.
[46] *See Notice of Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Certain Softwood Lumber Products from Canada*, 66 FR 43186, 43187 (August 17, 2001).
[47] *Id.*
[48] *See* Memorandum, "Class or Kind Determinations and Consideration of Certain Scope Exclusion Requests," dated March 12, 2002 (Lumber IV Preliminary Scope Memorandum) at Appendix II. This memorandum was included in the Preliminary Scope Memorandum at Attachment III. *See also Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products from Canada*, 70 FR 73437 (December 12, 2005) at section entitled "Scope of the Order."

in its rebuttal case brief[49] and throughout these proceedings, that the scope of these investigations is intended to cover each of the products listed above which were not covered in *Lumber IV*.

With regard to product-specific arguments, the GOC claims that truss kits are finished products and that the Department acknowledged this in *Lumber IV* when it stated that "{p}etitioners accept the principle that pallets and 'legitimate' pallet kits are outside the scope of these investigations" and the Department's statement that "truss kits are finished trusses unassembled."[50] However, the GOC has taken these statements out of context. As the memorandum cited by the GOC indicates, the petitioner had already agreed to exclude truss kits in *Lumber IV* and the quotations cited by the GOC were generated from a discussion of how to create an administrable exclusion.[51] If the truss kits had already been found to be outside of the scope, a discussion as to how to exclude the truss kits would be unnecessary.

With respect to the GOC's "finished products" claim, the GOC has cited to no analysis undertaken by the Department in *Lumber IV* to determine whether truss kits are finished products and thus outside the scope. On the other hand, we did conduct a finished product analysis in the Preliminary Scope Memorandum of these investigations.[52] The Department preliminarily determined in these investigations that truss kits do not qualify as finished products, but instead "that truss kits contain minimally-processed lumber that is explicitly covered by the scope."[53] We further cited to industry descriptions of truss kits demonstrating that they consist primarily of dimension lumber.[54] Thus, we explained in the Preliminary Scope Memorandum the reasons for our finding that certain components of truss kits are not finished products and are thus covered by the scope of these investigations.

In its scope brief, the GOC did not specifically address the Department's analysis and reasoning in the Preliminary Scope Memorandum for why we find truss kits to be within the scope of these investigations. Instead, it merely stated that it does not agree with the conclusion of this analysis and that "legitimate truss … kits are not intended to be within the scope of these investigations."[55] For the reasons we have provided, that conclusion is not supported by the expressed intentions of the petitioner, nor by the record evidence. Accordingly, we have determined for the purposes of this final determination that truss kits are covered by the scope of these investigations.

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[49] *See* Petitioner Rebuttal Brief at 17-19 and 46-59.
[50] Canadian Parties Joint Scope Brief at 14-16.
[51] *See* Letter from the GOC, "Certain Softwood Lumber Products from Canada: Comments on Product Coverage and Scope of the Investigations," dated January 9, 2017 at Attachment 4 (containing a memorandum titled, "Scope Clarification in the Antidumping and Countervailing Duty Investigations on Softwood Lumber from Canada").
[52] *See* Preliminary Scope Memorandum at Comment 12.
[53] *Id.*
[54] *Id.*
[55] Canadian Joint Scope Brief at 15. We note that the Structural Component Building Association (SCBA) commented on the *Preliminary Determination* with respect to trusses. *See* Letter from SCBA, "Re: June 23, 2017 Memorandum on Preliminary Scope Decisions – Comments from SBCA as Interested Party," dated July 4, 2017 (SCBA Comments). Because SCBA's comments do not address the Department's conclusions regarding the status of assembled trusses as finished products, we do not further consider SCBA's comments here.

The GOC has stated that its arguments regarding truss kits apply equally to pallet kits. Just as we explained why truss kits were not finished products and were covered by the scope of these investigations, we also did so with regard to pallet kits in the Preliminary Scope Memorandum, explaining that pallet kits consist largely of dimensional lumber.[56] We further noted that the scope states that it covers softwood lumber that may be classified by CBP as pallet components and also explicitly states that it covers notched stringers, which are the main component of pallets.[57] Just as with truss kits, another difference between these investigations and those in *Lumber IV* is that here the petitioner has explicitly stated that it does not agree to an exclusion for pallet kits and that pallet kits are in-scope merchandise. In addition, in its brief, the GOC also did not address any of the details or arguments set forth in the Preliminary Scope Memorandum that were the basis for our finding pallet kits to be covered by the scope of these investigations. Instead, it argued only that it disagreed with this finding and that "legitimate … pallet kits are not intended to be within the scope of these investigations."[58] For the reasons we have provided, that conclusion is neither supported by the expressed intentions of the petitioner, nor by the record evidence. Accordingly, we have determined for purposes of this final determination that pallet kits are also covered by the scope of these investigations.

Comment 4: Whether Certain Products are Finished Products

In the Preliminary Scope Memorandum, the Department rejected arguments that it exclude the products enumerated below. We stated that the products were covered, most of them explicitly, by the scope of these investigations and that the factors that the GOC identifies as distinguishing features of the products in question did not differentiate the products from softwood lumber covered by the scope of these investigations.

We did not find any of the following products to meet our definition of finished products, and we preliminarily determined these products were within the scope of the investigations.[59] We also noted that the scope did not provide for an exclusion for any of the products identified below, and that the petitioner had not supported exclusions for these products:

- Fence Pickets and Fencing Materials (discussed in detail in the Preliminary Scope Memorandum at Comment 11);
- Truss Kits (Comment 12);
- Pallet Kits (Comment 13);
- Window and door frame components (Comment 16);
- Flooring Products (Comment 17);
- Tongue and Grooved Products That are End-Matched (Comment 18);
- Tongue and Grooved Paneling (Comment 19);
- Certain Siding (Comment 20);
- Notched Stringers (Comment 21);
- Pre-Cut Bridging (Comment 22);

[56] *See Preliminary Scope Memorandum* at Comment 13.
[57] *Id*.
[58] *Id.* at 15.
[59] *See* Preliminary Scope Memorandum at Comment 6.

- Pre-Finished Products of a Certain Thickness (Comment 23);
- Ripped and Chopped Softwood Lumber Items (Comment 24); and
- Landscape Ties (Comment 26).[60]

The GOC argues that all of these products meet the Department's definition of finished products and thus, based on the Department's acknowledgement at Comment 6 of the Preliminary Scope Memorandum that finished products are outside the scope of these investigations, these products should be excluded. The GOC argues that the petitioner's main motivation for not excluding the products at issue is due to alleged circumvention and/or administrability concerns, which are unfounded and thus cannot be a basis for a refusal to exclude the products at issue.

The petitioner states that none of the products in question are finished products, that the scope covers each product, and that the scope as proposed was intended to cover each of these products. Additionally, the petitioner states that an exclusion for any of the products in question would pose a particularly high risk of circumvention and would present unique administrability challenges for CBP.

Department's Position:

All of these products, which were found to be in-scope merchandise in the *Preliminary Determination*,[61] are covered by the scope of the investigations, and are not finished products outside the scope of these investigations.

We disagree with the GOC's blanket statement that the above-referenced products meet the definition of finished products set forth in Comment 1. As noted above, in the Preliminary Scope Memorandum we provided individual explanations addressing why each of the products under discussion here are covered, and thus do not meet our definition of finished products.[62] The GOC did not address the reasoning and analysis we set forth in the Preliminary Scope Memorandum concerning why these products are covered by the scope in its brief. Accordingly, our decisions regarding these products remain unchanged.

While the GOC speculates that the petitioner's main motivation for not excluding the products in question is due to unjustified circumvention concerns, as we noted in the Preliminary Scope Memorandum[63] and as we detailed in Comment 2 above, if the petitioner identifies a particular product as covered by the scope during the course of the investigation, the Department will give substantial deference to the petitioner to determine whether a product-based exclusion is appropriate. It is the petitioner that is allegedly harmed by GOC subsidization and dumped Canadian exports, and therefore it is the petitioner whose concerns about circumvention should be considered and addressed.

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[60] *Id*. at Comments 11-13, 16-24, and 26.
[61] *Id.* We note that SCBA commented on the *Preliminary Determination* with respect to wood paneling. *See* SCBA Comments at 1-4. Because SCBA's comments do not address the Department's discussion regarding the status of wood paneling, we do not further consider them here.
[62] *See* Preliminary Scope Memorandum at Comments 11-13, 16-24, and 26.
[63] *Id.* at Comment 4.

Accordingly, we take no heed of the GOC's assertion that the petitioner's concerns regarding circumvention are "unfounded," or that there exist methods for limiting circumvention concerns. As noted above, if the petitioner believes certain scope language is necessary to address potential circumvention, and we find that such language is otherwise administrable, the Department will generally defer to the petitioner's desired scope language.

Furthermore, even if the petitioner was required to state its reasons for refusing to exclude certain merchandise from these investigations, which it is not, it has satisfied that requirement in this case. For each of the products listed above, the petitioner has explained that the product is explicitly covered by the AD/CVD petitions, or that the exclusion of the product would allow circumvention of a potential order by allowing other products to be imported without the assessment of AD/CVD duties, notwithstanding the petitioner's intent to cover such merchandise in the petition.

The GOC argues that the petitioner claims that it is only being injured by dimensional lumber, but the petitioner has stated clearly on the record that it is being injured not only by dimensional lumber, but also by semi-finished lumber, and even finished lumber products that could be interchanged with semi-finished or raw dimensional lumber, such as fence pickets.[64] The petitioner's basis for covering such merchandise is that there is little difference between these products and general lumber, as the products could be used in a myriad of applications.[65] Thus, the GOC's argument that the products listed above are either outside the scope or should be excluded because they are not the products for which the petitioner seeks relief, is incorrect. These products do not fit the definition of finished products as applied to these investigations and are the very type of products for which the petitioner seeks relief.

As noted throughout this case, due to the limited or complete lack of difference between dimensional lumber and many of the products that the GOC argues should be excluded, the petitioner's circumvention concerns are not unreasonable. Pallet components, truss components, stringers, fencing materials, and landscape ties are all covered by the definition of subject merchandise, as described in the scope of these investigations. Thus, allowing an exclusion for such products would appear to provide an opportunity for exporters of subject lumber to circumvent the order by allowing them to identify exports of lumber, regardless of actual intent, as pallet or truss components, or as other products for which the GOC requests an exclusion or a finding that the product is out of scope. The petitioner has cited, throughout this record, to instances of circumvention or administrability challenges posed by the products under discussion. For instance, the petitioner has cited to difficulties experienced by CBP in distinguishing truss components from general lumber,[66] fenceposts from general lumber,[67] and prefabricated home components from general lumber.[68] Thus, the GOC's assertions that many

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[64] *See* Letter, "Supplement to the Petitions for the Imposition of Antidumping Duties on Imports of Certain Softwood Lumber Products from Canada: Response to the Department's Supplemental Questions," dated December 1, 2016 (Supplement to Petition), at 1-6.
[65] *Id*.
[66] *Id.* at 1-2.
[67] *See* Letter from Petitioner, "Response to Comments on Scope," dated January 19, 2017 (Petitioner January 19, 2017 Scope Comments), at 10.
[68] *Id.* at 18-19. While the GOC has not discussed prefabricated home kits here, it has elsewhere, and such kits are

of the products in question here, if excluded, would not raise circumvention concerns is not supported by the evidence on the record.

Once the International Trade Commission (ITC) and Department have agreed to initiate an investigation on a certain scope, it is uncommon for the petitioner to be compelled to justify why it has rejected demands that it change such a scope. However, here, the petitioner has further demonstrated that its refusals to change the current scope are justified because such products are either the very products from which it seeks relief, or products that present reasonable circumvention concerns. While the Department has the discretion to modify a proposed scope in certain circumstances, use of such discretion is inappropriate here, where the petitioner has raised legitimate concerns that changing a scope would create significant potential for circumvention. Accordingly, we find that fence pickets and fencing materials, truss kits, pallet kits, window and door frame components, flooring products, tongue and grooved products that are end-matched, tongue and grooved paneling, certain siding, notched stringers, pre-cut bridging, pre-finished products of a certain thickness, ripped and chopped softwood lumber items, and landscape ties are all subject to the scope of these investigations.

Comment 5: Craft Kits

In the Preliminary Scope Memorandum, in our analysis relating to finished goods, the Department determined that there was insufficient information on the record to determine the scope status of "craft kits."[69] RILA asserts that the Department should explicitly add craft kits to the illustrative list of out-of-scope products.[70]

The petitioner argues that the Department should not add "craft kits" to the illustrative list of out-of-scope products at this time.[71]

Department's Position:

We agree with the petitioner, in part. RILA asserts that the Department's proposed language relating to finished goods was "not sufficiently comprehensive because it would not cover such items as craft kits and other do-it-yourself consumer items that are unassembled at the time of import," and asserts that the Department should explicitly add "craft kits" to the illustrative list of out-of-scope products.[72] RILA argues that "craft kit" is not a vague term, and that the term is a "commonly accepted retail term."[73] However, regardless of whether the term is well understood in a retail context, as with any scope determination, the Department must have a confident understanding of the product in question in order to determine that product's scope status. In our Preliminary Scope Memorandum, we explained that the record did not permit us to

highly similar to the products under discussion here and the circumvention attempts identified by CBP are instructive.

[69] *See* Preliminary Scope Memorandum at Comment 6.

[70] *See* Canfor Scope Brief at 2; Canadian Parties Scope Brief at 6; RILA Scope Brief at 2; IKEA Scope Rebuttal at 2.

[71] *See* Petitioner Scope Rebuttal at 22.

[72] *See* RILA Scope Brief at 6.

[73] *Id.*

make a scope determination for products characterized as "craft kits."[74] Accordingly, we agree with the petitioner that it is not appropriate to list "craft kits" among the goods identified as finished products.

However, in its scope brief, RILA lists a number of products that, it asserts, fall within the broader category of "craft kits," including "wood bird feeders, toys, model houses, cars, boats and other vehicles."[75] We agree that such products are finished goods – and are not softwood lumber covered by the scope of these investigations. Accordingly, we will include "wood bird feeders," "wood toys," and "model houses, cars, boats and other vehicles" in our list of products identified as out-of-scope finished goods that will be submitted to CBP following the final determination in these investigations.

Comment 6: Whether Certain Scope Language Should be Removed

The GOC argues that the Department should remove the following paragraph from the scope language:

> Subject merchandise as described above might be identified on entry documentation as stringers, square cut box-spring-frame components, fence pickets, truss components, pallet components, flooring, and door and window frame parts. Items so identified might be entered under the following ten-digit HTSUS subheadings in Chapter 44: 4415.20.40.00; 4415.20.80.00; 4418.99.90.05; 4418.99.90.20; 4418.99.90.40; 4418.99.90.95; 4421.99.70.40; and 4421.99.97.80.[76]

The GOC states that it is well-settled Department practice that the written scope description, rather than particular HTSUS codes, controls what merchandise is covered. Thus, it is the GOC's contention that the above language is not only unnecessary, but will cause confusion because the products described above are finished products that the Department, supported by the petitioner, has determined are not within the scope.

The petitioner notes that it included the language above in the scope because it will help prevent circumvention. Thus, the petitioner opposes its removal. The petitioner notes that to the extent parties may have "cause for concern" or confusion regarding the applicable HTSUS codes listed in the scope of these investigations, parties should rely on the written description of the scope.

Department's Position:

We disagree with the GOC and have not removed the paragraph in question. The GOC claims that the paragraph only identifies items that are finished products. It does not. Each product mentioned in the above-referenced paragraph was explicitly determined in the Preliminary Scope Memorandum to be in-scope merchandise and, thus, found not to be a finished good for the

[74] *See* Preliminary Scope Memorandum at Comment 6.
[75] *Id.*
[76] The last two HTSUS numbers were inadvertently listed as 4421.91.70.40 and 4421.91.97.80 in the scope accompanying the preliminary determination in the AD investigation.

purposes of these investigations: stringers in Comment 21; square cut box-spring-frame in Comment 34; fence pickets in Comment 11; truss components in Comment 12; pallet components in Comment 13; flooring in Comment 17; and door and window frame parts in Comment 16.

Some of the HTSUS categories in the paragraph in question contain both in-scope-merchandise *(i.e.*, stringers, square cut box-spring-frame components, fence pickets, truss components, pallet components, flooring, and door and window frame parts) and out-of-scope merchandise. We believe specifying in the scope which products are covered (stringers, square cut box-spring-frame components, fence pickets, truss components, pallet components, flooring, and door and window frame parts) and which products are not covered (finished products, which we have now defined in the scope) will, contrary to the claims made by the GOC, make it easier to identify which products covered by these HTSUS categories are inside and outside of the scope. Thus, we have continued to include this paragraph in the scope of these investigations.

Comment 7: Wood Shims

In our Preliminary Scope Memorandum, the Department determined that wood shims are within the scope of these investigations.[77] JD Irving asserts that wood shims are finished products, and are therefore outside of the scope.[78] The petitioner asserts that the Department should not modify its analysis, and should continue to find such products to fall within the scope.[79]

Department's Position:

We agree with the petitioner. JD Irving asserts that wood shims are finished products.[80] However, as we explained in the Preliminary Scope Memorandum, to constitute finished products for the purposes of these investigations, products must have "undergone sufficient processing such that they can no longer be considered intermediate products," and such products must be "readily differentiated from merchandise subject to these investigations at the time of importation."[81] Wood shims do not meet the second criteria.

The scope covers "{c}oniferous wood, sawn, or chipped lengthwise, sliced or peeled, whether or not planed, whether or not sanded, or whether or not finger-jointed, of an actual thickness exceeding six millimeters." The products identified by JD Irving are wood shims that are made from coniferous wood that, in part, exceed 6 millimeters in thickness. Although the wood shims described by JD Irving are tapered to widths of less than 6 millimeters, the scope does not indicate that products are not covered by the scope if a portion of the product is less than 6 millimeters in thickness.[82] Accordingly, we find that wood shims are covered by the scope

[77] *See* Preliminary Scope Memorandum at Comment 10.
[78] *See* JD Irving Scope Brief at 3.
[79] *See* Petitioner Scope Rebuttal at 57-59.
[80] *See* JD Irving Scope Brief at 3.
[81] *See* Preliminary Scope Memorandum at Comment 6.
[82] The petitioner also expresses concern that JD Irving's proposed interpretation regarding tapered woods products would create avenues for circumvention, *i.e.*, by allowing irregularly cut wood products to avoid duties. *See* Petitioner Scope Rebuttal at 58.

because they cannot be readily differentiated from in-scope softwood lumber, and therefore do not constitute finished products as defined by the scope of these investigations.

Comment 8: Pre-Painted Wood Products

In our Preliminary Scope Memorandum, the Department determined that pre-painted wood products are within the scope of these investigations.[83]

Woodtone and Maibec assert that pre-painted decorative wood products are finished products, and therefore should be determined to be out-of-scope.[84] Woodtone and Maibec assert that pre-painted decorative wood products including "individual pieces used for siding" and "complete siding project kits" meet the Department's criteria for finished goods.[85] In support of their position, Woodtone and Maibec assert that "pre-painted wood products go through extensive, costly and sufficient processing such that the merchandise can no longer be considered an intermediate product."[86] Woodtone and Maibec explain that the production process:

> 1) uses specific species of wood that are particularly amenable to coating, 2) involves remanufacturing of standard dimensional lumber into non-standard dimensions without grade stamps for structural application, and 3) results in a variety of surfaces, including smooth, brush faced and combed, and a variety of profiles, including tongue and groove, and beveling. Finally, the pre-painted/stained products need no further processing before sale and use. Moreover, in Maibec's case the pre-painted wood products are sold as dedicated kits for use in a specific application (siding) at a specific site, and thus cannot be sold to the general market and are of limited value if returned unused by the customer.[87]

Woodtone and Maibec emphasize that these factors demonstrate that the products are highly processed and are not properly considered intermediate goods.[88] As a result, they assert, the merchandise must instead be considered finished products.

The petitioner asserts that such products fall within the scope of these investigations.[89]

Department's Position:

The Department disagrees with Woodtone and Maibec. We continue to find that "pre-painted decorative wood products" are within the scope of these investigations.

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[83] *See* Preliminary Scope Memorandum at Comment 7.
[84] *See* Woodtone/Maibec Scope Brief at 2.
[85] *Id.*
[86] *Id.* at 3.
[87] *See* Woodtone/Maibec Scope Brief at 3-4.
[88] *Id.* at 4.
[89] *See* Petitioner Scope Rebuttal at 54-57.

We disagree with Woodtone and Maibec's assertion that pre-painted wood products, as described by the parties, constitute finished goods.[90] As the Department discussed in its treatment of finished goods, for the purpose of this scope, we have defined finished goods as products that are not properly considered intermediate goods, and goods which "can be readily differentiated from merchandise subject to these investigations at the time of importation."[91] The merchandise described by Woodtone and Maibec, however, cannot be readily differentiated from in-scope merchandise. The parties describe their products as "individual pieces used for siding," "individual siding and trim components" and "complete siding project kits."[92] Siding, however, is explicitly covered by the scope of these investigations, which covers "{c}oniferous wood siding, flooring, and other coniferous wood (other than moldings and dowel rods), including strips and friezes for parquet flooring, that is continuously shaped (including, but not limited to, tongued, grooved, rebated, chamfered, V-jointed, beaded, molded, rounded) along any of its edges, ends, or faces, whether or not planed, whether or not sanded, or whether or not end-jointed." The other characteristics of Woodtone's and Maibec's merchandise (*e.g.*, relating to price, finishing, etc.) do not render the merchandise out-of-scope for the reasons discussed throughout the Preliminary Scope Memorandum.[93]

Finally, to the extent that Woodtone and Maibec seek to have their merchandise excluded from the scope, the petitioner has stated that the companies' description of their merchandise is insufficiently detailed to permit an exclusion, and therefore it does not agree to an exclusion.[94] As noted above, the Department generally defers to the petitioner with respect to matters involving intended scope coverage, and in this case there are no administrability or evasion concerns that warrant an exclusion of the merchandise in question. For these reasons, we continue to find that pre-painted decorative wood products are within the scope of these investigations.

Comment 9: I-Joists

In the Preliminary Scope Memorandum, the Department determined that I-joists constitute finished products, and are therefore outside the scope of these investigations.[95]

Central Canada and Canfor assert that the Department should continue to find that I-Joists are finished products outside the scope of these investigations. Moreover, Central Canada and Canfor assert that the Department should include a specific definition of I-joists in the scope.[96] Specifically, Central Canada and Canfor assert that the Department should include the following language in the scope to define the parameters of the term I-joist:

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[90] *Id.* at 4.
[91] *See* Preliminary Scope Memorandum at Comment 6.
[92] Woodtone/Maibec Scope Brief at 2, 5.
[93] Woodtone and Maibec assert that there is limited potential for circumvention if pre-painted wood products are determined to be out-of-scope, because these products require a high degree of processing, and cannot be used in structural applications. However, given that the Department finds these products to be in scope, this argument is moot. *See* Woodtone/Maibec Scope Brief at 5.
[94] *See* Petitioner Scope Rebuttal at 57.
[95] *See* Preliminary Scope Memorandum at 16-17.
[96] *See* Canfor Scope Brief at 2; Central Canada Scope Issues Brief at 12.

> Fully assembled I-Joists, also known as I-Beams or I-Joist Beams, meeting the following description: I-shaped structural members made by gluing together an oriented strand board sheet, as their center web, with grooved flanges made from 1650f-1.5E to 2400f-2.0E machine stress rated (MSR) lumber, finger-jointed or not, or from laminated veneer lumber (LVL) or other non-lumber products, in lengths up to 64 feet. Effective as of January 1, 2017, they are classified under HTSUS subheading 4418.99.90.40.

The petitioner agrees that I-joists are outside the scope of these investigations, but does not agree that it is appropriate to include a definition of I-joists in the scope.[97]

Department's Position:

The Department agrees with the petitioner. We continue to find that I-joists, for the reasons articulated in the Preliminary Scope Memorandum,[98] are outside of the scope of these investigations and are accordingly not subject merchandise. We also agree with the petitioner, Central Canada and Canfor that the particular I-joist products[99] described by Central Canada and Canfor, are included in the larger group of all I-joists that are out-of-scope merchandise.[100]

However, we disagree that the text of the scope should be amended further to identify these particular I-joist products, because including such language in the text of the scope is not necessary or appropriate. As an initial matter, to the extent possible, the Department attempts to avoid using HTSUS classifications in defining the parameters of a scope.[101] Additionally, in the revised scope, the Department has explained that I-joists – as a class of products – are not subject merchandise.[102] Identifying one particular type of I-joist in the language of the scope, such as the product identified by Central Canada and Canfor, would serve to create confusion and ambiguity regarding the scope status of other I-joists that are slightly different from the I-joist specification described above. The Department must take into consideration whether a modification could create additional complications in administering the finalized scope when defining the scope of an investigation.[103] We determine the modification proposed by Central Canada and Canfor would do so.

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[97] *See* Petitioner Scope Rebuttal at 17-18.
[98] *See* Preliminary Scope Memorandum at Comment 6. We note that SCBA commented on the *Preliminary Determination* with respect to I-joists. *See* SCBA Comments at 1-4. Because SCBA's comments do not address the Department's discussion regarding the status of I-joists as finished products, we do not further consider them here.
[99] *See* Canfor Scope Brief at 2; Central Canada Scope Brief at 12.
[100] The petitioner also agrees that the particular product described by Central Canada and Canfor is outside the scope of these investigations. *See* Petitioner Scope Rebuttal at 17-18.
[101] *See Certain Steel Nails from the Sultanate of Oman: Final Negative Countervailing Duty Determination*, 80 FR 28958 (May 20, 2015) and accompanying Issues and Decision Memorandum at 3.
[102] Specifically, we state that: "The following products are illustrative of the type of merchandise that is considered 'finished,' for the purpose of this scope: I-joists; assembled pallets; cutting boards; assembled picture frames; garage doors."
[103] *See, e.g., Certain Steel Wheels from the People's Republic of China: Notice of Final Determination of Sales at Less Than Fair Value and Partial Affirmative Final Determination of Critical Circumstances*, 77 FR 17021 (March 23, 2012) and accompanying Issues and Decision Memorandum at Comment 1.

The Department continues to find that the described I-joists are not within the scope of these investigations. However, we will not include the additional language suggested by Central Canada and Canfor, which describes a particular type of I-joist, in the scope of these investigations.

Comment 10: Miscellaneous Products Discussed by the GBC and the BCLTC

In our Preliminary Scope Memorandum, we stated that high-value products, Western Red Cedar, and lumber from private lands, including First Nation Treaty Settlement Lands, are covered by the scope of these investigations.[104] The GBC and the BCLTC assert that the above-referenced products should be excluded from the scope of these investigations.[105]

Department's Position

We disagree with the GBC and the BCLTC. In our Preliminary Scope Memorandum, we addressed the parties' extensive arguments regarding high-value products, Western Red Cedar, and lumber from private lands, including First Nation Treaty Settlement Lands, and determined that each of these products is covered by the scope of these proceedings.[106] The GBC and the BCLTC have provided a cursory discussion of each product and have raised no new arguments. Accordingly, for the reasons stated in our Preliminary Scope Memorandum, we continue to find that these products are covered by the scope of these investigations.

Comment 11: Bed-Frame Components/Crating Ladder Components

In the *Preliminary Determination*, the Department adopted exclusions for bed-frame kits and for particular bed-frame components, and noted that it would consider expanded exclusionary language covering bed-frame components and an exclusion covering crating ladder components, if submitted by interested parties. BarretteWood, EACOM, and Central Canada[107] have submitted revised exclusionary language relating to bed-frame components:

> Box-spring frame components, also known as bed-frame components, meeting all of the following conditions, regardless whether packaged or shipped together or separately: (1) Sold as complete sets with all the necessary wooden components to assemble a certain number of boxspring frames with no further processing required; (2) The end rails must be radius-cut at both ends and must be substantial cuts so as to completely round one corner; (3) None of the components exceeds 1" in actual thickness or 84" in length; and (4) at least 25 percent by volume (MBF) of each entry must consist of radius-cut components.

[104] *See* Preliminary Scope Memorandum at Comment 27, 30, and 32.
[105] *See* Letter from GOC, "Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada: Canadian Parties' Comments Regarding Scope Status of Remanufactured Products," dated August 24, 2017, at V-103 through V-105.
[106] *See* Preliminary Scope Memorandum at Comment 27, 30, and 32.
[107] *See* Barrette Wood and EACOM Scope Brief at 3-4; Central Canada Scope Brief at 14-15.

Parties have submitted an analogous request for an exclusion for crating ladder components.

One domestic producer of bed frames, UFP, submitted rebuttal comments arguing that the proposed language covering bed-frame components "regardless whether packaged or shipped together or separately" would not be administrable and would be unenforceable.[108] Furthermore, the petitioner also concluded in its rebuttal brief that "the Department should not grant the requests of Central Canada and Barrette and EACOM to exclude bed or box spring frame components, or crating ladder components, from the scope of these investigations," on the same basis – that there would be too great a risk of circumvention and concerns with respect to the "administrability of the exclusion by the Department and Customs."[109]

Department's Position:

The Department will not adopt the proposed exclusions. The Department held consultations with CBP,[110] and CBP advised that the proposed exclusion was not administrable and subject to a large risk of circumvention. CBP highlighted administration problems relating to assessing whether merchandise qualifies for an exclusion when portions of such merchandise enters in separate shipments and customs entries. Further, with respect to the exclusion for bed-frame components, assessing the volume of merchandise meeting the "radius-cut" requirement would be impractical for field agents. Finally, CBP raised concerns regarding potential circumvention. CBP's concerns regarding this language are consistent with the Department's concerns, as expressed earlier in this proceeding, as well as those reflected by UFP and the petitioner in their rebuttal briefs.

Throughout this investigation, the Department has held numerous meeting and phone calls with interested parties in an effort to achieve a workable and commercially viable exclusion for bed-frame components and crating ladder components. Additionally, the Department has adopted less expansive exclusions covering bed-frame components, where possible.[111] Ultimately, as explained above in Comment 2, it is the Department's obligation to ensure that the scope of these investigations is administrable for CBP and the Department, and that any resulting order is not ripe for circumvention. Given these concerns, we are not able to adopt the parties' proposed exclusionary language.

Comment 12: U.S.-Origin Lumber Sent to Canada For Further Processing

In the Preliminary Scope Memorandum, the Department adopted language jointly submitted by the petitioner and the GOC to exclude from the scope of these investigations U.S.-origin lumber that has undergone three types of processing in Canada: (1) kiln drying; (2) planing to create smooth-to-size board; or (3) sanding.[112] In adopting that exclusion, we declined to adopt a broader version of the exclusion as proposed by two interested parties. However, we explained:

[108] UFP's Scope Rebuttal at 6.
[109] Petitioner's Rebuttal Scope Brief, at 34-37.
[110] *See* Memorandum, "Telephone Conversation Regarding Proposed Exclusion Language," dated July 5, 2017.
[111] *See* Preliminary Scope Memorandum at 49-50.
[112] *Id*. at Comment 1.

"should interested parties, including the petitioner, agree to expand the scope of this exclusion in the manner described by CIFQ and Matra, the Department would consider modifying the exclusionary language for the final determinations to reflect the agreed upon language provided the Department has sufficient time to do so."[113]

Central Canada, NAFP and Woodtone assert that the Department should expand the parameters of the exclusion.[114] Central Canada asserts that neither the Department nor any of the other parties has provided a reason as to why the exclusion should not be expanded to include lumber that is sent to Canada for profiling along any of its edges, ends or faces, or finger jointing. NAFP asserts that trimming, ripping/edging, re-sawing, and notching do not alter the U.S.-origin status of the lumber, and do not change the name, use or character of the U.S.-origin lumber in a degree that is substantially different from sanding, planning or kiln drying, *i.e.*, the agreed upon processing steps that meet the subject exclusion. Similarly, Woodtone requests that texturing/resawing, profiling, and pre-painting/staining do not alter the U.S.-origin status of the lumber, and do not change the name, use or character of the U.S.-origin lumber in a degree that is substantially different from sanding, planning or kiln drying.

The petitioner opposes any expansion of the exclusion.[115]

Department's Position:

The Department disagrees with Central Canada, NAFP and Woodtone. In the Preliminary Scope Memorandum, in adopting an exclusion for U.S.-origin lumber sent to Canada for further processing, we declined to adopt a broader version of the exclusion as proposed by two interested parties; however, we explained: "should interested parties, including the petitioner, agree to expand the scope of this exclusion in the manner described by CIFQ and Matra, the Department would consider modifying the exclusionary language for the final determinations to reflect the agreed upon language provided the Department has sufficient time to do so."[116] The petitioner has not agreed to any modification to the above-referenced exclusion.

Central Canada asserts that neither the Department nor any of the other parties has provided a reason as to why the exclusion should not be expanded to include lumber that is sent to Canada for profiling along any of its edges, ends or faces, or finger jointing.[117] Central Canada's argument on this point, however, is inapposite – the petitioner has explicitly opposed this request.[118] It is the Department's practice "to provide ample deference to the petitioner with respect to the definition of the product(s) for which it seeks relief during the investigation

[113] *Id.*
[114] *See* Central Canada Scope Brief at 2-3; NAFP Scope Brief at 2-3; Woodtone Scope Brief at 2-3; Central Canada Scope Rebuttal at 2-3.
[115] *See* Petitioner Scope Rebuttal at 39-40.
[116] *See* Preliminary Scope Memorandum at 9.
[117] *See* Central Canada Scope Brief at 2.
[118] *See* Petitioner Scope Rebuttal at 39-40.

phase of an AD or CVD proceeding."[119] In light of the lack of consent from the petitioner, the Department will not agree to the proposed expanded exclusion.

NAFP requests that trimming, ripping/edging, re-sawing, and notching be added to the list of processing steps that lumber may undergo while still meeting the requirements of this exclusion.[120] Woodtone requests that texturing/resawing, profiling, and pre-painting/staining similarly be added to the list of processing steps permitted under this exclusion.[121] NAFP provides several explanations for why the Department should modify the above-referenced exclusion. NAFP asserts that trimming, ripping/edging, re-sawing, and notching do not alter the U.S.-origin status of the lumber, and do not change the name, use or character of the U.S.-origin lumber in a degree that is substantially different from sanding, planning or kiln drying, *i.e.*, the agreed upon processing steps that meet the subject exclusion.[122] NAFP also asserts that such processing would not change the tariff heading or country of origin for NAFTA purposes.[123] Finally, NAFP argues that adoption of its proposed expanded exclusion would allow remanufacturers to purchase lumber from U.S. sawmills without undermining the remedial nature of any potential AD and CVD orders.[124] Woodtone presents an analogous set of arguments in support of its position that texturing/resawing, profiling, and pre-painting/staining should be added to the list of processing steps permitted under this exclusion.[125]

Despite the arguments provided by NAFP and Woodtone, the petitioner has not agreed to a revised exclusion. The petitioner states that it took into consideration the "types of processes" that would be "minor and sufficient to ensure that Customs could readily discern whether" lumber is of U.S. origin.[126] The petitioner explains that outside of the three processing for which it has agreed to an exclusion, the additional processes proposed by NAFP and Woodtone do not meet its criteria. The petitioner states, for example, that notched lumber is covered by the plain language of the scope and cannot be considered a minor process, and asserts that "staining, pre-painting, ripping, and the other processes described by NAFP and Woodtone would prevent Customs from readily discerning whether the lumber is of U.S. origin."[127]

As we explained in the Preliminary Scope Memorandum, and above, the Department gives substantial deference to the petitioner in fashioning the scope of a petition and the subsequent investigations.[128] The Department's practice "is to allow petitioner to define the scope because

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[119] *Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers from Mexico*, 77 FR 76288 (December 27, 2012) and accompanying Issues and Decision Memorandum at 7 (Washers IDM); *see also* Preliminary Scope Memorandum at 6 (*citing Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 75 FR 7244, 7247 (February 18, 2010), *unchanged In Notice of Final Determination of Sales at Less Than Fair Value: Narrow Woven Ribbons with Woven Selvedge from Taiwan,* 75 FR 41804 (July 19, 2010).
[120] *See* NAFP Scope Brief at 3.
[121] *See* Woodtone Scope Brief at 3.
[122] *See* NAFP Scope Brief at 3.
[123] *Id.*
[124] *Id.*
[125] *See* Woodtone Scope Brief at 3-4.
[126] *See* Petitioner Scope Rebuttal Brief at 40.
[127] *Id.*
[128] *See* Washers IDM at Comment 7; *see also* Preliminary Scope Memorandum at 6.

petitioners have close knowledge of the products for which they seek relief"[129] and the Department will accept the scope as written without "an overarching reason to modify the scope in the petition."[130] The petitioner has explained that it does not believe an exclusion is appropriate for U.S.-origin lumber which is further processed beyond the kiln drying, planing, or sanding processes described above, and we do not believe that there are administration-related or evasion-related concerns which would otherwise justify a broadening of the product exclusion. Accordingly, the Department will not modify the scope of the investigations to include an exclusion for U.S. origin lumber which is processed in Canada using the processes identified by Central Canada, NAFP and Woodtone.

Comment 13: Softwood Lumber Produced in Canada from U.S.-Origin Logs

In the Preliminary Scope Memorandum, the Department declined to adopt an exclusion covering lumber produced in Canada from U.S.-origin logs.[131] Central Canada asserts that the Department should exclude from the scope of these investigations any lumber produced in Canada from U.S. logs.[132] Specifically, Central Canada asserts that U.S. logs are not the merchandise of concern to the petitioner because those logs did not benefit from alleged stumpage subsidies in Canada. Because the logs did not benefit from stumpage, Central Canada argues that the softwood lumber produced from those logs should not be considered subject to the scope of these investigations. Further they claim that not granting an exclusion would cause serious injury to the U.S. timber industry and that the exclusion would be readily enforceable. The petitioner opposes this exclusion, asserting that the exclusion relates to products that are covered by the plain language of the scope, and there is no question that those products are softwood lumber made in Canada. Further, the petitioner asserts that the issue of whether U.S.-origin logs benefitted from countervailable subsidies or are sold at fair market prices is immaterial to the Department's scope analysis, as the potential injury to this industry does not relate to the language of the scope, which expressly covers the product at issue.[133]

Department's Position:

The Department disagrees with Central Canada. As an initial matter, we note that lumber produced from U.S-origin logs clearly constitutes Canadian softwood lumber. Such logs enter Canada as non-subject merchandise, and are processed into subject merchandise in Canada. No party argues otherwise. Accordingly, the request from Central Canada is that we treat certain types of Canadian softwood lumber in a different manner than other types of Canadian softwood lumber solely because of the log's place of harvesting.

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[129] *Notice of Final Determination of Sales at Less Than Fair Value: Outboard Engines from Japan*, 70 FR 326 (January 4, 2005) and accompanying Issues and Decision Memorandum at Comment 2.
[130] Preliminary Scope Memorandum at 7 (*citing Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 73 FR 51788, 51789 (September 5, 2008), *unchanged in Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 FR 4913 (January 28, 2009)).
[131] *See* Preliminary Scope Memorandum at Comment 31.
[132] *See* Central Canada Scope Brief at 3-11.
[133] *See* Petitioner Scope Rebuttal at 37-39.

As we have explained, in determining the scope of an AD or CVD investigation, the Department gives substantial deference to the intent of the party allegedly being injured by dumping and subsidization – the petitioner. In this case, the petitioner has explicitly, and consistently, opposed an exclusion for lumber made in Canada from logs harvested in the United States.[134]

Central Canada asserts that despite the petitioner's opposition, the Department should nonetheless grant an exclusion for lumber made in Canada from U.S.-origin logs, because the thrust of the petitioner's CVD allegations is that Canadian provincial governments provide stumpage subsidies to Canadian softwood lumber manufacturers, and therefore Canadian lumber manufactured from U.S. logs cannot have benefited from those specific alleged subsidies.[135]

We disagree that this argument justifies an exclusion from the scope of the investigations. First, this scope applies equally to both the investigation addressing subsidization of Canadian softwood lumber products, as well as the investigation addressing Canadian sales at less-than-fair-value of softwood lumber. With respect to the less-than-fair-value investigation, the existence or non-existence of stumpage programs covering U.S.-origin logs is of no import. Furthermore, with respect to the CVD investigation, the Department is investigating several Canadian subsidy programs which have an alleged effect on the production of subject merchandise, and the investigation does not relate solely to stumpage.

Additionally, Central Canada asserts that failure to exclude Canadian lumber manufactured from U.S. logs from the scope of these investigations will cause serious injury to the U.S. timber industry. Furthermore, Central Canada asserts that an exclusion covering Canadian lumber made from U.S.-origin logs would be limited and readily enforced.[136]

These arguments made by Central Canada are essentially the same arguments as those which were considered, and rejected, in the Preliminary Scope Memorandum. [137] At issue in these investigations is the alleged injury to the COALITION caused by dumped or subsidized imports of Canadian softwood lumber. That is the industry which we must consider in assessing the scope of the investigations.

Furthermore, as explained above, in the vast majority of cases, the Department will defer to the petitioner's proposed language, and will only consider modifying that language when the proposed scope language raises certain concerns with the Department and CBP. As that is not the situation in this case, we agree with the petitioner that softwood lumber produced from logs harvested in the United States should not be excluded from the scope of these investigations.

For these reasons, we are not granting an exclusion for lumber made in Canada from U.S.-origin logs.

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[134] *Id.*
[135] *See* Central Canada Scope Brief at 3-11.
[136] *Id.*
[137] *See* Preliminary Scope Memorandum at Comment 31.

Comment 14: Remanufactured Goods

In our Preliminary Scope Memorandum, we determined that the scope of these proceedings covers remanufactured products.[138] The GOC asserts that remanufactured products constitute a different class or kind of merchandise from the dimensional lumber that is the focus of these investigations, and that the Department should separate the merchandise identified in the petition into two or more separate classes or kinds of merchandise.[139] The petitioner responds that the Department should continue to find that the merchandise covered by the scope of these investigations constitutes a single class or kind of merchandise.[140]

Department's Position:

We agree with the GOC that the Department has the authority to determine if a product, although covered by the proposed scope in a petition, is a different class or kind of merchandise from other products covered by the proposed scope.[141] However, in this case, we disagree with the GOC's assertion that the general category of "remanufactured goods" is a different class or kind of merchandise from all other merchandise covered by the scope of the investigations.

As we stated in our Preliminary Scope Memorandum, these investigations cover lumber products beyond dimensional lumber, and the petitioner explicitly included products that have undergone various levels of remanufacturing within the scope.[142] Furthermore, numerous responses on the record of these proceedings clearly indicate that the scope covers lumber products beyond structural lumber. [143]

The GOC summarily asserts that applying the *Diversified Products* criteria demonstrates that "dimensional lumber and the remanufactured products included in the scope of this investigation have different uses, different physical characteristics, different purchaser expectations, different channels of trade, and different manners in which the product is advertised and displayed."[144] However, it is telling that the GOC has provided little argument and no facts on the record to permit the Department to conduct such an analysis with regard to remanufactured products on a product-by-product basis, or even at a more general level. Accordingly, as in our Preliminary Scope Memorandum, we cannot apply the Department's *Diversified Products* analysis to the general term "remanufactured products."

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[138] *Id.* at Comment 9.
[139] *See* Letter from GOC, "Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada: Scope Comments of Government of British Columbia Filed in Countervailing Duty Investigation of Softwood Lumber Products from Canada," dated August 24, 2017 (GOC Miscellaneous Scope Comments), at Attachments A-D.
[140] *See* Petitioner Scope Rebuttal at 3-8.
[141] *Torrington v. United States*, 745 F. Supp. at 728.
[142] *See* Preliminary Scope Memorandum at Comment 9; *see also* Supplement to Petition; Petitioner January 19, 2017 Scope Comments.
[143] *See* Supplement to Petition; Petitioner January 19, 2017 Scope Comments.
[144] *See* GOC Miscellaneous Scope Comments, at Attachments A-D.

We do note that, for certain remanufactured products, particular interested parties did provide scope arguments with sufficient facts to permit such an analysis, as explained above. In these instances, the Department addressed those arguments in the context of product-specific scope requests.

Comment 15: Eastern White Pine

In *Lumber IV*, the Department based its determination concerning the scope status of Eastern White Pine (EWP) on a careful and thorough evaluation of the entire case record concerning the *Diversified Products* criteria.[145] As part of this proceeding, the ITC considered comparable criteria and reached the same conclusion, *i.e.*, that EWP cannot be distinguished as a separate class or kind of softwood lumber distinct from the merchandise covered by these investigations.[146] In the Preliminary Scope Memorandum we analyzed record evidence concerning EWP based on the *Diversified Products* criteria finding, consistent with *Lumber IV* and the ITC preliminary determination, that EWP is the same class and kind of merchandise as the softwood lumber covered by the scope of these investigations.[147]

Central Canada argues that EWP, while botanically a softwood, commercially is a hardwood and maintains that EWP is distinct from softwood lumber in every respect, and consequently is a separate class or kind of merchandise. Central Canada presented arguments addressing each of the five *Diversified Products* criteria.[148]

In arguing that EWP has distinct physical characteristics from the lumber under investigation, Central Canada argues that EWP cannot bear loads and is not used structurally. Rather, Central Canada argues it is a discrete species of an appearance grade lumber that is presented and dressed in a unique way, is weaker and softer than the subject merchandise lumber, is permeable, and is cut to unique and distinct sizes. Central Canada claims that EWP is valued primarily for its overall attractive appearance, and that producers use manufacturing methods designed to maximize the quality and appearance of the wood when displaying it, similar to hardwood producers. Central Canada contends that the focus of these investigations is construction grade, framing lumber, which EWP is not. Central Canada claims that the Department misconstrued the ITC's statement that it is interchangeable with other types of softwood lumber. Central

[145] On March 12, 2002, as part of the *Lumber IV* investigation, the Department issued a memorandum preliminarily determining that certain lumber products for which a class or kind determination had been requested did not constitute a separate class or kind. *See* Memorandum, "Class or Kind Determinations and Consideration of Certain Scope Exclusion Requests," dated March 12, 2002 (*Lumber IV* Preliminary Scope Memorandum, included in the Preliminary Scope Memorandum as Attachment III. This determination was unchanged in *Lumber IV Final Determination*. Notably, in the litigation which followed before a NAFTA Panel, the Department's class or kind determination with respect to EWP was upheld by the Panel as lawful. *See In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination*, Sec. No. USA-CDA-2002-1904-02 (July 17, 2003) at 161-162 (holding that the Department's "determination not to treat EWP as a separate 'class or kind' of merchandise is supported by substantial evidence on the record, and is not contrary to law").

[146] *See Softwood Lumber Products from Canada*, Inv. Nos. 701-TA-566 and 731-TA-1342 (Preliminary) Determinations and Views of the Commission, USITC Publication No. 4463 at 12 (January 2017) (*ITC Preliminary Determination*) at 8-12.

[147] *See* Preliminary Scope Memorandum at Comment 27.

[148] The criteria from *Diversified Products Corp. v. United States*, 572 F. Supp. 883, 889 (CIT 1983) (*Diversified Products*) as set forth in 19 CFR 351.225(k)(2).

Canada claims that the ITC was referring to how EWP could be interchanged with other types of hardwood.

As it stated in comments submitted prior to the preliminary determination, Central Canada asserts that EWP is prized for its dimensional stability and aesthetic appeal, but does not have the strength required for construction uses. EWP has its own grading system based on the product's appearance, distinguishing it from other types of softwood lumber. Purchasers can expect from EWP a uniquely aesthetic, workable, appearance-grade wood fiber and expect it to be offered in unique and distinct sizes. Central Canada states that customers expect to pay 50 or even 100 percent more for EWP than typical softwood lumber. Central Canada claims that EWP is often cut to secondary manufacturers specifications and is produced in mills typically dedicated to EWP production. Further, Central Canada claims that the 15-year-old data from *Lumber IV* that the Department relied on in its preliminary decision is out of date, and therefore provides an insufficient basis to support the Department's finding that softwood lumber products sell at prices similar to EWP.

Concerning end use, Central Canada states that due to its appearance, workability, moisture content and dimension, EWP is distinctly suitable for end uses such as furniture applications, exterior siding, interior paneling, and crafts. These same characteristics, and its high price, it argues, render it unsuitable for uses such as general construction. Central Canada notes that while the Department claims that EWP could be used in construction, the Department failed to provide any examples of such use. Central Canada claims the Department did not rebut the proof it presented regarding the differing expectations regarding the size and price of EWP.

With respect to channels of trade, Central Canada contends, as it did in pre-preliminary determination comments, that EWP is sold primarily to furniture, window and other specialty product manufacturers that make use of its appearance and high dimensional stability, whereas softwood lumber is delivered to distribution centers for subsequent delivery to home builders or retailers. EWP, it claims, is sold predominantly in the eastern United States while the Western Pines are sold in the West. In addition, Western Pine, it claims, is usually transported by rail, whereas EWP is moved almost exclusively by truck. Central Canada notes that the Department has placed nothing on the record to contradict its statements regarding distribution channels.

Central Canada asserts that the following statements made in pre-preliminary determination comments were not disputed by the Department: The lumber industries market EWP in a different manner than softwood lumber by giving EWP its own grading system. EWP grading rules are developed for appearance. By contrast, the rules for dimension lumber are based on structural uses. The differences in grading rules reflect the wide recognition that EWP's end uses are directly related to its appearance, rather than strength and resistance to impact. In these and many other respects, EWP is more like hardwoods than softwoods. Also, Central Canada argues that EWP producers present more creative marketing in support of their products that do Western Pine producers. Central Canada also notes that EWP is shipped in different lengths and sizes because it is often cut to precise specifications. Further, due to the importance of appearance, EWP is individually packed and shipped by truck, while Western Pine is typically transported by rail.

The petitioner responds that, because all species of softwood lumber are covered by the plain language of the scope, EWP, a species of softwood lumber, is covered by the plain language of the scope. Further, the petitioner points out that this interpretation of the scope is consistent with the Department's conclusions in *Lumber IV*.

With respect to the Department's scope regulations, the petitioner points out that the regulation which contains the *Diversified Products* factors, 19 C.F.R. 351.225, specifies in subsection (a) that "the Department issues 'scope rulings' {under section 225} that clarify the scope of an order or suspended investigation with respect to particular products," only after an investigation is completed. Therefore, petitioner argues the Department is not required by law to apply the *Diversified Products* criteria in this investigation because the scope of an order or suspension agreement has not yet been issued.

In any case, the petitioner emphasizes that 19 CFR 351.225(k)(2) of the Department's regulations states that the Department resorts to a *Diversified Products* analysis only when the 19 C.F.R. 351.225(k)(1) factors – descriptions of the merchandise contained in (1) the petition, (2) the initial investigation, and (3) the determinations of the Department (including prior scope determinations) and the Commission – "are not dispositive." Thus, even if the regulation did apply, the petitioner argues that Central Canada's reliance on the *Diversified Products* criteria is misplaced because, in fact, the (k)(1) factors are dispositive on this issue.

However, should the Department address the *Diversified Products* criteria, with regard to physical characteristics, the petitioner argues that EWP shares general physical characteristics with other species of softwood lumber. The petitioner also contends that despite Central Canada's comments to the contrary, the Department did not misconstrue the ITC's findings, as the ITC expressly stated in its preliminary determination that "{Central Canada} acknowledged that EWP is interchangeable with other appearance-grade woods rather than with species used for framing."[149] With regard to the ultimate purchasers of EWP, the petitioner cites to the Department's finding in *Lumber IV* that customer expectations for all appearance-grade lumber are quite similar as they are all based on the appearance of the lumber itself.[150] The petitioner cites to Central Canada's statement that EWP is marketed and displayed separately from dimensional lumber and notes that such a characteristic is not unique among appearance-grade lumber, as the Department found that Western Red Cedar and Eastern White Cedar are also marketed differently than dimensional lumber.[151] With regard to end-use, the petitioner highlights the Department's citation to the ITC's preliminary report and the United States Department of Agriculture (USDA) Forest Service Wood Handbook, which state that EWP is used in wide range of uses, including as structural lumber, and notes that softwood lumber products such as sugar pine, ponderosa pine, Idaho pine, and spruce are interchangeable with white pine in the same applications.[152] Finally, with respect to advertising, the petitioner states that EWP is marketed and sold in a similar manner to other types of appearance grade softwood lumber.

[149] *See ITC Preliminary Determination* at 14.
[150] *See Lumber IV* IDM at Comment 52.
[151] *Id.*
[152] *See* Preliminary Scope Memorandum at Comment 27.

Department's Position:

The plain language of the proposed scope covers all species of softwood lumber and no party, including Central Canada, has contended that EWP is not a species of softwood lumber. While the petitioner has argued that, because EWP is covered by the plain language of the proposed scope, there is no need to rely on an analysis under the *Diversified Products* criteria, we disagree. Regardless of whether a product is covered by a proposed scope during an investigation, pursuant to section 731 of the Act, AD and CVD orders cover only one class or kind of merchandise. Thus, if EWP were found to be a different class or kind of merchandise from all other in-scope merchandise during this investigation, the Department would have to determine if a separate AD and CVD order is appropriate to solely cover EWP. As noted above, the Department has the authority to determine if a product, although covered by the proposed scope of an investigation, is a different class or kind of merchandise from the other products covered by the proposed scope.[153]

Accordingly, for these reasons, as it did in *Lumber IV*[154] and as the ITC did in its preliminary determination,[155] the Department conducted an analysis under the *Diversified Products* criteria in the preliminary determination. The results of all three analyses is that EWP is of the same class or kind of merchandise as the other products covered by the scope of these investigations. Central Canada has not offered arguments beyond those already addressed in the preliminary determination.[156] Thus, we are not going to repeat our analysis regarding the application of each of the five diversified criteria to EWP, which we addressed extensively in the Preliminary Scope Memorandum.[157]

We do emphasize, however, that despite Central Canada's claims to the contrary, the ITC noted that EWP is interchangeable with other appearance grade woods. In fact, the ITC explained that "the record demonstrates that softwood lumber products such as sugar pine, ponderosa pine, Idaho pine, and spruce are interchangeable with white pine in the same applications."[158] This conclusion is significant, because the ITC determined that the record demonstrated that EWP was interchangeable with other types of *softwood*, and not hardwood, lumber. This conclusion was made despite the fact that Central Canada continually argues that EWP is more akin to a hardwood. We note that following this statement, the ITC preliminary determination then proceeded to state that "EWP is interchangeable with other appearance-grade woods"[159] and that "EWP is not the only species of softwood lumber for which the grading system is not based on strength."[160] Central Canada's claims notwithstanding, as shown from the ITC's statements excerpted above, the Department did not misconstrue the ITC's conclusions.

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[153] *Torrington v. United States*, 745 F. Supp. at 728.
[154] *See Lumber IV* Preliminary Scope Memorandum.
[155] *See ITC Preliminary Determination* at 8-12.
[156] *See* Preliminary Scope Memorandum at Comment 27.
[157] *Id*.
[158] *See ITC Preliminary Determination* at 10.
[159] *Id*.
[160] *Id*.

As was the case in its pre-preliminary determination, Central Canada contends that the focus of these investigations is softwood lumber used for structural purposes. Central Canada argues that EWP is not used for structural purposes and thus it constitutes a different class or kind of merchandise from softwood lumber used for structural purposes. However, the USDA Forest Service Handbook notes that a large proportion of EWP, mostly second-growth knotty wood or lower grades, is used for structural lumber.[161] While Central Canada contends that EWP is too expensive to be considered for use in structural lumber, this argument does not appear to address the USDA's statement that customers buy lower grade EWP for structural uses. The Department also explained in *Lumber IV* that information on the record indicated that EWP had been, and was being, used in construction. Therefore, we agreed with, and cited to, a finding in *Lumber IV* that "differences in structural strength are not so great (between EWP and other lumber) to be deemed unique when compared to other softwoods."[162]

Leaving aside for the moment the question of whether EWP can be used in structural lumber applications, the scope of these investigations is softwood lumber, which covers a wide range of products, many of which have applications aside from structural applications and many of which have applications that include both structural and non-structural applications. If the Department were to categorize each species of softwood lumber into groups that had the same applications and average prices, as argued for by Central Canada, the result would likely be a determination that there are as many class or kinds of merchandise as there are softwood lumber species. Such an application of the *Diversified Products* criteria is unreasonable and there is no legal requirement for the Department to categorize scopes into arbitrarily narrow classes or kinds of merchandise in this manner.

Central Canada states that EWP is not typically produced at the same mills as other types of softwood lumber. To the extent that EWP is produced at mills dedicated to producing only EWP, and it is not clear that such mills exist, this is hardly unique to EWP. Canfor reported making fencing and boards at its WynnWood sawmill.[163] Tolko has mills dedicated to producing only Western Red Cedar products, another mill whose only production of in-scope-merchandise is dunnage, pallets, lathe strips and economy stud lumber.[164] Similarly, West Fraser maintains mills dedicated to a small number of particular products.[165]

While Central Canada claims that EWP is often cut to secondary manufacturer's specifications, this is hardly unique to EWP. Not only does the dimensional lumber cited throughout this record consist of many lengths, widths, and thicknesses, but the scope specifies as in-scope merchandise shims, pallet runners, flooring and siding that have been tongued, grooved, molded and rounded. The scope also covers semi-finished lumber, and covers products sold in many shapes and sizes.

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[161] *See* Memorandum, "Certain Softwood Lumber Products from Canada: Scope Exclusion Requests Received from Oregon-USDA Forest Service Wood Handbook - Wood as an Engineering Material," dated February 10, 2017, (USDA Forest Service Handbook) at 2-13.
[162] *See Lumber IV* Preliminary Scope Memorandum at 28.
[163] *See* Canfor's February 28, 2017, Section A Response (Canfor AQR), at A-38.
[164] *See* Letter from Tolko, "Certain Softwood Lumber Products from Canada: Reporting Exclusion Request," dated February 13, 2017, at 3-5.
[165] *See* Letter from West Fraser, "Certain Softwood Lumber Products from Canada. Case No. A-122-857: Rebuttal Comments on Product Characteristics," dated February 13, 2017, at 2-7.

The shapes and sizes of EWP, and the manner in which it is packaged, falls well within the spectrum of how other in-scope-merchandise is packaged and sold.

Central Canada also relies significantly on its assertion that, as opposed to SPF lumber, EWP is used and purchased for its appearance. Being purchased based on appearance is hardly unique to EWP. The National Lumber Grades Authority (NLGA) is replete with types of softwood lumber graded based on appearance.[166] The ITC found that other premium products such as Redwood and other types of Cedar, including Atlantic White Cedar, are priced based on their appearance.[167] Likewise, the Department found that many other pines are selected based on appearance.[168] The ITC noted that, while there is a separate grading system for EWP, EWP is not the only species of softwood lumber for which the grading system is not based on strength.[169]

Central Canada also cites to the higher price of EWP relative to average prices of softwood lumber as a reason for finding it to be a distinct class or kind from the merchandise under consideration. However, as noted above, the ITC found that many softwood lumber products, such as Ponderosa Pine, Idaho White Pine, Redwood, Eastern Red Cedar, Yellow Cedar, Port Orford Cedar, Bald Cypress, Atlantic White Cedar, also sell at prices similar to EWP.[170] While Central Canada notes that the pricing data cited to by the Department are 15 years old, Central Canada has presented no evidence demonstrating that these data and conclusions no longer apply.

Central Canada claims that EWP cannot be used for any of the end uses of typical softwood lumber; yet, based on Central Canada's own assessment, while 75 percent of all softwood lumber is used for construction applications, 25 percent of softwood lumber applications are non-construction uses. Both the USDA Forest Service Handbook and the NLGA identify many different applications for softwood lumber, including decking, siding, flooring, products used based on their appearance, fencing, and many other applications structural purposes.[171] With so many colors, sizes, and densities among the different forms of softwood lumber, the scope of this investigation of softwood lumber includes many different types of wood with many different applications and a wide range of prices – all of which constitute subject merchandise. Further, many single species of softwood lumber have many different applications, as evidenced above, and thus EWP is not distinct from the softwood lumber covered by the scope of this investigation in that it has many different potential applications.

With respect to EWP sales information, aside from a declaration placed on the record from a sales manager of a company arguing to exclude EWP,[172] Central Canada has provided few details demonstrating how EWP is sold in different channels of trade from other softwood lumber, despite being provided with ample opportunity to do so. This declaration stands in

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[166] *See* National Lumber Grades Authority, 2014, placed on this record on February 10, 2017, at Section 5.
[167] *See ITC Preliminary Determination* at 10.
[168] *See Lumber IV* Preliminary Scope Memorandum at 30.
[169] *Id*.
[170] *See ITC Preliminary Determination* at 14.
[171] *See* USDA Forest Service Handbook and Memorandum, "Certain Softwood Lumber Products from Canada: NLGA," dated February 10, 2017.
[172] *See* OFIA and CIFQ Scope Comments at Attachment 2.

contrast to other record evidence. As noted above, the USDA noted that other species of softwood lumber are used in identical applications as EWP, and the ITC found that other softwood lumber products (such as Ponderosa Pine, Idaho White Pine, Redwood, Eastern Red Cedar, Yellow Cedar, Port Orford Cedar, Bald Cypress, Atlantic White Cedar) also sell at prices similar to EWP.[173] Central Canada claims that EWP is sold predominantly in eastern North America and shipped by truck, while Western White Pine is sold predominantly in the west. Even if true, this only distinguishes EWP from Western White Pine and not the myriad of other softwood lumber products on the record, and Central Canada has not demonstrated that being shipped by truck in the more densely populated eastern North America is unique to EWP. Thus, there is nothing on this record that would distinguish our analysis from our decision in *Lumber IV,* where we found that the information on the record did not substantiate the claim that EWP is "sold in unique and distinguishable channels."[174]

As discussed above and demonstrated on the record, softwood lumber consists of many species that create a spectrum of densities, applications, appearances, and many other characteristics. Further, each species of softwood lumber has a multitude of applications. If the Department were to categorize each species of softwood lumber into groups that had the same applications and average prices, the result would likely be a determination that there are as many kinds and classes of merchandise as there are softwood lumber species. Not only would such a result be impossible to administer, as discussed above and in the Preliminary Scope Memorandum, the ITC Preliminary Determination, and in *Lumber IV*, such precision in determining separate classes and kinds of merchandise is inconsistent with the application of the *Diversified Products* criteria to softwood lumber. This is because many, if not most, species of lumber, such as EWP, do not just have one defining use or physical characteristic, but instead have a wide range of overlapping physical characteristics, end uses, customer expectations, and selling strategies. For instance, while softwood lumber species A may have a different primary application than softwood lumber species B, the secondary application of A, often overlaps with the primary application of B.

Central Canada has not cited to an example of an instance where all five *Diversified Products* criteria differ with respect to EWP and all other species of softwood lumber. This is due to the wide-ranging and overlapping characteristics of softwood lumber. Thus, we continue to find that EWP is not sufficiently different from the range of products subject to these investigations to be considered a separate class or kind of merchandise from the merchandise under consideration. Additionally, the petitioner has not supported an exclusion for these species, and we defer to its intention to have this merchandise covered by the scope of the investigations.

Comment 16: Additional Scope Issues

Comment 16A: Whether the Department Should Conduct a Pass-Through Analysis for

[173] *See ITC Preliminary Determination* at 14.
[174] *See Lumber IV* IDM at Comment 52.

Independent Remanufacturers That Purchase Softwood Lumber at Arm's Length

The GOC argues that this case could have a substantial impact on a significant number of independent remanufacturers who do not hold harvest rights on Crown lands, are not affiliated or cross-owned with entities that hold harvest rights on Crown lands, and that purchase all their lumber in arm's-length transactions.[175] Citing a decision from the CAFC and a WTO determination, the GOC argues that the Department may not presume a pass-through of a benefit in arm's-length transactions and, therefore, in the case of independent remanufacturers, the Department must conduct a pass-through analysis before it may countervail any alleged subsidies on the lumber that independent remanufacturers use to produce remanufactured products.[176] The GOC further argues that the Department should establish a separate "all-others" rate for independent remanufacturers in this final determination, which incorporates a pass-through analysis.[177]

Department's Position:

In essence, the GOC is arguing for a countervailing duty analysis to be performed for independent remanufacturers not selected as mandatory respondents and who did not seek to be examined as voluntary respondents. However, when we conduct a company-specific, rather than an aggregate, investigation, and we limit our selection of respondents, we do not conduct a countervailing duty analysis—including a pass-through analysis—for companies that are not individually examined. None of the cases cited by the GOC contradict this position. Although the cases cited by the GOC suggest that the Department may conduct a pass-through analysis where a company is individually examined,[178] or where we conduct an investigation on an aggregate basis,[179] the GOC has failed to support its contention that the Department must conduct a pass-through analysis for respondents that would fall into the "all-others" category.

Rather, the all-others rate established in AD and CVD proceedings is established to cover such scenarios: a rate applicable to all non-selected companies exporting softwood lumber products to the United States meeting the description of the scope of these investigations. Pursuant to section 705(c)(1)(B)(i)(I) of the Act, the Department will determine the estimated countervailable subsidy rate for each exporter and producer individually investigated, and will determine, in accordance with section 705(c)(5) of the Act, the estimated all-others rate for all exporters and producers not individually investigated. Section 705(c)(5) unambiguously directs that, where the Department conducts a company-specific investigation, "the all others rate *shall* be an amount equal to the weighted average countervailable subsidy rates established for

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[175] *See* GOC Miscellaneous Scope Comments at 108.
[176] *Id*. at 109.
[177] *Id.* at 110-115.
[178] *See id.* at 108-109 (citing *Delverde, SrL v. United States*, 202 F.3d 1360, 1366-67 (CAFC 2000) and *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1347 (CAFC 2004)).
[179] *See id.* at 109 (citing *US – Softwood Lumber IV*). We also note that the Department is governed by U.S. law, which is, in turn, fully consistent with our WTO obligations. As we have explained, our decision not to conduct a pass-through analysis for not-individually examined remanufacturers in this determination is fully consistent with the Act.

exporters and producers individually investigated, excluding any zero and *de minimis* countervailable subsidy rates, and any rates determined entirely {using facts available with an adverse inference}."[180] Thus, the Department has no authority to establish a different rate for certain subcategories of exporters and producers other than through the rates calculated for individually examined exporters and producers. We have calculated the all-others rate, which will apply to independent remanufacturers, as directed by the statute. However, as noted above, exporters and producers seeking their own CVD rate can request that they be individually reviewed as part of an expedited review after the publication of the CVD order, should the ITC reach an affirmative injury determination. A company that receives a *de minimis* or zero subsidy rate in an expedited review will be excluded from the CVD order.

Comment 16B: Whether Countervailing Duties Should Only Be Applicable on a First Mill Basis

The GOC notes that the mandatory respondents' sales of in-scope merchandise are of dimensional lumber and the subsidy allegations for the most part relate to dimensional lumber as well. Thus, the GOC argues, any calculated subsidy rate for all intents and purposes will be a subsidy rate for dimensional lumber, similar to what was done in a prior lumber proceeding.[181] Accordingly, the Department should order that duties to be collected on the same basis, which is essentially a first mill basis. The GOC argues that it would be unfair to apply CVD cash deposit rates to the extra value added by remanufacturing, which is unrelated to the alleged subsidies.[182]

Department's Position:

Absent any product exclusions or other exclusions based on a *de minimis* or zero subsidy rate, this investigation covers all softwood lumber products entering the United States that meet the description of the scope of these investigations, including any remanufactured products. In accordance with section 705(c)(1)(B)(ii) of the Act, we will direct CBP to collect cash deposits on merchandise subject to this investigation (including remanufactured products that are in-scope) "in an amount based on the estimated individual countervailable subsidy rate, the estimated all-others rate, or the estimated country-wide subsidy rate, whichever is applicable." Because, as discussed in Comment 16A, the statute requires that the all-others rate applicable to exporters and producers other than the individually-examined respondents be based on those individually-examined rates, and because the statute further requires the Department to instruct CBP to order the posting of cash deposits in the amount of the estimated all-others rate, we will not direct CBP to instead require duties only on a first mill basis. Further, to the extent the GOC is arguing that First Mills should be examined individually, as noted elsewhere, the Department continues to find that it does not have the authority to conduct a company exclusion process in the context of this investigation for respondents that have not been individually-investigated.

[180] Section 705(c)(5)(A)(i) (emphasis added). *See also* section 777A(e)(2) ("The individual countervailable subsidy rates determined … shall be used to determine the all-others rate under section 705(c)(5).").
[181] *Id*. at 115.
[182] *Id*.

Comment 16C: Whether the Department Should Exclude Softwood Lumber Products from New Brunswick

Subsequent to the *Preliminary Determination*, the Department excluded from the investigation softwood lumber products certified by the ALB to be both harvested and produced in Newfoundland and Labrador, Nova Scotia, and Prince Edward Island.[183] The GNB argues that the Department should exercise its authority and also exclude New Brunswick products from this investigation because not doing so would result in a grave injustice to lumber producers in the province of New Brunswick. Specifically, the GNB contends that it would be grossly unfair for the Department to apply the 19.88 percent preliminary all-others rate to New Brunswick softwood lumber producers because it has no semblance of reality, particularly in light of the oligopsony effect the Department preliminarily identified in the New Brunswick stumpage market.[184] The GNB notes that if JD Irving's calculated subsidy rate, as adjusted for the arguments made by JD Irving in its case and rebuttal briefs are adopted, falls below one percent for the final determination, then the other producers in New Brunswick should also have a similar rate. The GNB also argues that there is also a lack of concern from the U.S. industry about subsidies being received by softwood lumber producers from the Maritime provinces, including New Brunswick.[185] Finally, the GNB argues that excluding softwood lumber products from New Brunswick would reduce the Department's administrative burden by avoiding the need for individual company reviews for each producer in New Brunswick.

Department's Position:

On May 5, 2017, the petitioner amended the scope in the Petition,[186] indicating that it had no interest in seeking relief in connection with Canadian exports of lumber both harvested and produced in the Atlantic Provinces.[187] The petitioner has not alleged subsidies provided by the governments of the Atlantic Provinces, and none of the mandatory respondents reported producing softwood lumber products in these provinces.[188] On June 23, 2017, in response to arguments and upon consideration of the Petition Amendment, the Department preliminarily determined that certain softwood lumber products certified by the ALB as being first produced in the Atlantic Provinces from logs harvested in these provinces are excluded from the scope of the AD and CVD investigations.[189] In that ALB Scope Memo, the Department did not exclude softwood lumber products from New Brunswick.

In this CVD investigation, we preliminarily found that JD Irving, a lumber producer in New Brunswick being examined as a voluntary respondent, received countervailing subsidies, including subsidized stumpage, at a CVD rate of 3.02 percent. In the final determination, the

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[183] *See* ALB Scope Memorandum.
[184] *See* Letter from GNB, "Certain Softwood Lumber Products from Canada: Case Brief Concerning Product Scope Issues," dated August 7, 2017 (GNB Scope Brief) at 1-5.
[185] *Id*.
[186] *See* Petitioner Amendment to the Petition.
[187] Provinces of Newfoundland and Labrador, Nova Scotia, and Prince Edward Island.
[188] *Id*.
[189] *See* ALB Scope Memorandum at 1.

record supports continuing to find that JD Irving received countervailable subsidies. To the extent that the GNB argues that "if the Department's unproven theory of there being an oligopsony in the New Brunswick market is actually true, then the small producers in the province with less control of the market would pay a higher price for stumpage than JD Irving and therefore would receive a lower subsidy margin than JD Irving."[190] This argument is speculative, and, in any event, because we continue to determine that JD Irving received countervailable subsidies, we have no information on the record to demonstrate that all other softwood lumber producers in the province would have received *de minimis* subsidies. We are particularly unwilling to engage in such speculation when individual softwood lumber producers may request an expedited review for the Department to determine an individual subsidy rate.

With respect to the suggestion that other softwood lumber producers in New Brunswick should receive the same CVD rate as JD Irving, section 705(c)(1)(B)(i)(I) of the Act directs the Department to determine the estimated countervailable subsidy rate for each exporter and producer individually investigated and determine, in accordance with section 705(c)(5) of the Act, the estimated all-others rate for all exporters and producers not individually investigated. Section 705(c)(5) unambiguously directs that, where the Department conducts a company-specific investigation as it is doing here, "the all others rate shall be an amount equal to the weighted average countervailable subsidy rates established for exporters and producers individually investigated, excluding any zero and *de minimis* countervailable subsidy rates, and any rates determined entirely {using facts available with an adverse inference}."[191] Thus, the Department has no authority to establish a different rate for certain subcategories of exporters and producers other than through the rates calculated for individually examined exporters and producers. Accordingly, we have calculated the all-others rate, which will apply to those producers and exporters in New Brunswick that were not selected for individual examination, as directed by the statute.

In addition, we note that the petitioner did not amend the Petition to exclude products from New Brunswick from these investigations. As we stated in the ALB Scope Memo, it is the Department's general practice to defer to the intent of the petitioner and fulfill the Department's statutory mandate to provide, where appropriate, the relief requested by the petitioning industry.[192] Therefore, because we continue to find that countervailable subsidies exist in New Brunswick, and are received by JD Irving, and because the Petitions Amendment did not seek to exclude softwood lumber products from New Brunswick, we have not excluded New Brunswick from these investigations for the final determination. However, as noted above, exporters seeking their own CVD rate can request an expedited review after the publication of the CVD

[190] *See* GNB Case Brief at 1-5.
[191] Section 705(c)(5)(A)(i) (emphasis added). *See also* section 777A(e)(2) ("The individual countervailable subsidy rates determined … shall be used to determine the all-others rate under section 705(c)(5).").
[192] *Id*. at 5-6.

order. A company that receives a *de minimis* or zero subsidy rate in an expedited review will be excluded from the CVD order.

Comment 16D: Whether the Department Should Finalize the Exclusion of Softwood Lumber Products from the Atlantic Provinces

As noted above in Comment 16C, subsequent to the *Preliminary Determination*, the Department excluded from the investigation softwood lumber products certified by the ALB as being both harvested and produced in the Atlantic provinces.[193] The GNS supports the Department's exclusion as articulated in the ALB Scope Memo, but wants to alleviate any concerns that the Department may have regarding CBP's ability to effectively administer this exclusion. Specifically, the GNS argues that given CBP's long history with this exclusion (over three decades), CBP has experience administering a scope exclusion covering these types of softwood lumber products.[194] Moreover, given the close parallel between the previous certificate from the prior cases and the SLA, CBP will be familiar with the document and the exclusion process.[195] In addition, the GNS notes that given CBP's experience with certifications in other cases, it is clear this process is familiar to CBP, making this exclusion process manageable, removing any concerns from the parties to this proceeding.[196] Finally, the GNS argues that CBP can leverage its experience to effectively monitor and enforce the exclusion by, for example, requiring that the ALB certificate be included with each entry and/or requiring that the ALB certificate of origin number be identified on each CBP Form 7501. The Department also has the authority to prescribe how CBP must administer the exclusion.

Department's Position:

We agree with the GNS and given that no party challenged the Department's *Preliminary Determination* to exclude from the investigation softwood lumber products certified by the ALB as being both harvested and produced in the Atlantic provinces, we have adopted this exclusion for the final determination. We have also determined that we will instruct CBP to require that the ALB certificate be included with each entry and require that the ALB certificate of origin number be identified on each CBP Form 7501, for such entries to be excluded from the scope of the order, if issued. If an order is issued, we will instruct CBP to refund cash deposits collected on any suspended entries accompanied with the ALB certificate.

General Issues

Comment 17: Particular Market Situation

The petitioner argues that the Department should find a particular market situation (PMS) in Canada under section 504 of the Trade Preferences Extension Act of 2015 (TPEA) because of certain distortions which it argues affect the cost of production (COP) of the subject merchandise. These distortions result from the GOC's: (1) subsidization of sawmills' residual

[193] *See* ALB Scope Memorandum at 1.
[194] *See* GNS Scope Brief at 2.
[195] *Id*. at 3.
[196] *Id*. at 3-4.

markets (*e.g.*, bioenergy programs) that consume byproducts generated in the production of subject merchandise; (2) subsidization of, and involvement in, Canada's electricity market; and (3) subsidization of logs (*i.e.*, stumpage). According to the petitioner, the *totality* of these distortions represents a single PMS in Canada – "the sale of lumber byproducts in Canada are outside the ordinary course of trade and, therefore, should not be accounted for in the Department's normal value calculations." Thus, the Department should deny the mandatory respondents in this investigation an offset for their byproduct sales.

The petitioner asserts that revenue from byproducts is an important part of the economics of lumber production and that, historically, revenue from the sale of byproducts to pulp and paper producers represented a significant portion of sawmills' gross revenue. The petitioner also contends that a recent decline in market demand for paper products has spurred the GOC to support new markets for lumber byproducts. "Specifically, the Canadian federal and provincial governments have encouraged the development of energy from biomass…as a new market for lumber byproducts." According to the petitioner, the GOC's intervention in the bioenergy industry has "artificially stimulated demand for {lumber byproducts}…and thus resulted in significant distortion in the {COP} of subject merchandise."

The petitioner also points to GOC interventions in support of the pulp and paper industry as part of its claim that GOC subsidization of sawmills' residual markets has contributed to the distortion of Canadian lumber producers' COP. Specifically, the petitioner alleges that GOC financial assistance to the pulp and paper industry has artificially inflated demand for lumber byproducts by improving the efficiency of sawmills, promoting new products, and expanding production capacity of pulp and paper mills.

Additionally, the petitioner argues that the GOC has intervened in Canada's electricity market and that its actions intentionally and directly sustain the economic viability of both sawmills and byproduct consumers (*e.g.*, pulp and paper producers). The petitioner notes that "electricity costs account for a significant percentage of the operating budgets of sawmills, and approximately 30 percent of the operating budgets of pulp and paper producers."

Finally, the petitioner alleges that the GOC's subsidization of stumpage distorts lumber producers' COP. Specifically, the petitioner argues that the steady supply of subsidized logs distorts lumber producers' cost structure and impacts production decisions. This, in turn, enables Canadian lumber producers to meet artificially-inflated demand for lumber and lumber byproducts.

Respondents and other interested parties (collectively, the Canadian parties)[197] argue that there is no evidence to support a finding that a PMS exists. Canadian parties contend that, contrary to

[197] The GOC submitted a joint rebuttal brief regarding PMS on behalf of the GOC, the Governments of Ontario and Quebec, the British Columbia Lumber Trade Council, the Ontario Forest Industries Association, and Conseil de l'industrie forestière du Québec. *See* Letter, "Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada: Canadian Parties' Joint Rebuttal Brief (Joint Rebuttal Brief)," dated August 15, 2017 (Canadian Parties Rebuttal Brief). Mandatory respondents West Fraser, Tolko, Canfor, and Resolute endorsed and incorporated the arguments made in the joint rebuttal brief regarding PMS in their respective rebuttal briefs. *See* West Fraser Rebuttal Brief at 3-4; Tolko Rebuttal Brief at 10; Canfor Rebuttal Brief at 1; Resolute Rebuttal Brief at 2.

the petitioner's claim, substantial record evidence demonstrates that bioenergy programs sponsored by the GOC have neither distorted the market for, nor increased the prices of, lumber byproducts. Canadian parties assert that the petitioner's contention that bioenergy programs have increased the demand for byproducts is false because bioenergy programs do not consume wood chips, which garner the vast majority of revenue from byproduct sales. Canadian parties contend that nearly all wood chips from sawmills are purchased and used for the production of pulp and paper products and that woodchips are "not typically used as biomass for energy production." Canadian parties argue that the majority of lumber byproducts, in terms of both volume and value, are sold for uses other than bioenergy programs. Canadian parties assert that Canada's biomass policies have the potential to affect no more than an extremely small portion of overall lumber byproducts sales, specifically, those of lower-value byproducts (*e.g.*, those for shavings, sawdust, and bark). Accordingly, GOC policies have had no discernible impact on the vast majority of byproduct production and sales in Canada.

Canadian parties also claim that the petitioner changed the substance of its allegation regarding the GOC's interventions in the downstream market for lumber byproducts. Canadian parties contend that the petitioner's original PMS allegation focused on the GOC's alleged support for bioenergy programs, while its subsequent case brief focused on the GOC's alleged interventions in support of the pulp and paper industry.

Additionally, Canadian parties contend that the petitioner has not demonstrated that intervention by the GOC in the electricity market has distorted lumber costs. Canadian parties further argue that the petitioner's claims regarding electricity and stumpage are duplicative of claims being investigated in the concurrent CVD investigation.

Finally, Canadian parties argue that, even if the Department finds that a PMS exists in Canada, such a finding would not support a determination that the fair market value of byproducts is zero.

Department's Position:

During the course of this investigation, the Department issued a supplemental questionnaire to the Canadian parties to obtain more information related to the petitioner's PMS allegation.[198] In their supplemental questionnaire response, the Canadian parties provided a large amount of information responding to questions regarding all aspects of the petitioner's PMS allegation. Of most significance for the Department's PMS analysis was record information which demonstrated that bioenergy programs are not a significant market for lumber byproduct sales.[199] Specifically, the Canadian parties provided record evidence showing that, while a portion of low-value byproducts (*e.g.*, bark) may be used in bioenergy production, nearly all high-value byproducts (*e.g.*, woodchips) are used in pulp and paper production.[200] This is significant

[198] *See* Letter to All Interested Parties, "Less-Than-Fair-Value Investigation of Certain Softwood Lumber Products from Canada: Particular Market Situation Supplemental Questionnaire," dated June 30, 2017 (Supplemental Questionnaire).
[199] *See* Letter, "Less-Than-Fair-Value Investigation of Certain Softwood Lumber Products from Canada: Canadian Parties' Response to the Department's June 30, 2017, Particular Market Situation Supplemental Questionnaire," dated July 24, 2017, at Exhibit GOC-PMS-20 (Supplemental Questionnaire Response).
[200] *See* Supplemental Questionnaire Response at Exhibit GOC-PMS-20.

because woodchips are the largest sawmill byproduct, both in terms of value and volume.[201] No party, including the petitioner, provided any information to rebut the information contained in the Canadian parties' supplemental questionnaire response.

In its case brief, submitted after the Canadian parties responded to our supplemental questionnaire, the petitioner expanded its PMS allegation to encompass GOC initiatives to support "downstream markets that use sawmills' byproducts."[202] Specifically, in its case brief, the petitioner included, for the first time, specific allegations concerning the pulp and paper industry as a part of these downstream markets.[203] In its case brief, the petitioner claimed that the GOC intervenes to support the pulp and paper industry by increasing their production efficiency and reducing production costs, promoting new products from pulp processes that use wood chips as raw materials, and expanding the production capacity of paper and pulp mills by making capital investments in infrastructure.[204]

After carefully reviewing the record evidence, the Department determines that the record does not support a finding that a PMS exists due to the GOC's subsidization of sawmills' residual markets (*e.g.*, bioenergy programs) that consume byproducts generated in the production of subject merchandise.

Section 504 of the TPEA amended section 771(15) of the Act by adding an additional circumstance that the Department will consider to be outside the ordinary course of trade: "{s}ituations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or constructed export price." The TPEA also provided the Department with discretion to "use another calculation methodology under this subtitle or any other calculation methodology" when a PMS exists "such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade."[205]

Accordingly, a significant question which the Department must address as part of its PMS analysis in this case is whether there is substantial evidence on the record that the GOC's subsidization of sawmills' residual markets that consume byproducts generated in the production of subject merchandise (*e.g.*, bioenergy and pulp and paper) have led to a PMS such that the COP for subject merchandise does not accurately reflect the COP in the ordinary course of trade.

Both the petitioner and the Canadian parties agree that the pulp and paper industry has always been the traditional, primary, and long-standing consumer of lumber byproducts, as is supported

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[201] *Id*.
[202] *See* Petitioner Case Brief at 25.
[203] *Id*. While the petitioner noted in the PMS allegation that "in addition to providing support to the declining pulp and paper industry, the GOC has also created new markets for lumber byproducts," the petitioner did not provide any specific information pertaining to GOC support for the pulp and paper industry. Moreover, the basis of the petitioner's PMS allegation was that, in response to the declining pulp and paper industry, the GOC created *new* markets for lumber byproducts, *e.g.*, bioenergy programs. *See* PMS allegation at 7.
[204] *See* Petitioner Case Brief at 25-26
[205] *See* Section 773(e) of the Act.

by record evidence.[206] For example, the petitioner states that "the pulp and paper industry has long been the key consuming industry for sawmill byproducts – traditionally, wood chips, from its kraft pulping process…"[207] With respect to the markets for woodchips, specifically, the Canadian parties provided record evidence to show that virtually all of their woodchip sales were made to pulp and paper producers, *i.e.*, the primary and long-standing consumer of lumber byproducts, during the POI.[208] Consequently, the record evidence shows that, during the POI, the vast majority of lumber byproducts continued to be sold to, and consumed by, the pulp and paper industry, meaning that the market for lumber byproducts *remained within the ordinary course of trade during the POI*.

The Canadian parties also provided evidence to demonstrate that wood chip prices have been consistent, showing no significant distortions or fluctuations, for the past ten years, which bolsters the conclusion that lumber byproduct sales remained within the ordinary course of trade during the POI.[209] On the other hand, the petitioner has not provided any record evidence to refute the Canadian parties' evidence or to show how GOC interventions in the bioenergy sector resulted in a PMS, such that lumber producers' COP does not reflect the COP in the ordinary course of trade.

Further, the petitioner's argument, raised for the first time in its case brief, that GOC interventions in support of the pulp and paper industry led to a PMS, is not substantiated. For example, the petitioner alleges that the GOC subsidized the pulp and paper industry with financial assistance to create new products.[210] However, the petitioner did not provide any information showing the impact of any new products on either the demand for lumber byproducts or associated distortions to the COP of lumber.[211]

Regarding the remaining byproducts (*e.g.,* sawdust, shavings, hog fuel, *etc*.) the Canadian parties provided evidence to demonstrate that only a portion of these byproducts was used in the production of bioenergy, while the remaining portion was used in various sectors not related to bioenergy.[212] While the petitioner points to certain GOC initiatives related to bioenergy, the petitioner has provided no record evidence to support a finding that the market for these byproducts was in any way impacted by the GOC initiatives at issue, such that the COP for lumber was outside the ordinary course of trade.[213] Consequently, there is no record evidence that sales of the remaining byproducts (*i.e.*, sawdust, shavings, hog fuel) occurred outside of the ordinary course of trade.

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[206] *See* Petitioner Case Brief at 25; *see also* Canadian Parties Brief at 13.
[207] *See* Petitioner Case Brief at 25.
[208] *See* Supplemental Questionnaire Response at Exhibit GOC-PMS-20.
[209] *Id*. at Exhibit GOC-PMS-30.
[210] *See* Petitioner Case Brief at 20.
[211] *Id.* at 20.
[212] *See* Supplemental Questionnaire Response at Exhibit GOC-PMS-20 (this record information provided by the Canadian parties indicates that the remaining byproducts, *i.e.*, non-woodchip byproducts, account for a small percentage of total byproducts sold by Canadian softwood lumber producers, and of those, an even smaller percentage was used for bioenergy purposes).
[213] *See* PMS allegation, where the petitioner provided no record evidence to demonstrate that lumber byproducts were sold outside of the ordinary course of trade.

As noted above, the Canadian parties argue that there is no record evidence demonstrating that intervention by the GOC in the electricity market has distorted lumber costs and that the petitioner's claims regarding electricity and stumpage are duplicative of claims being investigated in the concurrent CVD investigation. The Department finds that, due to the lack of record evidence to support the assertion that GOC interventions related to bioenergy programs have impacted the demand for, or price of, lumber byproducts, such that the COP for lumber is outside the ordinary course of trade, the aforementioned allegations regarding electricity and stumpage are moot.[214]

Accordingly, the Department determines that record evidence does not support finding that a PMS exists in this investigation such that a denial or adjustment to respondents' byproducts offset would be warranted.

Whether the Department can find a PMS in the Final Determination

Canadian parties argue that the Department cannot find a PMS for the first time in a final determination given that it made no findings on the issue in a preliminary determination.[215] Canadian parties argue that doing so would deprive respondents of the opportunity to comment or to exhaust their administrative remedies.[216] Resolute specifically notes that the petitioner made three specific arguments related to Resolute in the PMS section of its case brief. [217]

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[214] During the hearing before the Department, Tolko's counsel argued that the petitioner was "asking for a double remedy," because "the electricity programs raised here are at issue in the CVD investigation" and "the stumpage rates" were also "at issue in the CVD case."{1} *See* Hearing Transcript: In the matter of: The Investigation of the Antidumping Duty Order on Certain Softwood Lumber Products from Canada, dated August 17, 2017 (*Hearing Transcript*), at 92-93, 109-110. "Double remedy" is a reference to a restriction appearing in the General Agreement on Tariffs and Trade (GATT) since 1947 – a requirement that "no product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization." *See* Article VI.5 of GATT 1947. The Department has stated in the past that "this provision is implemented" in United States law, in part, through section 772(c)(1)(C) of the Act, which "prohibits assessing dumping duties on the portion of the margin attributable to export subsidies." *See Antidumping: Circular Welded Carbon Steel Pipes and Tubes from Thailand; Final Determination of Sales at Less Than Fair Value*, 51 FR 3384 (Jan. 27, 1986) at "Suspension of Liquidation." *See also Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium from France*, 69 FR 46501 (August 3, 2004) ("{A}n export subsidy brings about a lower U.S. price, which could be ascribed to either dumping or export subsidization, as well as the potential for double remedies. Imposing both an export subsidy CVD and an AD duty, calculated with no adjustment for that CVD, would impose a double remedy specifically prohibited by Article VI.5 of the GATT"). Outside the context of export subsidies, a determination of the existence, or lack thereof, of a "double remedy" is largely dependent on the facts before the Department in the proceedings at issue. In the instant investigation, because the petitioner has alleged "a single particular market situation" based on the "totality" of the GOC actions described above, and because the petitioner has provided insufficient evidence with respect to GOC interventions in downstream markets for lumber byproducts (*e.g.*, the bioenergy industry), thus foreclosing the determination of a PMS based on the totality of GOC actions raised, the Department has determined that it need not address the allegations of double remedy with respect to the electricity and stumpage programs further in this final determination.

[215] *See* GOC Joint Case Brief at 5-10; *see also* West Fraser Case Brief at 18; Resolute, Tolko and Canfor all note that they endorse and incorporate the arguments made in the GOC's case brief.

[216] *Id*.

[217] *See* Resolute Rebuttal Brief at 2-5.

Resolute states that these arguments pertained to Resolute's by-product revenue, the Ontario Northern Industrial Electricity Rate program and Resolute's participation in the Hydro-Quebec power purchase program.[218] Resolute contends that these mentions were inaccurate, taken out of context and legally wrong.[219]

Department's Position: As discussed above, the Department did not find a PMS in this final determination. Therefore, these issues are moot.

Comment 18: Differential Pricing Analysis

In the preliminary determination, the Department employed its differential pricing (DP) analysis to determine whether the average-to-average (A-to-A) comparison method is appropriate.[220] Based on the results of its DP analysis for the final determination, the Department has calculated the weighted-average dumping margin for Canfor using the A-to-A method, for Resolute and Tolko using the average-to-transaction (A-to-T) comparison method, and for West Fraser using a "mixed" method using both the A-to-A method and the A-to-T method.

The GOC, Resolute, Tolko, and West Fraser each claim that the Department has unlawfully employed zeroing (*i.e.*, not offset dumping with individual, non-dumped, negative comparison results) inconsistent with WTO Appellate Body reports which the United States is obligated to implement.[221] Furthermore, the GOC, Tolko and West Fraser each assert that the Department has failed to lawfully identify a pattern of prices that differ significantly[222] and unlawfully applied the alternative A-to-T method to all U.S. sales,[223] both of which are inconsistent with WTO jurisprudence.[224] The GOC additionally argues that the mixed use of two comparison methodologies is not permitted under Article 2.4.2 of the AD Agreement.[225]

Separate from its arguments based on U.S. violations of its WTO obligations, Tolko argues that the Department has failed to establish the existence of a pattern of prices that differ significantly and has instead merely found "price *variations* measured against arbitrary statistical benchmarks."[226] Further, Tolko asserts that the difference in the weighted-average dumping margins calculated by the Department using the A-to-A method and the A-to-T method applied to all U.S. sales is only due to zeroing and not "differential pricing"; this difference is not significant; and the 25 percent threshold for measuring this significance is arbitrary.[227] Lastly, Tolko claims that the Department's application of the A-to-T method to all U.S. sales is defective under U.S. law because the Department has failed to legally explain its change in

[218] *Id*.
[219] *Id.*
[220] *See* 19 CFR 351.414(c)(1).
[221] *See* GOC Case Brief at 27; Tolko Case Brief at 13-14; Resolute Case Brief at 37-41; West Fraser Case Brief at 18.
[222] *See* GOC Case Brief at 26; Tolko Case Brief at 12; West Fraser Case Brief at 17.
[223] *See* GOC Case Brief at 26; Tolko Case Brief at 14; West Fraser Case Brief at 18.
[224] *See* GOC Case Brief at 25-26; Tolko Case Brief at 14-15; West Fraser Case Brief at 17.
[225] *See* GOC Case Brief at 26.
[226] *See* Tolko Case Brief at 12 (emphasis in the original).
[227] *Id.* at 12-13.

practice, starting with *Bags from Taiwan*, from applying the A-to-T method to "differential pricing transactions" to all U.S. sales.[228]

Separate from its arguments based on U.S. violations of its WTO obligations, West Fraser argues that the Department should not depart from its "normal" transaction-to-transaction (T-to-T) comparison method in its analysis of whether West Fraser sold softwood lumber at less-than-fair-value in this final determination.[229] West Fraser further argues that the Department's analysis based on the Cohen's *d* test does nothing to determine whether a pattern of prices that differ significantly exists and that the results of the Cohen's d test merely identify seasonal variations and not price differences.[230] West Fraser supports this claim based on the determination in *Lumber IV* where the Department accounted for "seasonal adjustments" when examining whether massive imports had contributed to critical circumstances in the 2001 LTFV investigation.[231]

Separate from its arguments based on U.S. violations of its WTO obligations, Resolute asserts that the Department's Cohen's *d* test is flawed as a basis for identifying a pattern of prices that differ significantly. First, Resolute hypothesizes that the current structure of the Cohen's *d* test can result in 100 percent of U.S. sales passing the test.[232] Resolute argues that incorporating an analysis that is this flawed in the Department's calculation of the weighted-average dumping margin unavoidably dictates that the results do not reflect the most accurate margin possible, which is "the basic purpose of the statute."[233] Based on Resolute's concern that 100 percent of a respondent's U.S. sales could be found to be at prices that differ significantly, Resolute contends that the Department's deployment of the Cohen's *d* test vastly overstates the value of sales for which the prices are significantly different from the prices of comparison sales using the Department's analysis.[234]

Second, Resolute asserts that the Department has inappropriately defined the test and comparison groups, the average prices of which it compares to determine whether the prices within the test group differ significantly from the prices of the comparison group. Resolute argues that the comparison group must constitute a "normal" group of sale prices "against which the alleged 'pattern-of-pricing' observation is being tested."[235] Consequently, "but more egregious,"[236] is the fact that after the prices for the sales within the test group are examined, these prices are subsequently included in the "normal" comparison group. This is particularly egregious when the comparison group commingles prices for sales which have both passed and failed the

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[228] *Id.* at 15 (referencing *Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value*, 75 FR 14569 (March 26, 2010) (*Bags from Taiwan*)).
[229] *See* West Fraser Case Brief at 16, 18.
[230] *Id*. at 17.
[231] *Id.* (referencing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 FR 15539 (April 2, 2002) (*Lumber IV*)).
[232] *See* Resolute Case Brief at 28.
[233] *Id*.
[234] *Id*. at 34.
[235] *Id.* at 29.
[236] *Id.*

Cohen's *d* test – *i.e.*, sale prices which have both been found to differ significantly and to not differ significantly, respectively.

Third, Resolute argues that although the Department has grouped its U.S. sales into two groups, the Department must still test the one "PASS" group against the "FAIL" group to determine whether a pattern exists. This is necessary because of the flaw noted above that the "normal" comparison group is an "ever-moving benchmark" and that this second application of a Cohen's *d* test which would show that there is not difference in the prices between the two groups.

Resolute asserts that if the Department were to correct these flaws, the results would demonstrate that the "vast majority of the transactions defined as 'PASS' by the Department" would not result in a finding that a pattern of prices that differ significantly exists.[237] Resolute argues that for the final determination, the Department should recognize the conceptual flaws built into its sequential analysis.[238] In the alternative, Resolute suggests, "the Department must modify its 'pattern of pricing' test to ensure that its results are accurate."[239] Specifically, Resolute argues that while the "targeted dumping provision of the statute requires the Department to find 'a pattern of prices…'" the "Department's construction of the two final groups "PASS" and "FAIL" involves not a single pattern but, rather, a series of sequential, different patterns."[240] According to Resolute, the "use of the singular ('a pattern') in this statement indicates that the statute contemplates a pattern, not an almost-infinite series of different patterns."[241] Additionally, Resolute notes that the Department fails to apply the Cohen's *d* test to the two groups (*i.e.*, the group of sales that have already passed the Cohen's *d* test and the group of sales that have already failed the Cohen's *d* test).[242] Therefore, Resolute argues that even if the Department were to decide to continue to apply the flawed sequential analysis as a first step in examining whether there is a pattern of prices that differ significantly, the Department must also perform a Cohen's *d* test on the results of the first application of the Cohen's *d* test to determine whether there is a pattern of prices that differ significantly.[243]

Resolute also argues that the Department's method for finding "targeted dumping" is unlawful because it "has never been subjected to public notice and comment and has never been presented for rule-making."[244] Surely, if "the Cohen's d test had been subjected to public scrutiny, it likely would have failed …. {a}s an unjustified, unexplained, undefended and indefensible change in the Department {sic} practice, {that} is not only technically unsound: it is unlawful."[245]

The petitioner argues that the Department correctly applied the DP analysis in its *Preliminary Determination*. Although several of the respondents refer to the Department's DP analysis, specifically the application of zeroing, as "unlawful," the petitioner argues that there is no basis

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[237] *Id.* Resolute Case Brief at 32-33.
[238] *Id*. at 33.
[239] *Id*.
[240] *Id*.
[241] *Id*.
[242] *Id*. at 34.
[243] *Id*. at 35.
[244] *Id*. at 36.
[245] *Id.*

for this claim.[246] The WTO's views have no binding effect under the law of the United States.[247] Furthermore, the DP analysis, as applied in the *Preliminary Determination*, has been affirmed by the Federal Circuit as lawful and reasonable.[248] The petitioner also notes that the DP analysis correctly identifies a pattern of prices that differ significantly.[249]

The petitioner states that West Fraser attempts to create an additional step to the DP analysis by requiring the Department "to determine whether a pattern of pricing differences exists apart from seasonal or other variations in the market having nothing to do with 'hidden or masked dumping'" as part of the ratio test.[250] According to the petitioner, this argument is baseless.[251]

The petitioner notes that the Federal Circuit has deemed the Department's meaningful differences test – including the thresholds and the use of zeroing – to be "a reasonable exercise of its delegated authority."[252] The petitioner argues that the Department's calculation of the mixed methodology for West Fraser was also lawful and reasonable.[253] The petitioner also argues that Resolute's argument that the DP analysis is unlawful is inapposite and ignores legal precedent because the CIT has already ruled that Administrative Procedures Act (APA) rulemaking is not required with respect to the DP analysis.[254]

Department's Position:

For the final results, the Department applied its DP analysis to determine whether the A-to-A method is appropriate to calculate the weighted-average dumping margins for the mandatory respondents. The Department applied the A-to-A method to all U.S. sales to calculate the weighted-average dumping margin for Canfor, and the A-to-T method to all U.S. sales to calculate the weighted-average dumping margins for Resolute, Tolko, and West Fraser.

As an initial matter, we note that there is nothing in section 777A(d) of the Act that mandates how the Department measures whether there is a pattern of prices that differs significantly or explains why the A-to-A method or the T-to-T method cannot account for such differences. On the contrary, the Department has carried out the purpose of the statute[255] through a gap filling

[246] *See* Petitioner Rebuttal Brief at 36.
[247] *Id*.
[248] *Id*. at 39.
[249] *Id*. at 39-40.
[250] *Id*. Petitioner Rebuttal Brief at 41-42.
[251] *Id*. at 42.
[252] *Id*. at 43.
[253] *Id*. at 45.
[254] *Id*. at 46.
[255] *See Koyo Seiko Co., Ltd. v. United States*, 20 F.3d 1156, 1159 (Fed. Cir. 1994) (*Koyo Seiko*) ("The purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value. Averaging U.S. prices defeats this purpose by allowing foreign manufacturers to offset sales made at less-than-fair value with higher priced sales. Commerce refers to this practice as 'masked dumping.' By using individual U.S. prices in calculating dumping margins, Commerce is able to identify a merchant who dumps the product intermittently—sometimes selling below the foreign market value and sometimes selling above it. We cannot say that this is an unfair or unreasonable result.") (internal citations omitted).

exercise which has been upheld by the CAFC as reasonable and in accordance with law.[256] As explained in the *Preliminary Determination*, as well as in various other proceedings,[257] the Department's differential pricing analysis, including the use of the Cohen's *d* test as a component in this analysis, is therefore lawful and Tolko is mistaken in its argument that the Department's differential pricing analysis violates Section 777A(d)(1)(B) of the Act.

With regard to arguments concerning the Department's DP analysis and U.S. obligations under the WTO Antidumping Agreement and the Appellate Body report in *US – Washers (Korea)*, we note that WTO findings are not self-executing under U.S. law.[258] The CAFC has held that WTO reports are without effect under U.S. law "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the Uruguay Round Agreements Act (URAA).[259] The Department has not revised or changed its use of the differential pricing methodology, nor has the United States adopted changes to its methodology pursuant to Sections 123[260] or 129[261] of the URAA's implementation procedures. Accordingly, the parties' citation to the WTO's conclusions in *US – Washers (Korea)* does not undermine the adherence of the differential pricing methodology to U.S. law.[262]

The Department finds that the purpose of section 777A(d)(1)(B) of the Act is to evaluate whether the A-to-A method is the appropriate tool to measure whether, and if so to what extent, a given respondent is dumping the subject merchandise at issue in the U.S. market.[263] While "targeting" and "targeted dumping" may be used as a general expression to denote this provision of the

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[256] *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (*Chevron*) (recognizing deference where a statute is ambiguous and an agency's interpretation is reasonable); *see also Apex Frozen Foods Pvt. Ltd. v. United States*, 37 F. Supp. 3d 1286, 1302 (CIT 2014) (applying *Chevron* deference in the context of the Department's interpretation of section 777A(d)(1) of the Act) (*Apex I*), *aff'd Apex Frozen Foods Pvt. Ltd. v. United States*, 862 F.3d 1332, 1346 (Fed. Cir. 2017) (*Apex CAFC I*).

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

[258] *See, e.g.*, SAA at 659 ("WTO dispute settlement panels will have no power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it."); *see also Corus Staal BV v. United States*, 395 F.3d 1343, 1349 (Fed. Cir. 2005).

[259] *See Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007); *United States – Antidumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R (7 Sept. 2016).

[260] 19 U.S.C. § 3533.

[261] 19 U.S.C. §3538.

[262] Tolko contends that the Department's refusal to offset for non-dumped transactions in its comparisons in this investigation is inconsistent with the United States' WTO obligations, as set forth by the Appellate Body, and adopted by the Dispute Settlement Body, in *United States – Final Dumping Determination on Softwood Lumber from Canada Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW (Sept. 1, 2006) (*See* Tolko Case Brief at 16). However, the Department fully complied with the conclusions of the Appellate Body in that decision. *See e.g. Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada,* 70 FR 22636 (May 2, 2005). Accordingly, there is no merit to Tolko's arguments in this regard.

[263] *See* 19 CFR 351.414(c)(1).

statute,[264] these terms impose no additional requirements beyond those specified in the statute for the Department to determine that the A-to-A method is not an appropriate comparison methodology. Furthermore, although "targeting" implies a purpose or intent on behalf of the exporter to focus on a sub-group of its U.S. sales, the CIT and CAFC have found that the purpose or intent behind an exporter's pricing behavior in the U.S. market is irrelevant to the Department's analysis of the statutory provisions of section 777A(d)(1)(B) of the Act.[265] The CAFC held that:

> Section 1677f-1(d)(1)(B) does not require Commerce to determine the reasons why there is a pattern of export prices for comparable merchandise that differs significantly among purchasers, regions, or time periods, nor does it mandate which comparison methods Commerce must use in administrative reviews. As a result, Commerce looks to its practices in antidumping duty investigations for guidance. Here, the {U.S. Court of International Trade (CIT)} did not err in finding there is no intent requirement in the statute, and we agree with the CIT that requiring Commerce to determine the intent of a targeted dumping respondent "would create a tremendous burden on Commerce that is not required or suggested by the statute."[266]

As stated in section 777A(d)(1)(B) of the Act, the requirements for considering whether to apply the A-to-T method are: 1) there exists a pattern of prices that differ significantly and 2) the Department explains why either the A-to-A method or the T-to-T method cannot account for such differences. As upheld by the CAFC, the Department's application of the differential pricing methodology constitutes a complete and reasonable interpretation of the language of the statute, regulations, and SAA in identifying when pricing cannot be appropriately taken into account using the A-to-A method, and thus provides a lawful remedy to combat masked dumping.[267]

As described in the *Preliminary Determination*, the differential pricing analysis addresses each of these two statutory requirements. The first requirement, the "pattern requirement," is addressed using the Cohen's *d* test and the ratio test. Satisfying the pattern requirement will establish that conditions exist in the pricing behavior of the respondent in the U.S. market such that dumping may be masked or hidden (*i.e.*, where higher-priced U.S. sales offset lower-priced U.S. sales). Consistent with the pattern requirement, the Cohen's *d* test, for comparable merchandise, compares the mean price to a given purchaser, region or time period to the mean price to all other purchasers, regions or time periods, respectively, to determine whether this difference is significant. The ratio test then aggregates the results of these individual

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[264] *See*, *e.g.*, *Samsung v. United States*, Slip Op. 15-58, p. 5 ("Commerce may apply the A-to-T methodology 'if (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or period of time, and (ii) the administering authority explains why such differences cannot be taken into account using' the A-to-A or T-to-T methodologies. *Id.* § 1677f-1(d)(1)(B). Pricing that meets both conditions is known as 'targeted dumping.'").

[265] *See JBF RAK LLC v. United States*, 991 F. Supp. 2d 1343, 1355 (CIT 2014); *aff'd JBF RAK LLC v. United States*, 790 F.3d 1358, 1368 (Fed. Cir. 2015) (*JBF RAK*), *see also Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States*, 608 Fed. Appx. 948 (Fed. Cir. 2015) (*Borusan*).

[266] *See JBF RAK*, 790 F.3d at 1368 (internal citations omitted).

[267] *See Apex CAFC I*, 862 F.3d at 1346.

comparisons from the Cohen's *d* test to determine whether the extent of the identified differences in prices which are found to be significant is sufficient to satisfy the pattern requirement, meaning that conditions exist which may result in masked dumping.

When the respondent's pricing behavior exhibits conditions in which masked dumping may be present (*i.e.*, there exists a pattern of prices that differ significantly), the Department then considers whether the standard A-to-A method can account for "such differences." To examine this second statutory requirement, the "explanation requirement," the Department considers whether there is a meaningful difference between the weighted-average dumping margin calculated using the A-to-A method and that calculated using the appropriate alternative comparison method based on the A-to-T method. Comparison of these results reflect whether the differences in U.S. prices mask or hide dumping when normal values are compared with average U.S. prices (the A-to-A method) as opposed to when normal values are compared with transaction-specific U.S. prices (the A-to-T method). When there is a meaningful difference in these results, the Department finds that the extent of masked dumping is meaningful so as to warrant the use of an alternative comparison method to quantify the amount of a respondent's dumping in the U.S. market. The Department finds that there is a meaningful difference if (1) the weighted-average dumping margin calculated under the A-to-T method crosses the *de minimis* threshold, or (2) the weighted-average dumping margin calculated under the A-to-T method is 25% greater than the weighted-average dumping margin calculated under the A-to-A method (if both margins are above *de minimis*).[268]

Resolute argues that the Department's differential pricing methodology is flawed because the "current structure of the Cohen's *d* test can result in 100 percent of U.S. sales passing the test," and "{t}hat result, in and of itself, is irrational because 100 percent of a total pool cannot be different from that total pool."[269] We disagree with this argument and have previously rejected it in *CTL Plate from France*:

> Dillinger France's inference that the magnitude of its U.S. sales passing the Cohen's *d* test may be indicative of the unreasonableness of the Cohen's *d* test is also baseless. Mere reliance on Dillinger's numerical result from the test does not demonstrate how or that the Cohen's *d* test is unreasonable and, therefore, the Department does not find Dillinger's argument in this respect persuasive. For example, a company sells a single product to two customers, A and B. The prices to customer A differ significantly from the prices to customer B, and logically then the prices to customer B differ significantly from the prices to customer A. Thus, in this example, all of the company's sales are at prices that differ significantly. The Department finds this result to be reasonable. Likewise, if the prices to customer A do not differ significantly with the prices to customer B, then the prices to customer B will not be significantly different than the prices to

[268] *See Apex Frozen Foods Pvt. Ltd. v. United States*, 144 F. Supp.3d 1308, 1332 (CIT 2016) (upholding the Department's application of the meaningful difference test) (*Apex II*), *aff'd Apex Frozen Foods Pvt. Ltd. v. United States*, 862 F. 3d 1337, 1346 (Fed. Cir. 2017) (*Apex CAFC II*) ("We find Commerce's provided rationales in support of its meaningful difference analysis to be reasonable.").
[269] *See* Resolute Case Brief at 28.

> customer A, and no sales will be found to differ significantly. While either of these situations may be at the outer range of potential results (*i.e.*, 100 percent or 0 percent), neither are unreasonable simply because of the numerical result.[270]

Resolute further argues against the Department's definition of a pattern and alleges that the Cohen's *d* test is based on a flawed sequential testing analysis. We disagree. As described in the *Preliminary Results*, the Cohen's *d* test evaluates whether sales of comparable merchandise to a particular purchaser, region or time period exhibit prices that are significantly different from sales to all other purchasers, regions or time periods, respectively. Thus, if the value of the calculated Cohen's *d* coefficient is equal to or greater than 0.8 (*i.e.*, the large threshold), then the prices to a particular purchaser, region or time period in the test group are found to differ significantly from the prices to all other purchasers, regions or time periods, respectively, for comparable merchandise.[271] This analysis was done for each group of comparable merchandise and each purchaser, region or time period in order to identify Resolute's U.S. sale prices which differed significantly.

The ratio test then aggregates the sales which are at prices that differ significantly (*i.e.*, that pass the Cohen's *d* test) to understand the extent of the significance of the price differences relative to all of the respondent's U.S. sales. From Webster's dictionary,[272] "pattern" has several meanings, including "8) a reliable sample of traits, acts, tendencies, or other observable characteristics of a person, group, or institution (behavior pattern) (spending pattern)" and "12) frequent or widespread incidence (a pattern of dissent)."

In the case of identifying a pattern of differing prices, "a pattern" is a reliable sample of traits, acts, tendencies or other observable characteristics, with frequent or widespread incidences. As described above, the ratio test quantifies the extent of the significant differences in prices of comparable merchandise which have been identified by the Cohen's *d* test. The Department finds that this definition of "pattern" supports the Department's approach.

As stated above, the results of the Cohen's *d* test determine whether the sales in the test group are at prices which differ significantly from the prices in the comparison group of sales. Both the test group and the comparison group are composed of multiple U.S. sales with individual prices; these are not the patterns to which the Act refers. The Act refers to "a" single pattern for the respondent. This pattern is manifested to the extent that prices for comparable merchandise differ significantly among purchasers, regions or time periods.[273] The Department's Cohen's *d* and ratio tests are consistent with this idea of "a" single pattern.

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[270] *See Certain Carbon and Alloy Steel Cut-to-Length Plate from France: Final Determination of Sales at Less Than Fair Value*, 82 FR 16363 (April 4, 2017), and accompanying Issues and Decision Memorandum at Comment 1.
[271] *Id*. ("For this analysis, the difference was considered significant, and the sales in the test group were found to pass the Cohen's *d* test, if the calculated Cohen's *d* coefficient is equal to or exceeds the large (*i.e.*, 0.8 threshold).").
[272] *See* Webster's Ninth New Collegiate Dictionary (1989) at 863-864.
[273] The Department uses control numbers, *i.e.*, CONNUMs, as a basis for establishing physically "comparable merchandise" in determining whether or not there is a pattern of export or constructed export prices for comparable merchandise that different significantly among purchasers, regions, or periods of time. The CIT has upheld the Department's use of CONNUMs in this capacity as reasonable and in accordance with law. *See Timken Co. v. United States*, 179 F. Supp. 3d 1168, 1179 (CIT 2016) (*Timken 2016*).

Furthermore, the CIT has sustained the Department's use of average prices instead of individual transaction prices in analyzing export prices under the ratio test.[274] Specifically, the Court held that "Congress did not modify the phrase 'pattern of export prices (or constructed export prices)' with either 'weighted average' or 'individual transactions.'"[275] The Court held that "Congress could have used either modifier, but chose not to."[276] Therefore, the CIT determined that "Commerce's decision to use weighted average prices therefore controls…"[277] The CIT reiterated this decision in *Apex II*, which was affirmed by the CAFC:

> Although Congress did not modify "export prices" with "weighted-average" in the statute, Congress similarly decided not to modify "export prices" with "individual transactions" as it had done in other provisions of the antidumping duty statute. Moreover, even if Congress intended for Commerce to establish that individual export prices differ significantly, it is not unreasonable for Commerce to fulfill that goal by looking to averages.[278]

> Commerce performs the Cohen's *d* test by calculating the difference between the weighted-average sales prices of a test group and its corresponding comparison group, and subsequently comparing that difference in relation to the pooled standard deviation of the two groups…Neither the statute nor Commerce's practice require it to identify significant price differences through the use of individual export prices rather than weighted-average export prices…Significant price differences between the weighted-averages of export prices reasonably indicate that export prices differ significantly because the analysis 'uses all of a respondent's reported U.S. sales of subject merchandise' and the weighted-averages are therefore representative of and account for all the export prices.[279]

In addition, Resolute proposes a "solution" to its perceived "failure" of the Department to identify a singular pattern. Under Resolute's suggested modification of the differential pricing analysis in the *Preliminary Determination*, the Department would aggregate the results of the Cohen's *d* test into two groups, one which includes sales which pass the Cohen's *d* test and a second which includes sales which do not pass the Cohen's *d* test, and then conduct a second-level Cohen's *d* test on these two groups of sales to determine whether a "pattern of prices" exists. The Department does not believe that this approach would be reasonable. The purpose of the Cohen's *d* test is not to evaluate whether a pattern exists, but rather to examine whether the prices of merchandise to a distinct purchaser, region or time period differ significantly with the prices of comparable merchandise to all other purchasers, regions or time periods, respectively. The pattern is then discerned based on the extent of these prices that differ significantly with the ratio test.

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[274] *See Samsung Elecs. Co. v. United States*, 72 F. Supp. 3d 1359, 1365-66 (CIT 2015) (*Samsung*).
[275] *Id*. at 1366.
[276] *Id*.
[277] *Id*.
[278] *Apex II*, 144 F. Supp. 3d at 1326, *aff'd Apex CAFC II*, 862 F.3d 1337 (Fed. Cir. 2017).
[279] *Apex II*, 144 F. Supp. 3d at 1324-26.

Resolute's proposal would misuse the Cohen's *d* test beyond its purpose of examining the degree of difference between two groups of data. This proposal would cloak an evaluation of the extent of the prices that differ significantly. It would do this by reevaluating whether the pricing behavior to multiple purchasers, regions or time periods differ from those to other, multiple purchasers, regions or time periods. The result of the proposed comparison would say nothing about the extent of the sales whose prices differ significantly (*i.e.*, the test group could be 10 percent of the sales or 80 percent of the sales of comparable merchandise), but would only commingle the pricing behavior to multiple purchasers, regions or time periods which have already been found to individually exhibit significantly different pricing behavior, and whose only relationship is that they have either passed or not passed the Cohen's *d* test when examined individually.

Resolute contends that the differential pricing methodology is unlawful because the Department "unilaterally and without complete notice and comment changed the regulations governing methodologies permissible for examining targeted dumping."[280] Tolko also argues that the Department has failed to explain, on "a legally adequate basis,"[281] its previous changes in practice with respect to the application of the A-to-T method as an alternative comparison methodology. We disagree with these arguments. The CIT has already ruled that APA rulemaking is not required with respect to the differential pricing methodology. Specifically, the Court has held that:

> Commerce has provided an adequate explanation for its change in practice and sought input from interested parties.
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> Commerce's explanation for the shift from the Nails test to the differential pricing analysis need not confirm that the change is a better policy or methodology than its predecessor. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009). "{I}t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." *Id*. "Thus, Commerce need only show that its methodology is permissible under the statute and that it had good reasons for the new methodology." *Huvis Corp. v. United States*, 570 F.3d 1347, 1353 (Fed. Cir. 2009).
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> Commerce explained that it continues to develop its approach with respect to the use of A-T "as it gains greater experience with addressing potentially hidden or masked dumping that can occur when the Department determines weighted-average dumping margins using the {A-A} comparison method." Final I&D Memo at 18 (internal quotations omitted). Commerce additionally explained that the new approach is "a more precise characterization of the purpose and application of {19 U.S.C. § 1677f-1(d)(1)(B)}" and is the product of Commerce's "experience over the last several years, … further research, analysis and consideration of the numerous comments and suggestions on what guidelines,

[280] *See* Resolute Case Brief at 35.
[281] *See* Tolko Case Brief at 15.

> thresholds, and tests should be used in determining whether to apply an alternative comparison method based on the {A-T} method." *Request for Comments*, 79 Fed. Reg. at 26,722. Commerce developed its approach over time, while gaining experience and obtaining input. Under the standard described above, Commerce's explanation is sufficient. Therefore, Commerce's adoption of the differential pricing analysis was not arbitrary.[282]

West Fraser argues that the use of the differential pricing analysis in this case is inappropriate because "there is no risk of 'hidden' or 'masked' dumping of West Fraser's sales of softwood lumber from Canada" because it is a "substantially undifferentiated, fungible product that is sold in competitive markets involving many sellers and many buyers."[283] Here, West Fraser attempts to add an additional step to the differential pricing analysis by requiring the Department "to determine whether a pattern of pricing differences exists apart from seasonal or other variations in the market having nothing to do with 'hidden or masked dumping.'"[284] We disagree with this argument because the pattern requirement of the statute necessitates only that there exist "significant differences" in prices of comparable merchandise, and does not require that the Department consider the reason these price differences exist. This interpretation of the statute was upheld by the CAFC:

> Our court recently addressed this issue in *JBF RAK LLC v. United States*, No. 14-1774, slip op. at 15-17, 790 F.3d 1358, 2015 U.S. App. LEXIS 10652 (Fed. Cir. June 24, 2015). The panel in *JBF RAK* concluded that § 1677f-1(d)(1)(B) does not require Commerce to consider alternate explanations for a "pattern of export prices … that differ significantly among … periods of time," and upheld Commerce's approach to analyzing targeted dumping. 2015 U.S. App. LEXIS 10652 at *12 ("Section 1677f-1(d)(1)(B) does not require Commerce to determine the reasons why there is a pattern of export prices for comparable merchandise that differs significantly among purchasers, regions, or time periods ….") . We agree with that holding. Section 1677f-1(d)(1)(B) is silent regarding Commerce's consideration of alternative explanations beyond targeted dumping, for a pattern of export prices that differs significantly among purchasers, regions, or time periods. Under the two-part test of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), because Congress has not directly spoken to the precise question at issue here, we must determine if Commerce's interpretation of § 1677f-1(d)(1)(B) "is based on a permissible construction of the statute." Nothing in the language of the statute requires Commerce to take the extra analytical step proposed by Borusan – consideration of Borusan's alternate explanations for the pricing patterns observed through use of the Nails test. *See also Borusan*, 990 F. Supp. 2d at 1389 ("The court cannot identify any language in the statute … that might

[282] *See Apex II*, 144 F. Supp. 3d at 1322 (citing *Certain Frozen Warmwater Shrimp from India: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 51309 (August 28, 2014), and accompanying Issues and Decision Memorandum (Shrimp IDM)).
[283] *See* West Fraser Case Brief at 16.
[284] *Id*. at 17.

> require Commerce to investigate whether a given respondent has a legitimate commercial reason for such a pricing practice."). We thus agree with the JBF RAK panel that Commerce's interpretation of § 1677f-1(d)(1)(B) is reasonable.[285]

Furthermore, even if seasonality were a factor, West Fraser's reliance on the adjustment for seasonality in the analysis of critical circumstances in *Lumber IV* is misplaced. First, this analysis was for a time period many years ago – 15 years removed from the current period of investigation. Second, this analysis is related to the quantity of shipments by Canadian producers and exporters in *Lumber IV*, and was unrelated to the prices at which lumber was sold in the U.S. market. As such, the Department finds the reference inapposite.

West Fraser's arguments regarding the T-to-T method appear to be misplaced. West Fraser states that "the basis and purpose of departing from the 'usual' transaction-to-transaction approach,"[286] does not comport with the Department's approach in the *Preliminary Determination*. West Fraser concludes by recommending that "the Department should not depart from its 'normal' transaction-to-transaction approach."[287] This is not, in any sense of the word, our "normal" our "usual" practice – we have used the T-to-T method sparingly, in fact. Accordingly, as the premise for West Fraser's arguments in this respect is factually incorrect, the Department is otherwise unable to further respond to this aspect of West Fraser's case brief.

With regard to West Fraser's argument about the Department's "mixed-alternative" methodology, we also disagree. In applying the "mixed-alternative" methodology, it is reasonable for the Department to zero the negative comparison results using the A-to-T method, not to zero the negative comparison results using the A-to-A method, and not to offset the aggregated A-to-T comparison results with any perceived negative amount for the aggregated A-to-A comparison results. In *Union Steel* and *Apex CAFC II*, the CAFC held that the Department found there to be no tension in the calculations when zeroing some results, but not others.[288] Specifically, in *Union Steel*, the CAFC stated the following:

> Commerce's decision to use or not use the zeroing methodology reasonably reflects unique goals in differing comparison methodologies. In average-to-average comparisons, as used in investigations, Commerce examines average export prices; zeroing is not necessary because high prices offset low prices within each averaging group. When examining individual export transactions, using the average-to-transaction comparison methodology, prices are not averaged and zeroing reveals masked dumping. This ensures the amount of antidumping duties assessed better reflect the results of each average-to-

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[285] *See Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States*, 608 Fed. Appx, 948, 949 (Fed. Cir. 2015) (the Department's interpretation of the statute was upheld by the Court in a non-precedential disposition). *See also Timken 2016*, 179 F. Supp. 3d at 1179 (citing to *JBF RAK*, 790 F.3d at 1368 and affirming the Department's determination that the CAFC had "already found that the purpose or intent behind an exporter's pricing behavior in the U.S. market is not relevant" to the Department's "analysis").
[286] *See* West Fraser Case Brief at 16.
[287] *Id.* at 18.
[288] *See Union Steel v. United States*, 713 F.3d 1101, 1109 (Fed. Cir. 2013) (*Union Steel CAFC*); *see also Apex CAFC II*, 862 F.3d at 1348-49.

> transaction comparison. Commerce's differing interpretation is reasonable because the comparison methodologies compute dumping margins in different ways and are used for different reasons.[289]

In *Apex CAFC II*, the CAFC noted that in the context of the mixed alternative methodology, "{i}t is…unsurprising that, in seeking to combine the two methodologies to arrive at a single AD rate, Commerce would be forced to subordinate the policy goals of one to the other"[290] (*i.e.*, not offsetting the aggregated A-to-T comparison results with any perceived negative amount for the aggregated A-to-A comparison results). The CAFC held that the Department's decision to "maximize and preserve the extent of uncovered masked dumping" in this respect was "consistent with the overall statutory purpose."[291]

In the *Preliminary Determination*, the Department established a 4.57 percent margin for Tolko under the A-to-A method and a 7.53 percent margin under the A-to-T method. Tolko argues that the Department "fails to recognize that the differences in margins it identifies are not the result of the difference between the average-to-average and the average-to-transaction methodology; the differences are solely attributable to zeroing."[292] Therefore, Tolko notes, that "{h}ad the Department not applied zeroing under any alternative, Tolko's margin would not meaningfully differ among the different calculation methodologies."[293] We disagree with this argument. The difference in these two calculated margins is, in fact, the result of masked or hidden dumping.

Masked dumping, as described in other proceedings,[294] may occur with the application of the A-to-A method *implicitly* within the averaging groups where higher prices offset lower prices, and

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[289] *Union Steel CAFC*, 713 F.3d at 1109.
[290] *Apex CAFC II*, 862 F.3d at 1350.
[291] *Id*.
[292] Tolko Case Brief at 13.
[293] *Id*.
[294] *See Certain Hot-Rolled Steel Flat Products from Japan: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 81 FR 53409 (August 12, 2016) and the accompanying Issues and Decision Memorandum at 29-34 for a general discussion of masked dumping; *see also United States Steel Corp. v. United States*, 621 F.3d 1351, 1361 (CIT 2010) (*U.S. Steel 2010*) ((". . .we noted, inter alia, two opinions of the Court of International Trade that found zeroing to be useful for "combat{ing} the problem of masked dumping, wherein certain profitable sales serve to 'mask' sales at less than fair value.") *citing Timken Co. v. United States*, 354 F.3d 1334, 1343 (January 16, 2004), *citing Serampore Indus. Pvt. Ltd. v. Dep't of Commerc*e, 675 F. Supp. 1354, 1360-61 (CIT 1987) (*Serampore*) and *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States,* 926 F. Supp. 1138, 1145-1146, 1150 (CIT 1996) (*Bowe Passat*)). In *U.S. Steel 2010,* the CIT further held that "Congress gave Commerce a tool for combating targeted or masked dumping by allowing Commerce to compare weighted average normal value to individual transaction values when there is a pattern of prices that differs significantly among purchasers, regions, or periods of time. 19 U.S.C. § 1677f-1(d)(1)(B). Commerce has indicated that it likely intends to continue its zeroing methodology in those situations, thus alleviating concerns of targeted or masked dumping. That threat has been one of the most consistent rationales for Commerce's zeroing methodology in the past." *See, e.g., Timken*, 354 F.3d at 1343; *Bowe Passat*, 926 F. Supp. at 1150; *Serampore,* 675 F. Supp. 1360-61. *See also Union Steel CAFC,* 713 F.3d at 1109 ("In average-to-average comparisons, as used in investigations, Commerce examines average export prices; zeroing is not necessary because high prices offset low prices within each averaging group. When examining individual export transactions, using the average-to-transaction comparison methodology, prices are not averaged and zeroing reveals masked dumping. This ensures the amount of antidumping duties assessed better reflect the results of each average-to-transaction comparison") (*citing Koyo Seiko,* 20 F.3d at 1159).

explicitly through the granting of offsets for non-dumped sales (*i.e.*, not zeroing negative comparison results). When the two statutory criteria have been met, the Act provides that the Department may use an alternative comparison method based on the A-to-T method, with zeroing, to unmask dumping. The alternative comparison method reveals the implicitly masked dumping by comparing normal value with individual U.S. sale prices rather than with weighted-average U.S. sale prices, and reveals the explicitly masked dumping by denying offsets for non-dumped sales. As noted above, the Department's application of this statutory remedy to address masked or "targeted" dumping, including the use of zeroing, has been affirmed by the CAFC.[295]

As we discussed in response to West Fraser's argument above, the CAFC has determined that the Department's "decision to use or not use the zeroing methodology reasonably reflects unique goals in differing comparison methodologies."[296] Furthermore, the CIT held in *Apex II*, that the "zeroing characteristic of A-T is inextricably linked to the comparison methodology and its effect in the meaningful difference analysis does not render the approach unreasonable."[297] On appeal in *Apex II*, the CAFC affirmed the CIT's finding on this issue, concluding the following:

> Commerce's meaningful difference analysis – comparing the ultimate antidumping rates resulting from the A-to-A methodology, without zeroing; and the A-to-T methodology with zeroing – was reasonable…{t}he notion that Commerce's chosen methodology is unreasonable because it only measures the effects of zeroing is misplaced… "Commerce examines average export prices; zeroing is not necessary because high prices offset low prices within each averaging group. When examining individual export transactions, using the [A-T] comparison methodology, prices are not averaged and zeroing reveals masked dumping."[298]

Tolko further argues that the 25 percent differential for meaningfulness is "arbitrary and not indicative of a significant difference in the margins or the Department's analysis."[299] We disagree. First, we see no distinction between the reasonableness of the use of the 25 percent threshold and the *de minimis* standard in applying this test. Both thresholds come from the regulatory provision regarding the significance of a ministerial error after a preliminary determination.[300] The *de minimis* threshold was upheld by the CIT in *Apex I*, wherein the court found that the Department's "reliance on the *de minimis* standard was not arbitrary."[301] The court explained that the *de minimis* threshold, defined as 0.5 percent, "represents the minimum weighted-average dumping margin needed to levy AD duties in reviews. That is, the agency does not impose duties at all if it finds that an exporter's rate is less than or equal to 0.5 percent. The threshold is small by design, because reviews aim 'to counteract as much dumping behavior'

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[295] *See, e.g., Apex CAFC II*, 862 F.3d at 1348-49.
[296] *Union Steel*, 713 F.3d at 1109.
[297] *Apex II*, 144 F. Supp. 3d at 1335.
[298] *See Apex CAFC* II, 862 F.3d at 1348-49 (citing *Union Steel CAFC*, 713 F.3d at 1109).
[299] Tolko Case Brief at 13.
[300] *See* CFR 351.224(g).
[301] *See Apex I*, 37 F. Supp. 3d at 1299 (citing *Union Steel v. United States*, 823 F. Supp. 2d 1346, 1359 (CIT 2012) (*Union Steel*)).

as possible."[302] The CIT's judgment was subsequently upheld in *Apex CAFC I*, where the CAFC affirmed the Department's application of the meaningful differences test – including the thresholds and the use of zeroing – as a "reasonable exercise of its delegated authority."[303] The CAFC held that the meaningful differences test, as applied in that case by the Department, was reasonably within the agency's discretion:

> By statute, Commerce must explain why an observed pattern of price differences "cannot be taken into account using" the A-A methodology. 19 U.S.C. § 1677f-1(d)(1)(B)(ii). As already established, the statute is silent on how Commerce is to perform this analysis or even what it means for the A-A methodology to take "account" of price differences. Faced with a broad delegation of authority, Commerce devised its meaningful difference test, in which antidumping rates – as they would ultimately be applied for the A-A methodology versus an alternative – are compared, across all sales.[304]

Likewise, in *Apex II*, the CIT again affirmed the Department's use of the meaningful differences test to determine whether the standard comparison methodology could account for the "significant price differences" uncovered by the differential pricing analysis.[305]

In light of the CIT's and CAFC's holdings with respect to the Department's meaningful difference test and the application of the *de minimis* threshold in particular, we see no logical distinction to differentiate that practice and threshold from the use of the 25 percent threshold, and no party has provided an argument that makes such a distinction. Accordingly, we do not agree with Tolko's unsubstantiated claims in this regard.

Second, the CIT has held that the Department's explanation as to why the A-to-A method cannot account for the pattern of prices of comparable merchandise that differ significantly is reasonable. The CIT in *Apex II* made the following conclusion:

> Commerce's explanation posits that there is a meaningful difference where the A-A calculated margin is *de minimis* and the A-T calculated margin is not *de minimis*. Implicit in Commerce's meaningful differences analysis is that A-A can account for some degree of price differences. There may be instances where the identified price differences do not mask dumping or the masked dumping itself is *de minimis*. However, where the amount of uncovered masked dumping results in an A-T calculated margin that is not *de minimis*, and the A-A calculated margin would be *de minimis*, it is reasonable for Commerce to presume that A-A cannot account for the pattern of significant price differences because, unlike A-T, A-A cannot uncover the dumping that was masked by the differentially priced sales.[306]

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[302] *Id*.
[303] *Apex CAFC I*, 862 F.3d at 1348.
[304] *Id.* at 1346.
[305] *Apex II*, 144 F. Supp. 3d at 1323.
[306] *Id.* at 1333.

The Court also held that the "fact that the price differences between sales that pass and that do not pass the Cohen's *d* test were at times small in absolute terms does not undermine Commerce's pattern determination. Indeed, 'small differences may be significant for one industry or one type of product but not for another.'"[307] Similarly, here, the fact that for Tolko the price difference between the sales that pass and do not pass the Cohen's *d* test may be small in absolute terms, does not undermine the Department's pattern determination.

Furthermore, the absolute difference in prices of comparable merchandise is not conclusive – the Department must also consider the difference in prices relative to the level of dumping being considered. For example, an absolute difference of 2.96 percent has different implications when the underlying level of dumping is 5 percent as opposed to one hundred percent. Accordingly, the Department considers such factors in determining if there is a meaningful difference between the rates calculated using the standard and alternative comparison methodologies. In this regard, the logic used by the Department for purposes of determining whether or not there is a "meaningful" difference in its analysis is similar to that used by the Department when considering whether a ministerial error is "significant," as set forth in 19 CFR 351.224(g) of the Department's regulations.

Comment 19: Whether Critical Circumstances Exist with Respect to Shipments of Certain Softwood Lumber Imports from Canada

In the *Preliminary Determination of Critical Circumstances*,[308] the Department found that (1) there is a history of dumping and material injury by reason of dumped imports of the subject merchandise; (2) importers, exporters or producers had reason to believe that potential AD/CVD petitions could be filed as early as October 12, 2015 following expiration of the SLA and the one year "standstill period"; and, (3) shipment data from October 2015 through June 2016, as compared with the preceding nine-month period of January 2015 through September 2015 did not demonstrate massive surges in imports for Canfor, Resolute, Tolko, and West Fraser, but that U.S. import data indicates that "all other" shippers had massive surges in imports. Based on these conclusions, the Department preliminarily determined that critical circumstances did not exist with respect to Canfor, Resolute, Tolko, and West Fraser, but that critical circumstances existed with respect to imports of softwood lumber shipped by "all others." [309]

Our analysis for this final determination supports finding that critical circumstances exist for Resolute, Tolko and West Fraser. Furthermore, we continue to find that critical circumstances exist with respect to "all others."[310]

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[307] *Id*. at 1330.

[308] *See Antidumping and Countervailing Duty Investigations of Certain Softwood Lumber Products from Canada: Preliminary Determinations of Critical Circumstances*, 82 FR 19219 (April 26, 2017) (*Preliminary Determinations of Critical Circumstances*).

[309] The petitioner agrees with the Department's basis for finding a history of dumping and material injury by reason of dumped imports of the subject merchandise. The petitioner also agrees with the Department's methodology for determining whether imports represent a massive surge.

[310] For details regarding our calculation of massive imports for all four mandatory respondents and "all others," *see* Memorandum, "Calculations for Final Determination of Critical Circumstances in the Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada," dated concurrently with this memorandum

Section 733(e)(1)(A)(i) of the Act: History of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise

Canadian parties argue, and Central Canada argues in rebuttal, that because the North American Free Trade Agreement (NAFTA) and World Trade Organization (WTO) panel decisions overturned the ITC threat-of-injury determination pertaining to the only previous dumping order on softwood lumber from Canada in *Lumber IV*,[311] and because the ITC issued a negative determination on threat of material injury with respect to that proceeding, there is no basis for the Department to conclude in this investigation that there is a history of injurious dumping of softwood lumber from Canada. Canadian parties also argue that although the Department was instructed by the United States Trade Representative (USTR) to implement an affirmative determination by the ITC pursuant to section 129(a)(1) of the URAA, the CIT held in *Tembec I*[312] that section 129 does not grant the USTR authority to order the Department to implement such determinations. Accordingly, Canadian parties argue that the *Lumber IV* AD order does not provide a basis for finding a history of injurious dumping of softwood lumber from Canada.

The petitioner argues in rebuttal that WTO and NAFTA panel decisions are not binding on U.S. courts and, thus, have limited relevance to the Department's analysis. With respect to the Canadian parties' challenge to the reliability of the *Lumber IV* AD order based on a ruling made by the CIT in *Tembec I*, petitioner argues that the judgment in *Tembec I* was vacated by the CIT in *Tembec II*[313] and voluntarily dismissed as part of the *2006 SLA*. The petitioner states that due to the voluntary dismissal of all litigation pursuant to the *2006 SLA*, the dumping order remained valid until it was terminated by the *2006 SLA*.

Department's Position:

In order to determine whether there is a history of dumping and material injury pursuant to section 733(e)(1)(A)(i) of the Act, the Department generally considers current or previous AD determinations and orders covering subject merchandise from the country in question exported to the United States and current AD findings and orders in any other country with regard to the import of subject merchandise.[314] Here, pursuant to section 773(e)(1)(A)(i) of the Act, the Department has determined to rely on the Department's dumping determination in the *Lumber IV Final Determination* covering certain softwood lumber from Canada. In accordance with that analysis, the Department finds that there is a history of injurious dumping of softwood lumber from Canada.

(Final Determination Critical Circumstances Analysis Memo).

[311] *See Lumber IV Final Determination* and the accompanying Issues and Decision Memorandum at Comment 9.

[312] *See Tembec, Inc. v. United States*, 441 F. Supp. 2d 1302 (2006) (*Tembec I*)

[313] *See Tembec, Inc. v. United States*, 461 F. Supp. 2d 1355 (2006) (*Tembec II*).

[314] *See, e.g., Certain Oil Country Tubular Goods from the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination,* 74 FR 59117, 59120 (November 17, 2009), unchanged in *Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 FR 20335 (April 19, 2010).

History of Dumping

The Canadian parties and Central Canada challenge the validity of the *Lumber IV* AD order on two bases: (1) the NAFTA[315] Extraordinary Challenge Committee allegedly overturned the ITC's threat of injury determination in *Lumber IV* and the WTO[316] purportedly concluded that the ITC's threat decision was inconsistent with U.S. WTO obligations; and (2) the CIT's findings in *Tembec I*. As an initial matter, we find it significant that although parties make arguments with respect to the ITC's threat of injury determination, there is no discussion with respect to a history of dumping in particular. In fact, although there was much litigation on the issue of the Department's dumping determinations in *Lumber IV*, neither the NAFTA panel, nor the WTO, ever determined that the Department erred in finding that Canadian exporters and producers had sold merchandise during the period of investigation of *Lumber IV* to the United States for less than fair value, with the exception of West Fraser.[317] The ITC's determination of injury or threat of injury is a different analysis from the Department's dumping analysis, both statutorily and as a matter of fact. Accordingly, we have determined that for analyzing a history of dumping, none of the decisions cited by the Canadian parties and Central Canada call into question the history of the existence of dumping.

Thus, the Department continues to rely upon the Department's finding in *Lumber IV Final Investigation*,[318] that certain softwood lumber from Canada was being sold for less than fair value. We recognize that the scope of merchandise covered by this investigation differs in some respects from the scope of merchandise covered by the *Lumber IV* investigation, as noted above. Nonetheless, the majority of softwood lumber from Canada found to be dumped in *Lumber IV* would be covered, today, by the scope of this investigation. Thus, for purposes of our critical circumstances analysis, we determine that there exists a history of dumping with regard to imports of certain softwood lumber from Canada.

History of Material Injury

With respect to our material injury analysis, we acknowledge that the NAFTA litigation resulted in a remand in which the ITC found no threat of injury, which was affirmed by an Extraordinary Challenge Committee.[319] The history of this litigation began on January 22, 2003, when USTR first issued notice that Canada requested WTO dispute settlement regarding the ITC's determination.[320] On September 5, 2003, the panel convened by the WTO Dispute Settlement

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[315] *See Softwood Lumber from Canada*, Inv. Nos. 701-TA-414, 731-TA-928 (Final) (Third Remand), USITC Pub. No. 3815, Views on Remand (September 10, 2004) at 13.
[316] *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, Report of the Panel (March 22, 2004) (WT/DS277/R).
[317] *See North American Free Trade Agreement, Article 1904 NAFTA Panel Reviews; Notice of Panel Decision*, 70 FR 34746 (June 15, 2005).
[318] *See Lumber IV Final Determination*.
[319] *See North American Free-Trade Agreement*, Article 1904 NAFTA Panel Reviews; Notice of Completion of the Extraordinary Challenge Committee, 70 FR 48103 (August 16, 2005).
[320] *See WTO Dispute Settlement Proceeding Regarding the United States International Trade Commission Final Determination of Threat of Material Injury in the Investigation Concerning Certain Softwood Lumber from Canada,*

Body (WTO panel) issued its decision, affirming in part and remanding in part the ITC's determinations.[321] On December 15, 2003, the ITC maintained on remand that an industry was threatened with material injury by reason of dumped and subsidized subject imports.[322] By decision circulated on April 29, 2004, the WTO Panel affirmed in part and remanded in part the ITC's determinations on remand.[323] On June 10, 2004, the ITC again determined on remand that the U.S. softwood lumber industry was threatened with material injury by reason of dumped and subsidized subject imports.[324] On August 5, 2004, the ITC issued a notice that (1) the WTO panel issued its final report finding that the ITC final determination was not in conformity with U.S. WTO obligations, and (2) the USTR requested, pursuant to section 129(a)(4) of the URAA, that the ITC render actions not inconsistent with the panel findings.[325] On August 26, 2004, the ITC set forth a schedule for the proceeding pursuant to section 129(a)(4) of the URAA.[326] By a decision issued on August 31, 2004, the WTO Panel remanded to the ITC again with explicit instructions directing the ITC to reverse its affirmative determinations. On September 10, 2004, while the ITC contested the WTO Panel's authority to reverse the ITC's decision in these circumstances, a majority of the ITC Commissioners issued a determination consistent with the WTO Panel's decision.[327] By decision issued on October 12, 2004, the WTO Panel affirmed the third remand and subsequently directed the NAFTA Secretariat to issue a Notice of Final Panel Action on October 25, 2004.[328] As a result of the WTO dispute, the AD and CVD Orders were amended by the Department to reflect a new ITC threat of injury decision, in accordance with USTR's direction, pursuant to a section 129(a)(4) of the URAA.[329] On November 15, 2005, the WTO Panel reviewing the *Amended AD and CVD Orders*, concluded that the determination pursuant to section 129(a)(4) of the URAA was fully consistent with the United States' WTO obligations.[330] This led to an outstanding legal issue, which became the source of dispute before the CIT in *Tembec I, II* and *III*.[331]

The CIT held in *Tembec II*, that, in effect, the Section 129 Determination and Amended AD and CVD Orders did not trump the undermining of the initial threat of injury determination by the NAFTA Panel and Extraordinary Challenge Committee. However, that decision was

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68 FR 3088 (January 22, 2003).

[321] *See Certain Softwood Lumber Products from Canada,* USA-CDA-2002-1904-07, Decision of the Panel (September 5, 2003).

[322] *See Softwood Lumber from Canada,* Inv. Nos. 701-TA-414 and 731-TA-928 (Remand), USITC Pub. 3658 (December 2003).

[323] *See Certain Softwood Lumber Products from Canada*, USA-CDA-2002-1904-07, Remand Decision of the Panel (circulated April 29, 2004).

[324] *See Softwood Lumber from Canada,* Inv. Nos. 701-TA-414 and 731-TA-928 (Remand) (Second) (June 10, 2004).

[325] *See Softwood Lumber from Canada,* 69 FR 47461 (August 5, 2004).

[326] *See Softwood Lumber from Canada*, 69 FR 52525 (August 26, 2004).

[327] *See Antidumping and Countervailing Duty Investigations of Certain Softwood Lumber Products from Canada: NAFTA Panel Decision,* 69 FR 69584 (November 30, 2004).

[328] *Id.*

[329] *See Amendment to Antidumping and Countervailing Duty Orders on Certain Softwood Lumber Products from Canada*, 69 FR 75915 (December 20, 2004) (*Amended AD and CVD Orders*).

[330] *See Panel Report; United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by* Canada, 2005 WTO DS LEXIS 64, WT/DS277/RW (Nov. 15, 2005).

[331] *See Tembec, Inc. v. United States*, 475 F. Supp. 2d 1393 (2007) (*Tembec III*).

subsequently vacated by *Tembec III*.[332] Thus, as a matter of law, *Tembec I* and *Tembec II* could not be appealed by any party to that litigation, and the Court's holding was in no way binding on the Department, the ITC, or the USTR. We find the arguments made by the Canadian parties and Central Canada to be curious – although the *2006 SLA* settled the *Tembec* litigation, and no case or controversy existed to be determined by the Court in that litigation once the case was vacated, they still argue that the Department was somehow bound by the Court's ruling.[333] We disagree.

In fact and law, the ITC's threat-of-injury determination remained an outstanding issue when the United States and Canadian governments entered into the *2006 SLA*.[334] The *Lumber IV* AD Order, whether it be the original AD Order, or the subsequently Amended AD Order, was revoked pursuant to that settlement, and the settlement itself stated that it was entered into to ensure that "there is no material injury or threat thereof to an industry in the United States from imports of {softwood lumber} from Canada, and to avoid litigation under Title VII of the Tariff Act of 1930… on this issue."[335]

Thus, the Department makes two determinations with respect to the history of material injury and/or threats of material injury with respect to certain softwood lumber from Canada. First, we determine that there existed threat of material injury throughout the *Lumber IV* investigation and subsequent reviews. Second, we determine that the *2006 SLA* was intended to address concerns of material injury and/or threats of material injury which existed at the time the governments entered into the Agreement, and these concerns continued to exist throughout the life of that Agreement. Again, we recognize that the scope of merchandise covered by the *Lumber IV* AD Order differed in some respects from the scope of merchandise covered by the *2006 SLA*, and both differed in some respects from the scope of merchandise covered by this investigation. Nonetheless, the majority of softwood lumber from Canada covered by both *Lumber IV* and the *2006 SLA* would be covered by the scope of this investigation. Thus, from the underlying *Lumber IV* investigation to the cessation of the *2006 SLA*, we find that there existed a history of material injury and/or threat of material injury with regard to imports of certain softwood lumber from Canada.

Section 733(e)(1)(A)(ii): Whether the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales

Canadian parties argue, and Central Canada argues in rebuttal, that there is no basis for the Department to conclude that there is knowledge of dumping and material injury. Canadian parties argue that: (1) the preliminary determination dumping margins for the four mandatory

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[332] *Id.*

[333] We understand the parties' arguments to be that despite being vacated, the Court's ruling in *Tembec I* retained a certain amount of legal status. Whether that legal status is properly termed "advisory," or "dicta," we do not agree with the Canadian parties and Central Canada that the Department is bound in any way by that decision for purposes of its critical circumstances analysis in this investigation. Further, it is well established that the Constitution prohibits Federal Courts from issuing advisory decisions. *See Muskrat v. United States*, 219 U.S. 346, 349-362 (January 23, 1911).

[334] *See* Exhibit 5B to the *2006 SLA*.

[335] *Id.*

respondents do not come close to the thresholds the Department considers sufficient for imputing knowledge of dumping; (2) the Department should not rely on the ITC's January 2017 preliminary determination in the pending investigations to impute knowledge of dumping and material injury to importers because the ITC need only find a "reasonable indication" of injury, and where there are simultaneous AD and CVD investigations, the ITC does not explain whether allegedly unfairly subsidized imports, allegedly dumped imports – or both – form the basis for its injury determination; and, (3) relying on the ITC's January 2017 preliminary determination is problematic if the Department adheres to its October 2015 "knowledge" date for purposes of determining whether there are "massive imports" because notice of the ITC finding would be lacking.

The petitioner argues that the ITC's affirmative preliminary injury determination provides a basis for the Department to find that a reasonable basis exists to impute importer knowledge that material injury is likely by reason of imports of softwood lumber from Canada.

Department's Position:

In determining whether an importer knew or should have known that the exporter was: (1) selling subject merchandise at LTFV and (2) that there was likely to be material injury by reason of such sales, the Department must rely on the facts before it at the time the determination is made. The Department generally bases its decision with respect to knowledge of dumping on the margins calculated in the preliminary determination and bases its decision with respect to knowledge of likely material injury on the ITC's preliminary injury determination. [336] The Department normally considers margins of 25 percent or more for EP sales and 15 percent or more for CEP sales sufficient to impute importer knowledge of sales at LTFV.[337]

In this investigation, the mandatory respondents reported both EP and CEP sales. The final margins for Canfor, Resolute, Tolko, and West Fraser (ranging from 3.20 percent to 8.89 percent) do not exceed the threshold the Department normally considers sufficient to impute knowledge of dumping. Consequently, the Department determines that section 735(a)(3)(A)(ii) of the Act is not satisfied, and therefore, does not reach the issue of whether to impute importer knowledge with respect to material injury. However, because the Department has determined that there is a history of dumping and material injury by reason of dumped softwood lumber imports in the United States, section 735(a)(3)(A)(i) is satisfied, and the Department next analyzes whether section 735(a)(3)(B) is satisfied, *i.e*., whether there have been massive imports of the subject merchandise over a relatively short period.

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[336] *See, e.g., Carbon and Alloy Steel Wire Rod from Germany, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Preliminary Determination of Critical Circumstances*, 67 FR 6224, 6225 (February 11, 2002), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Moldova,* 67 FR 55790; *Affirmative Preliminary Determination of Critical Circumstances: Magnesium Metal from the People's Republic of China*, 70 FR 5606, 5607 (February 3, 2005), unchanged in *Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Magnesium Metal from the People's Republic of China*, 70 FR 9037.

[337] *See, e.g., Dioctyl Terephtalate from the Republic of Korea: Final Affirmative Determination in the Less-Than-Fair-Value Investigation*, 82 FR 28824 (June 16, 2017).

Section 733(e)(1)(B): Whether there have been massive imports of the subject merchandise over a relatively short period

Canadian parties and Central Canada, on rebuttal, challenge the Department's reliance on what they call "flawed" Global Trade Atlas (GTA) data, which they state do not capture or reflect corrections to import statistics that U.S. Census regularly releases, to calculate whether there were massive imports for all others. Canadian parties argue, and Central Canada argues in rebuttal, that the Department's most recent practice is to apply the experience of the selected mandatory respondents to determine critical circumstances, and if no mandatory respondent demonstrates massive imports, the Department must find the same for the "all others" group.

In addition, Canadian parties and Central Canada, on rebuttal, assert a two-pronged argument: (1) the Department should follow its practice of comparing shipment data for the months immediately before and after the filing of the petition rather than the date importers or exporters or producers had reason to believe that a proceeding was likely (*i.e.,* the so called "knowledge" date); and, (2) if the Department departs from its traditional comparison and utilizes an October 2015 "knowledge" date and all available data, it should apply the same type of seasonality adjustment as it did in *Lumber IV*. If the Department follows its traditional practice of examining shipment data before and after the petition, that comparison demonstrates no massive imports, whether or not a seasonality adjustment is applied to the data. Finally, the Canadian parties argue that the Department's practice of examining "the longest period for which information is available up to the date of preliminary determination" would require the Department to compare data over a forty-month timeframe, which conflicts with Congress' statutory directive that the Department compare shipments "over a relatively short period."

In rebuttal, the petitioner argues that the Department's use of GTA data is consistent with the Department's previous practice. The petitioner supports the comparison period used by the Department in the *Preliminary Determination*. The petitioner argues that not only is the Department's choice of comparison periods supported by substantial evidence on the record, parties to this proceeding have not offered a convincing rationale for the Department to use a different period. In rebuttal, the petitioner contends that because Canadian producers had early knowledge of a likely AD or CVD proceeding, use of an expanded base and comparison period was proper.

Department's Position:

In determining whether imports of the subject merchandise were "massive," the Department normally will examine the volume and value of the imports, seasonal trends, and the share of domestic consumption accounted for by the imports.[338] In determining whether there are "massive imports" over a "relatively short period," pursuant to section 733(e)(1)(B) of the Act, the Department normally compares the import volumes of the subject merchandise for at least three months immediately preceding the filing of the Petition (*i.e.,* the "base period") to a comparable period of at least three months following the filing of the Petition (*i.e*., the "comparison period"). If the Department finds that importers, or exporters or producers, had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was

[338] *See* 19 CFR 351.206(h)(1).

likely, the Department may consider a period of not less than three months from that earlier time.[339] Imports normally will be considered massive when imports during the comparison period have increased by 15 percent or more compared to imports during the base period.[340]

As an initial matter, Canadian parties are not correct that the Department's most recent practice, as reflected in *Emulsion Styrene-Butadiene Rubber from Brazil*,[341] is to apply the experience of the mandatory respondents to "all others," rather than analyzing import statistics. The Department only relies on the experience of the mandatory respondents to measure "all others" if the record does not indicate the existence of other shippers, and in *ESB Rubber from Brazil*, the sole mandatory respondent was the only shipper.[342] Additionally, many cases before the Department have two or more mandatory respondents, and the massive imports analysis might yield different results for each. Thus, as a practical matter, looking to the experience of the mandatory respondents to impute the experience of "all others" could often lead to an ambiguous result. The Department's normal methodology in factual circumstances such as this investigation where there are additional shippers, is to use import data.[343]

The Department has determined to conduct its critical circumstances analysis using 21-month base and comparison periods. In the *Preliminary Determinations of Critical Circumstances*, the Department explained that, pursuant to 19 CFR 351.206(i), importers, exporters or producers had reason to believe that potential AD/CVD petitions could be filed as early as October 12, 2016. Specifically, the SLA between the United States and Canada expired on October 12, 2015, and expressly provided for a "standstill" period of 12 months after the expiration of the agreement, during which the U.S. domestic industry agreed to not file AD/CVD petitions.[344]

We find that the language of 19 CFR 351.206(i) that importers, exporters or producers "had reason to believe" that a proceeding was likely, has been met. While Canadian parties contend that this analysis ignores efforts made by the U.S. and Canadian governments to negotiate a new agreement, it would be an unreasonable standard to conclude that importers, exporters or producers would have to be 100 percent certain that a petition would be filed to have a "reason to believe" that a proceeding was likely before they accelerate imports. While there is no exact formula for determining when the prospect of future proceedings crosses the line from "possible"

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[339] *See* 19 CFR 351.206(i).
[340] *Id.*
[341] *See Emulsion Styrene-Butadiene Rubber from Brazil: Final Affirmative Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 82 FR 33048 (July 19, 2017) (*ESB Rubber from Brazil*), and accompanying Issues and Decision Memorandum at "V. Final Negative Determination of Critical Circumstances."
[342] *See Emulsion Styrene-Butadiene Rubber from Brazil, the Republic of Korea, Mexico, and Poland: Initiation of Less-Than-Fair-Value Investigations,* 81 FR 55438, 55442-55443 (August 19, 2016) (identifying the one producer/exporter as the sole producer/exporter).
[343] *See Certain Carbon and Alloy Steel Cut-to-Length Plate from Italy: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 82 FR 16345 (April 4, 2017), and accompanying Issues and Decision Memorandum at "IV. Critical Circumstances"; *see also 1,1,1,2 Tetrafluoroethane (R-134a) From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part*, 82 FR 12192 (March 1, 2017), and accompanying Issues and Decision Memorandum at Comment 3.
[344] *See Petitions* at Volume I, at 70-73.

to "likely," in our *Preliminary Critical Circumstances Determinations*, we focused on the termination of the *2006 SLA*'s 12 month "standstill" period on the filing of AD and CVD petitions. As a result of these unique circumstances, the parties could accelerate imports to mitigate against the uncertainty caused by the filing of a dumping petition, the suspension of liquidation, and possible dumping duties. Indeed, information on the record supports that exporters ship their products to third-party vendors in the U.S. in anticipation of future sales (*i.e.,* "vendor-managed inventory" sales), and thus would have little to lose by building up inventory in the U.S. prior to the suspension of liquidation.[345]

This determination is further supported by additional information on the record. In a *Times Colonist* article provided by the petitioner, the B.C. Lumber Trade Council, which includes three of the four mandatory respondents in this investigation,[346] stated in February 2017, that they "have been readying ourselves and preparing for litigation for 16 months now."[347] In addition, petitioner has placed on the record a statement by the Deputy Legal Adviser and Director General, Trade Law Bureau of Canada's Department of Foreign Affairs, Trade and Development, indicating data, legal and strategic preparation in advance of termination of the "standstill" period.[348] Thus, the Department continues to find that, pursuant to 19 CFR 351.206(i), importers, exporters or producers had sufficient reason to believe that proceedings were likely following expiration of the SLA on October 12, 2015 and termination of the "standstill" period.

The Canadian parties' argument concerning the requirement that the analysis to determine whether or not imports were "massive" should be limited to imports during the months directly preceding and following the filing of the petition, does not consider the need to assess the length of the base and comparison periods relative to the particular circumstances of the case. Due to the statutory limitation imposed on the application of provisional measures imposed by section 733(e)(2) of the Act, exporters, producers and importers would also be aware that the Department only has the authority to extend provisional measures beginning ninety days prior to the preliminary determination; this provides an incentive for any exporters, producers and importers to begin "massive" imports as early as possible after the expiration of the *2006 SLA*,

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[345] *See Preliminary Determination*, and accompanying PDM at "XII. Export Price and Constructed Export Price ("For each respondent's VMI sales, where the merchandise under consideration is sold after the date of importation from inventory located within the United States, we used the CEP methodology, consistent with section 772(b) of the Act.").

[346] *See* Letter from the petitioner, "Certain Softwood Lumber Products from Canada: Refiling of March 2, 2017 Response to Government of Canada's Comments on Allegations of Critical Circumstances," dated May 15, 2017 (Petitioner May 15, 2017 CC Comments) at Exhibit 10.

[347] *Id.* at Exhibit 9 (Times Colonist, "B.C. Coast braces for softwood lumber battle").

[347] *Id.*

[348] *Id.* at Exhibit 11 ("Let's assume that the scenario is no negotiations are successfully concluded and litigation—let's call it broadly—is initiated in October. There are a lot of steps that we've already been working on for the last year or more. I would group them in three broad categories. The first is data preparation. There's a lot of work to make sure that our numbers are in order. That's involved working at the federal government level with provincial governments, with experts, and stakeholders to make sure that we have the best situation, in terms of the numbers, to address potential claims. Second, there is the legal preparation with our U.S. counsels, not only the Canadian federal government's U.S. counsel, but also the U.S. counsel for the provinces and territories and for industry groups.").

and well in advance of any potential filing by U.S. producers. The Department observes that if we were constrained to a three or six-month base and comparison period, exporters, producers and importers in this case specifically could have strategically increased imports, and the Department would have been unable to adequately address this in the critical circumstances context, because a petition was prohibited from being filed for a full year's time following the expiration of the *2006 SLA*. We reject this interpretation of section 19 CFR 351.206(i), as it would unreasonably limit application of section 733(e)(1)(A), despite the flexibility accorded to the Department under section 733(e)(1)(B), and would allow foreign exporters and producers to evade the disciplines of the AD and CVD laws, defeating the very purpose of a critical circumstances analysis. In applying the AD and CVD laws, the Department has the responsibility and the inherent authority to consider the prevention of evasion in interpreting its own regulations and statute. [349]

As noted above, in analyzing the history of dumping and material injury, with respect to ascertaining what timeframe constitutes a "relatively short period of time" in this case, the Department has looked to the history of dumping and material injury spanning from the filing of the petition in *Lumber IV* in 2001 through the termination of the *2006 SLA* in 2015. Here, the Department finds that 21 months constitutes an appropriate base and comparison period, in light of the beginning and anticipated termination of the *2006 SLA*'s "standstill period." This determination is consistent with the Department's long-standing practice in critical circumstances determinations to examine the longest period for which information is available up to the date of the preliminary determination.[350] Furthermore, although we do not disagree that 21 months is a longer comparison period than comparison periods utilized in past cases, we find that the facts in this case are unique, and that following 14 years of dumping and threat of injury/injury determinations covering certain softwood lumber from Canada, this period of time is "relatively" short in comparison for purposes of analyzing whether or not there was a surge of "massive imports" following the cessation of the *2006 SLA*.

For the non-individually investigated companies, we relied upon GTA import statistics of subject merchandise, less the mandatory respondents' reported shipment data, to determine if imports in the post-Petition period for the subject merchandise were massive. These data demonstrate that there was an increase in imports of greater than 15 percent during a "relatively short period" of time, in accordance with 19 CFR 351.206(h) and (i). Regarding Canadian parties' contention that the GTA data placed on the record by the Department contains errors, we find the issue moot, as Canadian parties' own data, which varies only slightly from the GTA data, also demonstrates an increase in imports of greater than 15 percent during the same time period.[351]

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[349] *Mitsubishi Elec. Corp. v. United States,* 1046, 700 F.Supp. 538, 555 (1988), *aff'd* 898 F.2d 1577 (Fed.Cir.1990); *Tung Mung Development Co., Ltd. v. United States*, 219 F.Supp. 2d 1333 (Ct. Int'l Trade 2002).

[350] *See, e.g., Certain Steel Wheels From the People's Republic of China: Notice of Final Determination of Sales at Less Than Fair Value and Partial Affirmative Final Determination of Critical Circumstances*, 77 FR 17021 (March 23, 2012) (*Certain Steel Wheels Final Determination*), and accompanying Issues and Decision Memorandum at Comment 6; *Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea*, 77 FR 17413, 17416 (March 26, 2012) (*Refrigerator-Freezers from Korea*).

[351] *See* Final Determination Critical Circumstances Analysis Memo.

Therefore, we find that there were massive imports for the non-individually examined separate rate entities, pursuant to section 733(e)(1)(B) of the Act and 19 CFR 351.206(c)(2)(i).[352]

Seasonality

Canadian parties argue that should the Department depart from a three-month base and comparison period, it should apply the same type of seasonality adjustment as it did in *Lumber IV*. In the *Lumber IV* CVD critical circumstances memorandum, the Department recognized that the lumber industry is in fact seasonal, and thus applied a seasonality adjustment to ensure that it was comparing appropriate aggregate numbers for its "massive imports" analysis.[353] In applying that adjustment, the Department found that subject imports from Canada were subject to seasonal trends which would need to be addressed in its analysis of whether or not massive imports within the meaning of the statute had occurred.[354]

Canadian parties also argue that the GTA data that the Department has placed on the record for its import surge analysis contains errors, and does not include enough prior-year data necessary to calculate a seasonality adjustment. Canadian parties claim that they have submitted U.S. Census data to the record of this investigation which he Department should use to overcome these problems. The Canadian parties have replicated the approach to calculating a seasonal adjustment factor that the Department employed in *Lumber IV*. They claim that assuming that the Department continues to use an October 2015 "knowledge" date – no single mandatory respondent, nor the "all others" group, exhibits increases in volume or value of at least 15 percent.

The petitioner argues that the Canadian parties' proposed seasonal adjustment is not supported by evidence on the current record. Specifically, the magnitude of volume changes from 2014 to the first half of 2017 has fluctuated significantly from quarter to quarter. As such, if the Department was to apply a single seasonality adjustment factor across this entire time period, the single adjustment period would fail to account for the wide fluctuations in volume changes. If the Department does consider seasonality as a factor, it should compare November 2016 to January 2017, to the same time period year-over-year. The petitioner argues, that based on a year-over-year comparison, several of the responding Canadian parties satisfy the Department's definition of "massive imports" under 19 CFR § 351.206(h)(2).

Department's Position:

As noted above, the Department's long-standing practice in critical circumstances determinations is to examine a period for which information is available up to the date of the preliminary determination.[355] Since both the base and comparison periods encompass more than one year,

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[352] *Id.*

[353] *See Notice of Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Certain Softwood Lumber Products from Canada*, 66 FR 43186, 43190 (August 17, 2001).

[354] *Id.*

[355] *See, e.g., Certain Steel Wheels Final Determination* at Comment 6; *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Determination of Sales at Less*

any distortion caused by seasonality will be reduced by the inclusion of all seasons in both the base and comparison periods. Moreover, the Canadian parties' own analysis appears to show fluctuations in volume over several-year periods rather than seasonal fluctuations.[356] When comparing lengths of time as long as twenty months, an analysis such as that offered by Canadian parties can no longer be considered a seasonal analysis.

The Department has a practice of considering seasonal trends when determining whether imports are massive only when those trends are clear and predictable.[357] The seasonal trends of the type for which the Department would adjust are revealed by spike or a dip in volume at certain times during the year and where those spikes and dips are consistent from year to year. The six-month comparison offered by Canadian parties, which compares summer-fall to winter-spring, show no such clear seasonal trends. Rather, it shows that there are very slight decreases in volume from the summer-fall period to the winter-spring period at about exactly half a year's time. The opposite (a slight increase) is true for the other half of each year. The increases and decreases over the six years analyzed average out to nearly zero percent.[358] Thus, Canadian parties have not made a clear case for a seasonality adjustment to the Department's massive imports analysis.

Comment 20: Whether the Department Should Deduct SLA Export Tax from U.S. Price

In the *Preliminary Determination*, the Department deducted export taxes paid by the mandatory respondents to the Canadian government pursuant to the terms of the *2006 SLA* on U.S. exports during a portion of the POI. The petitioner agrees with the Department's methodology. Tolko, Resolute, and Canfor claim that, just as the Department does not deduct AD and CVDs in its export price and constructed export price calculations, neither should it deduct export taxes imposed under the *2006 SLA*. Additionally, the *2006 SLA* export tax was imposed as part of a comprehensive settlement of the CVD order in the previous *Lumber IV* investigation, so Canfor argues that these taxes were specifically adopted to eliminate any injury caused by dumping or subsidization and offset the countervailable subsidies received. Accordingly, Canfor argues that as a result, these taxes should not be deducted under section 772(c)(2)(B) of the Act. Canfor also states that, because U.S. domestic producers committed to not filing AD or CVD petitions during the pendency of the *2006 SLA*, and because the only part of the POI during which these *2006 SLA* export taxes were in effect was October 2015, which was within the period covered by the agreement, in accordance with Annex 18 of the SLA, the petitioner is estopped from arguing that SLA export taxes were not specifically intended to offset subsidies.

Than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part, 77 FR 63791 (October 17, 2012), and accompanying Issues and Decision Memorandum at Comment 10.C.

[356] *See* Canadian Parties' Case Brief at Exhibit 1, "Twenty-Month Comparison with Pre-Period from February 2014 to September 2015 and Post-Period from October 2015 to May 2017."

[357] *See, e.g., Countervailing Duty Investigation of Certain New Pneumatic Off-the-Road Tires From India: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part,* 82 FR 2946 (January 10, 2017), and accompanying Issues and Decision Memorandum at Comment 10; *Countervailing Duty Investigation of Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part,* 80 FR 34888 (June 18, 2015), and accompanying Issues and Decision Memorandum at Comment 23.

[358] *Id.* ("Six-Month Comparison with Pre-Period from June 2016 to November 2016 and Post-Period from December 2016 to May 2017.").

The petitioner argues in rebuttal that the Department rejected similar arguments in the *Lumber IV* Investigation. The petitioner argues that the Department held under a previous settlement agreement that similar export taxes did not offset CVD subsidies because they were assessed by the Canadian government on lumber exports above a certain threshold, and were calculated by the Canadian government based on factors having nothing to do with countervailable subsidies received. The petitioner counters Canfor's contention that U.S. producers' commitment pursuant to Annex 18 of the *2006 SLA* to not file AD or CVD petitions estops the petitioner from arguing that the export taxes collected are not intended to offset subsidies. The petitioner explains that the "no injury" letters that Canfor references state that "{t}he representations and commitments contained in this letter shall have no force or effect after the SLA 2006 is terminated or expires." In addition, the petitioner argues that the SLA terms do not specify that the export taxes are intended to offset countervailable subsidies.

Department's Position:

Under sections 772(c)(2)(B) and 771(6)(C) of the Act, export taxes, duties, or other charges levied on the export of merchandise to the United States, *specifically intended to offset the countervailable subsidy received*, are not deductible from export price (EP) or constructed export price (CEP). The Act is clear that although U.S. price may be reduced by any export tax, it cannot be reduced by an export tax which is "levied on the export of merchandise to the United States specifically intended to offset the countervailable subsidy received."[359] The reason for this exception to the allowance for export tax adjustments is clear -- if the trade distorting effects of the countervailable subsidy on the U.S. price can be shown to be reduced by a "specific" amount as a result of the export tax, it would be illogical for the Department to negate that reduction in distortion by nonetheless lowering the U.S. price by deducting that particular export tax in its calculations.

To satisfy this language in the Act, a party must prove to the Department through record evidence that an export tax has specifically offset a countervailable subsidy received in order for no deduction to be applied. Otherwise, the general rule of section 772(c)(2)(B), which provides for the deduction of export taxes from U.S. price remains the default calculation. This analysis is analogous to the Department's treatment of duty drawback, where the Department will only allow a duty drawback adjustment under section 772(c)(1)(B) if a party can specifically demonstrate that: (1) the rebate and import duties are dependent upon one another, or in the context of an exemption from import duties, if the exemption is linked to the exportation of the subject merchandise; and, (2) the respondent has demonstrated that there are sufficient imports of the raw material to account for the duty drawback on the exports of the subject merchandise.[360] In this case, no party has provided evidence that the export taxes and the quantitative restrictions of the *2006 SLA* specifically offset a countervailable subsidy by a specific amount. Indeed, although the *2006 SLA* did implement trade-restrictive measures as a result of a settlement of the *Lumber IV* CVD investigation, it also addressed the settlement of the *Lumber IV* AD investigation as well. Furthermore, the export taxes and volume restraints, pursuant to Article

[359] *See* Section 772(c)(1)(B) and 771(6)(C).
[360] *See Final Affirmative Determination and Affirmative Determination of Critical Circumstances, in Part, in the Less-Than-Fair-Value Investigation of Emulsion Styrene-Butadiene Rubber from the Republic of Korea*, 82 FR 33045 (July 19, 2017), and accompanying Issues and Decision Memorandum at Comment 5.

VII of the *2006 SLA*, varied, depending on the Province from which softwood lumber was exported. Some Provinces paid an export charge, expressed as a percentage of export price, linked to the prevailing monthly price, while others paid a lower export charge, expressed as a percentage of export price, linked to the prevailing monthly price, in addition to a volume restraint. Per Annex 7A and 7B of the *2006 SLA*, the prevailing monthly prices were based on framing lumber composite prices produced by *Random Lengths*, while the volume restraints were tied to quota volumes dependent on expected United States consumption– a far different model of addressing unfair Canadian trade than CVDs.

In *Lumber IV*, with respect to export taxes imposed and collected by the Canadian government under the 1996 SLA, the Department determined that such export taxes were not intended to offset the countervailable subsidy received and, thus, were deductible from EP and CEP:

> . . . Section 771(6)(C) stipulates that, in order to qualify for the export tax exemption, the tax must be "specifically intended to offset the countervailable subsidy received." According to the language of the SLA, the agreement was "intended to ensure that there is no material injury or threat thereof to an industry in the United States from imports of softwood lumber from Canada." The SLA does not mention a countervailable subsidy, nor was it negotiated under the countervailing duty or suspension agreement sections of the Act. Furthermore, we agree with the petitioners that the SLA tax is not comparable to a countervailing duty because, unlike a countervailing duty, it was only applied to exports above a certain threshold. The SLA limited, to 14.7 billion board feet, the amount of softwood lumber that could enter the United States fee-free. Canadian lumber exports to the United States in excess of 14.7 billion board feet were subjected to a graduated export fee that was collected by the Canadian Government. Therefore, no tax at all was imposed on the majority of subject merchandise. That being the case, the export taxes imposed by the SLA do not meet the definition in section 771(6)(C) of the Act; thus, they are ineligible for the exemption described in section 772(c)(2)(B) of the Act. For the final determination we continue to deduct SLA taxes from the starting price in order to calculate EP and CEP.[361]

Consistent with the precedent established in *Lumber IV*, we will continue to deduct from EP and CEP export taxes collected for all U.S. sales shipped during the time period, within the POI, that the *2006 SLA* was in force (the SLA expired on October 12, 2015).[362]

Accordingly, we find that the export taxes collected pursuant to the *2006 SLA* were not intended to offset a countervailable subsidy by a specific amount, as Tolko, Resolute, and Canfor claim.

As we suggested in *Lumber IV*, it is possible that a suspension agreement negotiated pursuant to sections 704 and 734 of the Act could, through its terms, establish export taxes that require the

[361] *See Lumber IV Final Determination,* and accompanying Issues and Decision Memorandum at Comment 9.
[362] *See Preliminary Determination*, and accompanying PDM at "XII. Export Price and Constructed Export Price."

exporting country to "offset completely the amount of the net countervailable subsidy."[363] However, this is not the case with respect to the *2006 SLA*.

First, the *2006 SLA* does not base the amount of export taxes collected on any countervailable subsidy; there is simply no language in the agreement mentioning countervailable subsidies, and the agreement was not negotiated under the CVD or suspension agreement provisions of the Act. In addition, the fact that, under the *2006 SLA*, Canadian producing regions could pay a lower export tax by imposing volume restraints on exports demonstrates that the export taxes imposed were far removed from those "specifically intended to offset {a}… countervailable subsidy." While the Department can accept quantitative restrictions as part of a suspension agreement,[364] the Department has no authority to impose quantitative restrictions (here, volume restraints) on imports in conjunction with duties in an AD or CVD investigation. Finally, with respect to the respondents' citation to the Department's practice of not deducting AD and CVDs from EP and CEP, the Department affirms its preliminary determination that "export taxes specified by the {2006} SLA are collected by the GOC and were applied based on export volume, prevailing prices, and other mechanisms unrelated to AD duties and CVDs."[365]

Thus, based upon similar reasoning to that we applied in *Lumber IV*, for the final determination, we will continue to deduct from EP and CEP the *2006 SLA* export taxes paid by the mandatory respondents on all U.S. sales shipped during the time period, within the POI, that the SLA was in force.[366]

Comment 21: Deduction of Indirect Selling Expenses and Inventory Carrying Costs Incurred in Canada from U.S. CEP

In the preliminary determination, the Department deducted indirect selling expenses and inventory carrying costs incurred in the country of manufacture in computing U.S. CEP for Canfor, Resolute, Tolko, and West Fraser.

Tolko argues that the Department's calculation is inconsistent with 19 CFR 351.402(b) and the SAA,[367] which states that deductions to CEP must be "any expenses which result from, and bear a direct relationship to, selling activities in the United States."[368] Tolko contends that, absent a

[363] *See* Section 704(b)(1) of the Act.
[364] *See* Section 734(a)(2) of the Act.
[365] *See* PDM at n. 115.
[366] *See* Memorandum, "Analysis for the Final Determination of the Less-Than-Fair-Value Investigation of Softwood Lumber from Canada: Canfor," dated concurrently with this memorandum (Canfor Final Analysis Memorandum); Memorandum, "Analysis for the Final Determination of the Less-Than-Fair-Value Investigation of Softwood Lumber from Canada: Resolute," dated concurrently with this memorandum (Resolute Final Analysis Memorandum); Memorandum, "Analysis for the Final Determination of the Less-Than-Fair-Value Investigation of Softwood Lumber from Canada: Tolko," dated concurrently with this memorandum (Tolko Final Analysis Memorandum); Memorandum, "Analysis for the Final Determination of the Less-Than-Fair-Value Investigation of Softwood Lumber from Canada: West Fraser," dated concurrently with this memorandum (West Fraser Final Analysis Memorandum).
[367] *See* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1, (1994).
[368] *See* Tolko Case Brief at 7 (citing to the SAA at 823).

finding that the expenses at issue concern commercial activities in the United States, there can be no justification for adjusting only U.S. sales for these expenses, and not Canadian sales.

West Fraser argues that making an adjustment to CEP for indirect expenses incurred in Canada creates an asymmetry because West Fraser incurred these same expenses and costs in the HM but no corresponding adjustment was made to NV calculations. West Fraser claims that a failure to make comparable adjustments to NV prevents an equal comparison and creates an imbalance in level of trade where none would otherwise exist. West Fraser contends that the Department has rejected an interpretation that would have created an imbalance in the level of trade, arguing that to do so "would frustrate the legislative intent that the Department make comparisons at the same level of trade."[369]

Resolute argues that the Department incorrectly deducted HM indirect selling expenses and HM inventory carrying costs from CEP because these expenses were incurred in Canada for activities that took place exclusively in Canada before the merchandise entered the United States. Therefore, regardless of where the expenses were paid, they were not associated with commercial activities in the United States and should not be treated as CEP selling expenses incurred in the United States. Additionally, Resolute argues that indirect selling expenses and inventory carrying costs incurred in Canada would not be deducted if Resolute sold through an affiliated trading company in the U.S., or if Resolute sold directly to the unaffiliated U.S. customer and incurred U.S. indirect expenses, which would be deducted from CEP. Accordingly, Resolute asserts, such a deduction is also inappropriate here.

The petitioner argues that the Department should continue to deduct indirect selling expenses and inventory carrying costs incurred in Canada for U.S. sales from CEP. The petitioner avers that Canfor, Resolute, Tolko, and West Fraser's indirect selling expenses and inventory carrying cost expenses are not related to an intermediate transaction, but instead relate to the sale to the final U.S. unaffiliated customer. Accordingly, the petitioner contends that these expenses should be deducted from CEP.

The petitioner contends that Section 772(d)(1) of the Act directs the Department to deduct from "the price used to establish {CEP}" direct and indirect selling expenses which relate to commercial activity in the United States and that 19 CFR 351.402(b) states that the Department will adjust the price of U.S. sales by "expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, no matter where or when paid." The petitioner argues that the *Preamble* explains, "the phrase 'no matter where or when paid' is intended to indicate that if commercial activities occur in the United States and relate to the sale to an unaffiliated purchaser, expenses associated with those activities will be deducted from CEP even if, for example, the foreign parent of the affiliated U.S. importer pays those expenses." Thus, if an expense is incurred by a foreign parent or incurred in a foreign country but relates specifically to the U.S. sale to the unaffiliated customer, the petitioner argues that the Department deems the expense related to economic activity in the United States and appropriately deducts it from CEP.

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[369] *See* West Fraser Case Brief (citing to *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27351 (May 19, 1997) (*Preamble*)).

Department's Position:

We agree with the petitioner, in part, and the respondents, in part. All four mandatory respondents have reported certain U.S. transactions as CEP sales because they are executed after importation from an inventory location in the United States.[370] For this reason the Department considers these sales to be CEP sales. Additionally, while the indirect selling expenses incurred in Canada by Canfor, Resolute, Tolko, and West Fraser for these U.S. CEP sales do not involve an affiliated reseller, these expenses and costs are related to, and were incurred solely on behalf of, the sale to the final unaffiliated U.S. customer.

With respect to U.S. inventory carrying costs, the Department's regulations provide that we will deduct these expenses as they are incurred in the United States and relate to selling activities in the United States.[371] Accordingly, for the final determination, we will continue to deduct U.S. inventory carrying costs from CEP.[372]

We agree with Resolute, Tolko, and West Fraser that home market inventory carrying costs incurred for U.S. sales should not be deducted from CEP. Home market inventory carrying costs related to U.S. sales are incurred in Canada and relate to economic activity in Canada and, thus, these costs will not be deducted from CEP for purposes of the final determination.[373]

With regard to indirect selling expenses, the Department's practice, pursuant to section 772(d)(1) of the Act, is to allow an adjustment for certain indirect selling expenses, *i.e.*, DINDIRSU. For example, in *CORE from Canada*,[374] under facts similar to those in this case, the Department determined it was appropriate to deduct the respondent's indirect selling expenses, reported in DINDIRSU, from CEP, finding that those expenses were related to economic activity in the United States.[375] In the instant case, all four mandatory respondents engage in selling activities in Canada that tie directly to economic activity in the United States. Consistent with *CORE from Canada*, we are making the same adjustment to account for expenses that relate to the sale to the first unaffiliated U.S. purchaser. Therefore, for the final determination, the Department will

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[370] *See* Canfor AQR at A-20; Resolute's March 1, 2017, Section A Response (Resolute AQR) at A-16; Tolko's February 28, 2017, Section A Response (Tolko AQR) at A-25; West Fraser's February 28, 2017, Section A Response (West Fraser AQR) at A-19.
[371] *See* 19 CFR 351.402(b).
[372] *See* Tolko Final Analysis Memorandum; Canfor Final Analysis Memorandum; Resolute Final Analysis Memorandum; West Fraser Final Analysis Memorandum.
[373] *Id*.
[374] *See Certain Corrosion-Resistant Carbon Steel Flat Products Final Results of Antidumping Duty Administrative Review*, 72 FR 12758 (March 19, 2007) (*CORE from Canada*), and the accompanying Issues and Decision Memorandum at Comment 3.
[375] *See CORE from Canada* IDM at Comment 3. *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 70 FR 54711 (September 16, 2005) (*Ball Bearings*); *Stainless Steel Sheet and Strip in Coils From Germany; Notice of Final Results of Antidumping Duty Administrative Review*, 67 FR 7668 (February 20, 2002) (*SSSC from Germany*) ("Consistent with established practice, we have deducted indirect selling expenses incurred in country of manufacture that are associated with economic activities in the United States.").

continue to deduct the mandatory respondents' indirect selling expenses incurred in Canada for U.S. sales from CEP.[376]

Comment 22: Currency Conversions in the HM Program

The petitioner argues that the Department unnecessarily converted certain HM expense fields incurred in U.S. dollars into Canadian dollars in the HM program.[377] The petitioner argues that where a respondent incurred any HM expenses in U.S. dollars, the Department's practice is to rely on the expense as incurred in U.S. dollars in the NV calculations, to avoid distortions caused by the changes in the exchange rate between the dates of HM sales and U.S. sales in price comparisons. The petitioner contends that although Tolko and West Fraser reported certain HM expenses in U.S. dollars, the Department unnecessarily converted U.S. dollar expenses in the HM program, which allowed such distortions.

Tolko agrees that the Department unnecessarily converted certain HM expenses originally incurred in U.S. dollars; however, the petitioner's proposed programming requires a technical correction to the currency adjustment fields. West Fraser did not comment on this issue.

Department's Position:

We agree with the petitioner and agree with Tolko that the petitioner's proposed programming to correct this issue needs to be adjusted with respect to Tolko's HM program. Section 351.415(a) of the Department's regulations states that the Department will "convert foreign currencies into United States dollars using the rate of exchange on the date of sale of subject merchandise."

We have determined that we inadvertently converted Tolko and West Fraser's U.S. dollar HM expenses into Canadian dollars in the HM program, which lead to unintended distortions in the margin calculation program results because the conversion occurred on the HM date of sale as opposed to the U.S. date of sale, as required by Section 351.415(a). Accordingly, for the final determination, for calculating HM net price, we have maintained HM expenses incurred in U.S. dollars in the margin calculation program and converted them into Canadian dollars based on the U.S. date of sale.[378] We note that the margin program, after converting these expenses into Canadian dollars on the U.S. date of sale, converts the total HM net price to U.S. dollars using the same daily exchange rate. Thus, the currency conversion performed in the margin program does not cause the same distortions.

Comment 23: Matching Criteria When Applying Arm's Length Test to Canfor's and Resolute's Home Market Sales

[376] *See* Canfor Final Analysis Memorandum, Resolute Final Analysis Memorandum, Tolko Final Analysis Memorandum, and West Fraser Final Analysis Memorandum.
[377] Due to the proprietary nature of these expenses, see the Tolko and West Fraser final analysis memoranda for additional detail.
[378] Due to the proprietary nature of these expenses, see the Tolko and West Fraser final analysis memoranda for additional detail.

In the *Preliminary Determination* we stated that, for the purpose of model matching, we would not match across species, moisture content, or grade group.[379] While we applied this approach in matching home market sales to U.S. sales, we did not apply it to our use of the arm's length test.[380] The petitioner argues that we should apply the model matching criteria that we announced in the context of the arm's length test. No other party commented on this issue.

Department's Position:

We agree with the petitioner. As we stated in the preliminary determination, it was our intention to not match across species, moisture content, or grade group.[381] For the final determination, in applying the arm's length test, we have not matched across species, moisture content, or grade group.[382]

Company-Specific Issues: Canfor

Comment 24: Basis for Canfor's Gross Unit Price

In the *Preliminary Determination*, the Department stated that it would base gross unit price on the length-specific or tally prices, where applicable, in calculating all preliminary determination margins, instead of invoice prices.[383] Canfor argues that for home market tally sales the Department based gross unit price on Canfor's reported invoice price instead of the reported length-specific price. Canfor asserts that the Department should revise its home market program in the final determination to base gross unit price on the reported length-specific price or tally price for the reasons stated in the *Preliminary Determination*. The petitioner did not comment on this issue.

Department's Position:

We agree with Canfor. In Canfor's home market program, we set gross unit price equal to invoice price, rather than to the length-specific, or tally price.[384] For the final determination, we have set Canfor's gross unit price equal to Canfor's reported length-specific, or tally price, rather than set it equal to the invoice price.[385]

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[379] *See* PDM at 16-17.
[380] *See* Canfor Preliminary Analysis Memo at Comparison Market SAS Program. *See also* Memorandum, "Analysis for the Preliminary Determination of the Less-Than-Fair-Value Investigation of Softwood Lumber from Canada: Resolute," dated June 23, 2017 (Resolute Preliminary Analysis Memo) at Comparison Market SAS Program.
[381] *See* PDM at 16-17.
[382] *See* Canfor Final Analysis Memo at Comparison Market SAS Program. *See also* Resolute Final Analysis Memorandum.
[383] *See* PDM at 18-19.
[384] *See* Memorandum, "Analysis for the Preliminary Determination of the Less-Than-Fair-Value Investigation of Softwood Lumber from Canada: Canfor," dated June 23, 2017 (Canfor Prelim Analysis Memorandum) at Attachment I.
[385] *See* Canfor Final Analysis Memorandum at Comparison Market Program.

Comment 25: Variable Representing Canfor's Total Cost of Manufacturing

In the *Preliminary Determination*, the Department adjusted Canfor's by-product offset for all of its mills located in British Columbia,[386] but we only applied this adjustment to the calculation of the total cost of production calculated in the margin program. The petitioner argues that this adjustment should apply to the cost of manufacture as used in the margin program rather than only to the cost of manufacture used to calculate the cost of production when performing the cost test. Canfor did not comment on this issue.

Department's Position:

We agree with the petitioner. The downward adjustment to the by-product offset of Canfor's mills located in British Columbia should be applied to the cost of manufacture as used in the margin program, as well as when used in performing the cost test. Therefore, for the final determination, we have applied a downward adjustment in the margin program to the by-product offset of Canfor's mills located in British Columbia in calculating Canfor's total cost of manufacturing.[387]

Comment 26: Canfor's Reported Export Taxes

The GOC imposed taxes pursuant to the *2006 SLA* between the United States and Canada. The agreement expired on October 12, 2015[388] and so taxes were only collected until October 11, 2015. At verification, we found that Canfor did not report export taxes paid pursuant to the *2006 SLA* for CEP sales with a date of shipment after October 11, 2015 that entered the United States on October 11, 2015 or before.[389]

The petitioner argues that the Department should adjust Canfor's reported export taxes to reflect this omission.

Canfor argues that for the additional export taxes reported at verification, if the Department determines to deduct export taxes from gross unit price, the Department should deduct those taxes consistent with the sales and rate Canfor identified at verification.[390]

Department's Position:

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[386] *See* Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination," dated June 23, 2017 (Canfor Preliminary Cost Analysis Memorandum) at 1-2.
[387] *See* Canfor Final Analysis Memo at Margin Program.
[388] *See* 2006 Softwood Lumber Agreement Between the Government of the United States of America and the Government of Canada Extending the Softwood Lumber Agreement Between the Government of the United States of American and the Government of Canada, As Amended (January 23, 2012) placed on the record by the petitioner in its letter "Petition for the Imposition of Antidumping and Countervailing Duties on Imports of Certain Softwood Lumber Products from Canada," November 25, 2016, Volumes I, Exhibit 63.
[389] *See* Memorandum, "Verification of the Sales Response of Canfor Corporation, Canadian Forest Products Ltd., and Canfor Wood Products," dated July 25, 2017, at 39.
[390] *Id*.

We agree with the petitioner. As stated in Comment 20, in calculating U.S. net price, we have determined that it is proper to deduct from gross unit price export taxes paid pursuant to the *2006 SLA*. Canfor acknowledged that it did not report these export taxes for CEP sales with a date of shipment from the U.S. warehouse to the U.S. unaffiliated customer after October 11, 2015 that entered the United States on October 11, 2015 or before.[391] Canfor stated that for such sales it should have reported an amount equal to the *2006 SLA* export tax rate of 5 percent of gross sales value minus rebates, discounts, freight divided by 1 plus the duty rate.[392] However, we note that according to *Random Lengths*, the effective *2006 SLA* Export Tax on Western Canadian shipments to the United States in the applicable period in 2015 was 5 percent in August, 5 percent in September and 15 percent in October.[393] For the final determination, for CEP sales with a date of shipment after October 11, 2015 that entered the United States on October 11, 2015 or before, we have set these sales equal to the month-specific *2006 SLA* export tax rate derived *Random Lengths* as a percent of gross sales value minus rebates, discounts, freight divided by 1 plus the duty rate of five percent.[394]

Comment 27: Canfor's Electricity Costs

In the *Preliminary Determination*, pursuant to section 773(f)(2) of the Act, the Department applied the transactions disregarded rule to transactions between Canfor's Prince George (PG) sawmill and Canfor Pulp Products, Inc. (CPPI) and, in doing so, adjusted Canfor's electricity costs paid to CPPI) by the PG sawmill to reflect a market price. Canfor asserts that for the final determination, the Department should determine that these were not purchases of electricity from an affiliated party, but were instead payments covering its portion of the bill for electricity supplied by an unaffiliated party, BC Hydro. As a result, Canfor argues that the Department should determine that no adjustment to the PG sawmill's manufacturing costs is required.

The petitioner disagrees with Canfor's argument, pointing out that the Department's cost verification report clearly indicated that a transaction for electricity took place between the PG mill and CPPI.[395] The petitioner argues that Canfor has provided no basis for reversing this adjustment from the *Preliminary Determination*.

Department's Position:

For this final determination, we have determined to continue to apply the transactions disregarded rule to the transactions between Canfor's PG sawmill and CPPI. The Department's established practice when the respondent purchases inputs from an affiliated reseller is to value the input at the higher of transfer price or the adjusted market price for the input (*i.e.*, the affiliate's average acquisition cost plus the affiliate's SG&A costs).[396] The Department has

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[391] *Id*.
[392] *Id*.
[393] *See Petitions* at Volume I at Exhibit 39 (citing to http://www.randomlengths.com/in-depth/us-canada-lumber-trade-dispute/).
[394] *See* Canfor Final Analysis Memorandum at Margin Program.
[395] *See* Memorandum, "Verification of the Cost Response of Canfor Corporation in the Antidumping Duty Investigation of Certain Lumber from Canada," dated July 28, 2017 (Canfor Cost Verification Report) at page 19.
[396] *See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from*

explained that the inclusion of the affiliate's SG&A expenses ensures that the adjusted market price reflects the affiliates cost of providing the services.[397] Further, the Department has applied the transactions disregarded rule in instances where the affiliated services were limited to document handling and acting as the payment intermediary.[398]

In the current proceeding, the PG sawmill *(i.e*., a part of Canadian Forest Products Ltd.) and CPPI are separate legal entities and both manufacture products (CPPI produces non-subject merchandise). CPPI also functions as a middleman between all the facilities in the Northwood location (*i.e.*, including the PG sawmill) and BC Hydro.[399] While CPPI does not generate the electricity, it does provide the electricity through its single substation, and it is the payment intermediary. In turn, CPPI invoices the PG sawmill and the other Northwood facilities for their portion of the electricity costs.[400] While Canfor may consider these transactions to only be a pass-through to its affiliated Northwood facilities, the fact remains that CPPI provided services to the Northwood facilities by acting as the document handler (*e.g*., providing documentation for allocating the costs to the different facilities, invoicing each of the Northwood facilities, processing the receipt of payments from the Northwood facilities, etc.) and acting as the payment intermediary. Accordingly, we consider it appropriate for the final determination to continue to include CPPI's SG&A expenses in the electricity market price computation to account for the services CPPI is providing.

Comment 28: Canfor's Reported Packing Costs

In the *Preliminary Determination*, consistent with its normal methodology, the Department calculated Canfor's net price by deducting the cost of packing.[401] However, Canfor asserts that it inadvertently double counted the cost of packing by also including it in the reported cost of manufacture (COM). Accordingly, the cost of packing should be removed from the reported COM.

The petitioner attests that the Department has an established practice, regarding submitted error allegations after the *Preliminary Determination*, of correcting a respondent's clerical errors after the preliminary results only if the Department can assess from information already on the record that an error has been made, that the error is obvious from the record, and that the correction is accurate.[402] The petitioner argues that if the packing costs were included in the Canadian mills' COM, Canfor should have been able to readily identify those costs in a breakdown of the COM.

Thailand, 69 FR 34122 (June 18, 2004) and accompanying Issues and Decision Memorandum at Comment 5.
[397] *Id*.
[398] *See Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from Mexico*, 77 FR 17422 (March 26, 2012) (*Refrigerator-Freezers from Mexico)* and accompanying Issues and Decision Memorandum.
[399] *See* Canfor Case Brief at 16.
[400] *See* Canfor Cost Verification Report at page 19.
[401] *See* Canfor Preliminary Analysis Memorandum at Attachment I.
[402] *See, e.g*., *Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, From Italy*, 57 FR 8295 (March 9, 1992); s*ee also Certain Fresh Cut Flowers from Colombia; Final Results of Antidumping Duty Administrative Reviews*, 61 FR 42833 (August 19, 1996).

Department's Position:

We agree with Canfor. Record evidence demonstrates that packing costs, in amounts readily ascertainable from the record, were included in both the cost of manufacturing reported to the Department in Canfor's cost database,[403] as well as in its sales files (*i.e.,* response to sections B and C). As Canfor notes, these expenses are normally incurred during the production process, at the mill, and included as part of the COM in its normal books and records. However, these costs were inadvertently not excluded from Canfor's reported costs and would be double-counted for reporting purposes if they were not excluded from COM. Therefore, in order to correct the double-counting of Canfor's packing costs in the AD margin calculation, for the final determination we have excluded packing costs from the reported COM.[404]

Comment 29: Canfor's By-product Offsets

In the event that the Department does not find a particular market situation in Canada, the petitioner asserts that the Department's by-product offset adjustment from the *Preliminary Determination* should continue to be made on a province-wide basis. The petitioner asserts that the Department has determined that a province-specific analysis is most appropriate for the transactions disregarded analysis for softwood lumber, particularly with respect to wood chip by-products, because of the distinct geographical markets and pricing structures across provinces.[405] In addition, the petitioner argues that other than identifying certain regional sub-markets and asserting that they capture differences due to haul rates, Canfor provides no quantitative analysis or evidence such as price comparisons based on published prices, supply and demand trends, or other economic data demonstrating that these "baskets" do indeed constitute separate markets with tangible, quantifiable distinctions.

Canfor argues that the Department should conduct its transactions disregarded comparison of by-products on an overall basis (*i.e*., across all provinces) or should at least make the adjustment using regional comparisons. Canfor contends that the regional markets are a better comparison because Canfor's sawmills usually supply pulp mills that are located within relative proximity to the sawmill. Canfor points to a map that it has submitted, which shows four distinct regions and sawmills supply pulp mills in those regions.[406]

Department's Position:

The Department has determined that the record evidence does not support that a particular market situation was present in Canada during the POI.[407] Therefore, for this final determination, we have continued to evaluate the arm's length nature of Canfor's by-product

[403] *See* Canfor Cost Verification Report at Exhibit C-13 and Canfor Sales Verification Report at Exhibit SVE-25.
[404] *See* Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Canfor," dated concurrently with this memorandum (Canfor Final Cost Calculation Memorandum) at issue 4.
[405] The petitioner cites to Lumber IV AR1 IDM at Comment 7.
[406] *See* Canfor Case Brief at Attachment 1.
[407] *See* Comment 17.

affiliated transfer prices.[408] In doing so, we disagree with Canfor that we should alter our analysis of the respondent's by-product offsets for woodchips and hog fuel revenue received from affiliated parties. Record evidence[409] shows that wood costs vary significantly by province. This is due in part to differing stumpage and harvesting costs associated with obtaining logs in different provinces. As wood chips are a by-product of the logs, it is reasonable to assume that the wood chip market tends to follow the log market. Supply and demand factors also can cause variances in the province woodchip markets, whereby one province could be a net importer of chips and another province a net exporter due to oversupply.

Further, while we agree that arguments could be made to delineate the by-product price comparisons in several different ways (*i.e*., northern and southern provinces, northern and southern Canada, east coast and west coast, *etc*.), the fact remains that comparing by-product prices on a province specific basis is reasonable. Not only is it reasonable, it is logical considering the way that stumpage costs are charged by province.[410] As explained in Canfor's section D response, stumpage costs related to logging are charged by each Provincial Government. Further, the record does not provide any specific evidence to warrant stepping away from our decision in *Lumber IV AR1*[411] and also in *Lumber IV Final Determination*.[412] Therefore, consistent with *Lumber IV AR1* and *Lumber IV Final Determination*, we have continued to conduct our analysis of Canfor's by-product sales offsets on a province-wide basis and have applied the same adjustment we made from the *Preliminary Determination* for the final determination. [413]

Comment 30: Canfor's Reconciling Items

In the *Preliminary Determination*, the Department adjusted Canfor's reported costs by eliminating two offsets (*i.e*., credits) to the wood products administration expense accounts because the nature of these two values were unclear. According to Canfor, the Department verified the nature of these accounts and found that they are related to costs that are also included in the reported costs for merchandise under consideration. Therefore, for the final determination, Canfor contends that the Department should eliminate the adjustment that was applied to Canfor's reported costs at the *Preliminary Determination*. The petitioner did not comment on this issue.

Department's Position:

We agree with Canfor. Based on an examination of the underlying wood products administrative expenses at the cost verification,[414] we found that the expenses associated with the credits in

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[408] *See* Canfor's Preliminary Cost Calculation Memorandum.
[409] *See* Canfor's May 15, 2017 response to the Department's supplemental D questionnaire at exhibit D-43.
[410] *See* Canfor's original section D response at page D-17.
[411] *See Notice of Final Results of Antidumping Duty Administrative Review and Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products from Canada*, 69 FR 75921 (December 20, 2004) and the accompanying Issues and Decision Memorandum at Comment 7 (*Lumber IV AR 1*).
[412] *See Lumber IV Final Determination* and accompanying Issues and Decision Memorandum at Comment 11.
[413] *See* Canfor Final Cost Calculation Memorandum.
[414] *See* Canfor Cost Verification Report at 10.

question were also included in the wood products administration expense accounts. Thus, the credits were appropriately included as offsets in the reported costs. As a result, for the final determination, we have reversed the adjustment that we made at the *Preliminary Determination* for these two offsets.[415]

Comment 31: Canfor's Costs Related to Canal Flats

In the *Preliminary Determination*, the Department adjusted Canfor's reported G&A expenses to exclude the gains and losses related to the permanently closed Canal Flats mill. Canfor asserts that the reversal of a provision (*i.e.*, a gain) associated with the closure of the Canal Flats mill should be included in the G&A expenses. Canfor considers the reversal of the provision to be a part of the restructuring costs in its normal books and records, and contends that the Department should include this reversal in its calculation of Canfor's G&A expenses.

The petitioner contends that the Department confirmed at verification that the income and expenses in the restructuring account related to the shutdown of the mill. The petitioner argues that, in the past, the Department has excluded from the cost of production costs that are associated with the shutdown or closure of an entire facility.[416] Therefore, the petitioner asserts that the Department correctly excluded the net gain associated with the shutdown from Canfor's G&A expense ratio in the *Preliminary Determination* and should continue to do so for the final determination.

Department's Position:

We disagree with Canfor. The reversal of the provision relates to the permanently closed Canal Flats mill, and thus we have not included this gain in the calculation of the G&A expense ratio. As discussed in Comment 35, in *Softwood Lumber from Canada (2005)*, the Department explained that "once a facility is sold or shut down, by definition it no longer relates to the ongoing or remaining production."[417] The Department's longstanding practice has been to exclude costs or gains that are related to the permanent closure or sale of entire production facilities, as they no longer relate to the normal, ongoing operations of a company.[418] Here, the permanent nature of the Canal Flats mill shutdown is not in question and is in fact supported by record evidence.[419] Therefore, consistent with *Softwood Lumber from Canada (2005)*, we have not included in Canfor's G&A expenses the reversal of a provision (*i.e.*, gain) associated with the permanently shut down Canal Flats mill.

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[415] *See* Canfor Final Cost Calculation Memorandum at Issue 1.
[416] *See Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products From Canada*, 70 FR 73437 (December 12, 2005) (*Softwood Lumber from Canada (2005)*), and accompanying Issues and Decision Memorandum at Comment 8. *See also Purified Carboxymethylcellulose from the Netherlands: Final Results of Antidumping Duty Administrative Review*, 72 FR 70821 (Dec 13, 2007), and accompanying Issues and Decision Memorandum at Comment 1.
[417] *See Softwood Lumber from Canada (2005) IDM* at Comment 8.
[418] *See*, *e.g.*, *id*. *See also Certain Polyester Staple Fiber from Korea: Final Results of the 2006-2007 Antidumping Duty Administrative Review*, 73 FR 74144 (December 5, 2008), and accompanying Issues and Decision Memorandum at Comment 3.
[419] *See* Canfor Cost Verification Report at 22.

Comment 32: Gain and Losses for Derivatives

In the *Preliminary Determination,* in calculating Canfor's cost of production, the Department adjusted Canfor's reported financial expenses to exclude gains and losses related to certain derivatives. Canfor argues that these derivative transactions in question were undertaken for the purpose of controlling the cost of financing its operations and were properly included in its submitted financial expenses.

The petitioner argues that the record does not contain any evidence demonstrating that the derivatives in question were undertaken to control the cost of financing Canfor's operations. Moreover, the petitioner claims that the Department confirmed the appropriateness of its preliminary adjustment at Canfor's cost verification. Further, the petitioner argues that the Department should also disallow the amount related to the energy derivatives as it is also not associated with the company's cash management exposure.

Department's Position:

We agree with the petitioner. For the final determination, we have disallowed Canfor's inclusion of the amounts associated with the derivative transactions in question in its financial expenses because the derivatives at issue represent investment activity. It is the Department's practice to exclude investment-related gains or losses from the calculation of COP.[420] Investment activities are a separate profit making activity not related to the company's normal operations. In this instance, Canfor is not selling lumber on the Chicago Mercantile Exchange (CME) that results in the shipment of subject merchandise where the sales would be reported. Further, Canfor is not proactively attempting to diminish risks related to the volatility in the price of the main inputs used in its general operations to produce subject merchandise.[421] Here Canfor's particular derivative instruments in question are related solely to speculative investment activity and do not relate to the general production operations of the company.[422] In calculating the cost of production, the Department seeks to capture the costs of producing the foreign like product and subject merchandise, and to exclude the cost of investment activities.[423] Therefore, we have excluded the gains and losses on these particular derivative transactions from Canfor's financial expense rate calculation for the final determination.[424]

Company-Specific Issues: Resolute

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[420] *See Certain Cold-Rolled Steel Flat Products from the Russian Federation: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 81 FR 49950 (July 29, 2016), and accompanying Issues and Decision Memorandum at Comment 6.
[421] *See Phosphor Copper from the Republic of Korea: Final Affirmative Determination in the Less-Than-Fair-Value Investigation,* 82 FR 12433 (March 3, 2017), and accompanying Issues and Decision Memorandum at Comment 2.
[422] *See* Canfor AQR at exhibit 16.
[423] *See Certain Hot-Rolled Steel Flat Products from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 81 FR 53428 (August 12, 2016) (*Hot-Rolled from Turkey*), and accompanying Issues and Decision Memorandum at Comment 8.
[424] *See* Canfor Final Cost Calculation Memo at Issue 3.

Comment 33: Resolute's Credit Expenses

In the *Preliminary Determination*, the Department relied on short-term borrowing rates from the U.S. Federal Reserve to calculate Resolute's imputed credit expenses for U.S. sales.[425] The petitioner asserts that the Department should use the short-term borrowings of Resolute's U.S. affiliate, Resolute FP US, Inc. (Resolute FP US), to calculate Resolute's credit expenses.[426] Resolute asserts that the Department should continue to rely on U.S. Federal Reserve rates to calculate Resolute's credit expenses.[427]

Department's Position:

We agree with the petitioner, and will modify the methodology applied in our *Preliminary Determination*. The Department calculates credit expenses based on short-term interest rates associated with the currency in which the sales are denominated.[428] The Department has a clear preference for relying on the actual borrowing experience of the respondent, where possible, rather than a surrogate rate, *e.g.*, the Federal Reserve rate in the context of U.S. sales.[429] In calculating a respondent's credit expenses, the Department will also rely on the experience of the respondent's affiliate or subsidiary.[430]

Resolute FP US is a subsidiary of Resolute Forest Product Inc. (RFP), *i.e.*, the respondent's parent company, and is one of the companies that forms RFP's Wood Products division.[431] During the POI, Resolute FP US had two bank credit facilities through which it drew U.S. dollar funds on a short-term basis.[432] Based on these borrowings, Resolute provided a weighted-average calculation of its short-term credit expenses, in addition to credit expenses based on Federal Reserve rates.[433]

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[425] *See* Resolute Preliminary Analysis Memorandum at 8 (relying on Resolute's "CREDITU" field to calculate inventory carrying costs).
[426] *See* Petitioner Case Brief at 61-64.
[427] *See* Resolute Rebuttal Brief at 5-8.
[428] *See* Import Administration Policy Bulletin 98-2 (February 23, 1998) (Bulletin 98-2).
[429] *See Certain Steel Concrete Reinforcing Bars from Turkey; Final Results of Antidumping Duty Administrative Review and New Shipper Review*, 64 FR 49150, 49155 (September 10, 1999) (*Turkey Rebar*) (noting the Department's "clear preference for the actual borrowing experience of the respondent.").
[430] *See Refrigerator-Freezers from Korea* IDM at Comment 31 (relying on short-term borrowing rates for respondent's U.S. affiliate to calculate U.S. credit expenses); *Ball Bearings and Parts Thereof From France, Germany, Italy, and Singapore: Preliminary Results of Antidumping Duty Administrative Reviews, Partial Rescission of Administrative Reviews, and Notice of Intent To Revoke Order In Part*, 68 FR 6404, 6407 (February 7, 2003) (*Ball Bearings*) ("The record indicates, however, that a wholly owned subsidiary of Paul Mueller did have a short-term borrowing rate in the United States and we used this rate to calculate credit for all U.S. sales made by Paul Mueller."); *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Spain*, 67 FR 35482 (May 20, 2002), and accompanying Issues and Decision Memorandum (Steel Beams IDM) at "Margin Calculations" (noting that "{w}e recalculated U.S. imputed credit expenses using the combined U.S. interest rate of the two affiliated parties in the United States which had short-term borrowings during the POI.").
[431] *See* Resolute AQR, at Exhibit A-3 (describing Resolute FP US as a "US importer and seller of lumber in the United States.").
[432] *See* April 24, 2017 SQR at 25-26.
[433] *Id.* at Exhibit SC-5.

As explained by Resolute throughout these proceedings, Resolute FP US is engaged in the sale of subject merchandise. Pursuant to intercompany agreements, which govern the relationship between Resolute Canada, Resolute Growth, and Resolute FP US – the entities comprising the vast majority of RFP's Wood Products division – "Resolute Canada acts as the distributor in Canada of the softwood lumber produced by Resolute Growth and itself and Resolute FP US plays the same role in the United States for the softwood produced by Resolute Canada and Resolute Growth."[434] Although the sales team for all sales, including sales to the United States, is based in Resolute FP Canada's office in Montreal, Resolute FP US "provides certain limited distribution services for sales of lumber in the U.S. market. Also, Resolute FP US is the importer of record and seller to all U.S. customers."[435] Additionally, Resolute has stated that "Resolute Canada *and, to a lesser extent, Resolute US* provide various corporate support services (*i.e.*, selling, general and administration (SG&A)) to the other legal entities that are parties to that {intercompany} agreement."[436] The record therefore demonstrates that Resolute FP US is involved in the sale of subject merchandise to the United States.[437]

Based on these considerations, the petitioner asserts that the Department should use Resolute FP U.S.'s short-term interest rate as the basis for calculating Resolute's credit expenses. The petitioner cites *Turkey Rebar* in support of its position. There, the Department determined that:

> {s}ince the U.S. subsidiary most directly involved in selling the subject merchandise had no U.S. dollar borrowings, and because we have a preference for using actual experience where possible, we have continued to use the average of the rates paid by the other parties involved in making the sale, rather than the Federal Reserve rate.[438]

The petitioner asserts that this case demonstrates that the Department will rely on credit expenses incurred by affiliates to calculate credit expenses for a respondent.

Resolute argues that the scenario in *Turkey Rebar* is distinct from the facts of this case because, there, the two affiliates whose borrowings the Department relied upon were (1) a "producer of the subject merchandise" and (2) "a trading company that was intimately involved in the sale of the subject merchandise."[439] In contrast, Resolute FP US is not a producer of subject merchandise and had limited involvement in the U.S. sales process, only serving as importer of record. As a result, Resolute argues that the Department's approach in *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada* is more appropriate under these circumstances.[440] In *Canada CORE/CTL*, the

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[434] *See* Resolute March 1, 2017 QRA, at A-7.
[435] *Id*.
[436] Resolute's May 18, 2017 Supplemental Section A Questionnaire Response (Resolute May 18, 2017 SQR), at 5 (emphasis added).
[437] *See* Resolute Rebuttal Brief, at 8.
[438] *See Turkey Rebar*, 64 FR at 49155.
[439] *See* Resolute Rebuttal Brief at 7.
[440] *See Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada: Final Results of Antidumping Duty Administrative Reviews*, 63 FR 12725 (March 16, 1998) (*Canada CORE/CTL*).

Department declined to use the borrowing experience of the respondent's U.S. affiliate that was not involved in the sale of subject merchandise to calculate credit expenses, and instead relied on Federal Reserve rates.[441]

We find that the circumstances in *Turkey Rebar* are analogous to the facts of the instant investigation. Although we agree with Resolute that Resolute Canada and Resolute Growth are the largest RFP companies in terms of lumber production, and that Resolute Canada performs the majority of the sales functions in both the U.S. and Canadian markets, Resolute FP US was nonetheless involved in the sale of subject merchandise to the United States. On numerous occasions in this investigation, Resolute identified Resolute FP US as a company involved in the sale of softwood lumber to the United States, and has noted that the intercompany agreements between the entities comprising the RFP Wood Products division specify that Resolute FP US plays certain roles in the sales process.[442]

Additionally, as noted above, in several cases following the issuance of the Department's policy bulletin concerning imputed credit expenses,[443] the Department relied on the borrowing experience of U.S. affiliates to calculate a respondent's credit expenses.[444] Adopting such an approach here, therefore, is consistent with Department practice.

For these reasons, we determine that the experience of Resolute FP US provides an appropriate measure of the opportunity cost associated with extending credit to Resolute's customers in the United States. Therefore, for the final determination, we will recalculate Resolute's credit expenses for U.S. sales by relying on the interest rates associated with Resolute FP US's short-term U.S. dollar (USD) borrowings.

Comment 34: Corrections to Resolute's Sales Databases as Noted in the Sales Verification Report

Resolute asserts that the Department should ensure that the final determination reflects minor corrections identified by Resolute in preparation for verification, as well as several discrepancies that were identified by Department officials in the course of verification.[445] The petitioner did not comment.

Department's Position:

We agree with Resolute. For the final determination, we will rely on the revised database submitted by Resolute to incorporate minor corrections.[446] Additionally, this database reflects the

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[441] *Id.* at 12742.
[442] See Resolute QRA, at A-7; Resolute May 18, 2017 SQR, at 5.
[443] *See* Bulletin 98-2.
[444] *See Refrigerator-Freezers from Korea* IDM at Comment 31; *Ball Bearings*, 68 FR at 6407; Steel Beams IDM at "Margin Calculations."
[445] *See* Resolute Case Brief at 22-23.
[446] *See* Memorandum, "Verification of the Sales Responses of Resolute FP Canada Inc. in the Antidumping Investigation of Certain Softwood Lumber Products from Canada," dated July 28, 2017 (Resolute Verification Report), at 2; *see also* Memorandum, "Antidumping Duty Investigation of Certain Softwood Lumber Products from

correction of several additional minor discrepancies that were identified in the course of verification.[447]

Comment 35: Resolute's Corporate Level Costs

The petitioner argues that the Department should include as additional G&A expenses the corporate level depreciation, pension, and other miscellaneous expenses that were identified in the cost verification report. In addition to these amounts, the petitioner argues that the Department should also include the corporate level costs associated with the permanently closed Fort Frances mill as these costs are related to the general operations of the company as a whole.

Department's Position:

We agree with the petitioner in part. Based on our verification findings, we have included as additional G&A expenses for Resolute Canada and Resolute Growth, the corporate level depreciation, pension, and other miscellaneous expenses that were identified at the cost verification.[448] These expenses relate to all mills that operate under the consolidated Resolute entity and have therefore been allocated to the consolidated Resolute companies based on the relative cost of goods sold.[449]

With regard to the costs associated with the permanently closed Fort Frances mill, however, we disagree with the petitioner. In *Softwood Lumber from Canada (2005)*, the Department explained that, "once a facility is sold or shut down, by definition it no longer relates to the ongoing or remaining production."[450] The Department further elaborated that, "because the closed facility is no longer involved in production, the closure costs should not be assigned to the cost of manufacturing products which are still produced."[451] In making these statements, the Department drew a distinction between costs associated with permanent shut downs and costs associated with idle assets. Unlike permanently closed facilities, idle assets are production assets held for future purposes which "can be brought online quickly to fulfill a preplanned function" and, as such, are considered an overhead burden that should be included in a company's reported costs.[452] Here, the permanent nature of the Fort Frances mill shut down is not in question, and is supported by the record evidence.[453] Therefore, consistent with *Softwood Lumber from Canada*

Canada: Final Determination Analysis for Resolute FP Canada Inc.," dated concurrently with this memorandum.

[447] *See* Letter from Resolute, "Softwood Lumber from Canada: Response of Resolute FP Canada Inc. to the Department's Post-Verification Request for Revised Databases," dated August 3, 2017, at 2-3.

[448] *See* Memorandum, "Verification of the Cost Response of Resolute FP Canada Inc. in the Antidumping Investigation of Certain Softwood Lumber Products from Canada," dated July 27, 2017 (Resolute Cost Verification Report), at 2.

[449] We note that these corporate level costs are unrelated to the third collapsed company, Opitciwan, which is not part of the consolidated Resolute group. Therefore, the additional Resolute corporate level costs were not allocated to Opitciwan in the final determination. *See* Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Resolute FP Canada Inc.," dated concurrently with this memorandum (Resolute Final Cost Calculation Memorandum) at 2.

[450] *See Softwood Lumber from Canada (2005)* IDM at Comment 8.

[451] *Id.*

[452] *Id.*

[453] *See* Resolute Cost Verification Report at 12.

(2005), we have excluded from Resolute's corporate level G&A expenses the costs associated with the permanently shut down Fort Frances mill.

Comment 36: Allocation of Resolute Canada's Corporate Charges

The petitioner argues that the Department's preliminary adjustment allocating Resolute Canada's corporate charges between G&A and selling activities should be revised to reflect the ratio of G&A and selling charges to Resolute Growth, *i.e.*, to reflect data that has been verified. Resolute argues that the specific ratio between the G&A and selling activities performed by Resolute Canada for Resolute Growth is not identical to the other Resolute companies for which Resolute Canada provides these services. Therefore, Resolute argues that the Department should continue to use the allocation percentage calculated in the *Preliminary Determination*.

Department's Position:

We agree with the petitioner and have updated the corporate charge allocation percentage to reflect Resolute Canada's experience with Resolute Growth, as this information represents verified data specific to the activities performed by Resolute Canada on behalf of its subsidiaries.

In its normal operations, Resolute Canada provides G&A and selling services to its subsidiaries and in return is reimbursed for the cost of these services via corporate charges.[454] For reporting to the Department, Resolute Canada offset its total fiscal year G&A expenses by the total fiscal year corporate charges.[455] Because these services also include selling activities, in the *Preliminary Determination*, the Department allocated Resolute Canada's corporate charges between G&A and selling activities based on Resolute Canada's overall experience (*i.e.*, total relative G&A and selling expenses prior to the offset for corporate charges).[456] For the final determination, we find that it is more appropriate to base the allocation on the costs actually incurred by Resolute Canada on behalf of its subsidiaries, rather than Resolute Canada's total G&A and selling expenses. At verification, we examined the G&A and selling expenses incurred by Resolute Canada on behalf of Resolute Growth.[457] While Resolute contends that the expenses incurred on behalf of Resolute Growth would not be identical to the expenses incurred on behalf of other subsidiaries, Resolute did not present a breakdown for G&A and selling activities of the expenses incurred for all subsidiaries. Therefore, we find it reasonable to base the allocation on the data that was demarcated by category and verified, *i.e.*, the Resolute Canada G&A and selling expenses incurred on behalf of Resolute Growth, because this is the best information available to the Department on the record of this investigation for determining the allocation. Consequently, for the final determination, we revised the allocation of Resolute Canada's corporate charges between G&A and selling activities to reflect the ratio of G&A and selling expenses incurred by Resolute Canada for Resolute Growth.

Comment 37: Resolute Growth's G&A Expenses

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[454] *Id.* at 35.
[455] *Id.* and CVE 17.
[456] *See* Resolute Preliminary Cost Calculation Memorandum at 3.
[457] *See* Resolute Cost Verification Report at 35.

The petitioner contends that because Resolute Growth relies on Resolute Canada for all G&A and selling activities, the Department should use the verified total corporate charge for these services rather than the lower net amount identified in Resolute Growth's internal financial statements. Resolute counters that there is no basis for this assumption and that the net G&A expense used in Resolute Growth's G&A expense rate calculation is correct.

Department's Position:

We agree with Resolute and have not adjusted Resolute Growth's reported net G&A expense. At verification, we confirmed that the total fiscal year corporate charge from Resolute Canada to Resolute Growth was included in the net G&A expense that Resolute Growth reported to the Department.[458] Furthermore, we tied the net G&A expense from the G&A expense calculation worksheet to Resolute Growth's income statement.[459] Because the net G&A expense reported to the Department includes the full corporate charge from Resolute Canada and matches the amount reported in Resolute Growth's fiscal year income statement, we have continued to rely on the reported net G&A expense from Resolute Growth's normal books and records in the calculation of the company's G&A expense rate.

Comment 38: Resolute Growth's Miscellaneous Income

The petitioner argues that the Department should deny the net miscellaneous income as an offset to Resolute Growth's reported G&A expenses since Resolute Growth failed to demonstrate that the offset is warranted. Resolute counters that miscellaneous income was not included in the G&A expense rate calculation for Resolute Growth, therefore an adjustment to remove such income is unnecessary.

Department's Position:

We agree with Resolute. Based on an examination of the G&A expense rate calculation submitted for Resolute Growth, we confirmed that Resolute did not offset Resolute Growth's G&A expenses with the miscellaneous income at question.[460] Therefore, any discussion of whether the miscellaneous income should be allowed as an offset to G&A expenses is moot.

Comment 39: Resolute's Wood Segment Corporate Income and Expense Items

The petitioner argues that Resolute Canada's G&A expenses should be revised to exclude the road building provision reversal that is related to expenses recorded in a prior period and to reclassify the depreciation expense, pension expense, and inventory variation gain to the cost of manufacturing. Resolute argues that the Department's established practice is to base the G&A expense rate on the expenses as reflected in the audited financial statements of the legal entity that produces the subject merchandise. Because the provision reversal was recorded as income on Resolute Canada's 2016 audited financial statements, Resolute contends that the income should likewise be included in the calculation of Resolute Canada's 2016 G&A expense rate.

[458] *See* Resolute Cost Verification Report at 35 and cost verification exhibit (CVE) 17.
[459] *See* Resolute Cost Verification Report at 36 and CVE 17.
[460] *Id.* at CVE 17.

Department's Position:

With regard to the income recognized on the reversal of a prior period provision, we agree with the petitioner and have excluded the amount from the calculation of Resolute Canada's G&A expense rate in the final determination. The Department's established practice in calculating the G&A expense rate is to exclude income items that are associated with non-recurring provisions from prior years and instead include only income items that relate to the current period.[461] The cost verification report establishes that the original provision was related to a credit received under a 2013 road building program (*i.e.*, companies are returned a portion of the funds paid for building roads that are also used by third parties, such as campers).[462] Prior to the POI, the government audited the program and revoked a portion of the original credit. As a result, Resolute recorded a provision to recognize the potential expense of losing the credit previously granted. During the POI, Resolute won its appeal, and, accordingly, reversed the provision. We found at verification that the provision and its subsequent reversal were recorded in separate periods.[463] Thus, the income that the reversal generated is intended to offset an expense recognized in a prior period. Consistent with the Department's practice regarding income recognized during the POI which relates to non-recurring losses recognized prior to the POI, we have disallowed Resolute's claimed offset for the reversal of the prior period provision.

While the Department's general practice is to recognize period expenses at the time they are recognized in the producer's audited financial statements, we do not find that Resolute's citation to *HR from Brazil* is germane to the particular facts of this case.[464] At issue in *HR from Brazil* were respondent's contention that certain expenses recognized on its audited financial statements should be excluded since they were actually incurred on behalf of the company's parent and respondent's argument to revise G&A expenses to reflect a cash rather than accrual basis of accounting.[465] As such, the Department found in *HR from Brazil* that the G&A expense rate should reflect the expenses recognized on the producer's GAAP-based audited financial statements. Here, the question to be resolved is whether income related to the reversal of a prior period provision is an appropriate offset to current period G&A expenses. For the reasons enumerated above, we find that the reversal of the prior period provision is not an appropriate offset to current period expenses, and, therefore, excluded the provision reversal income from the calculation of Resolute Canada's net G&A expenses.

With regard to the wood segment corporate level depreciation expense, pension expense, and inventory variation gain, the fact that Resolute in its normal books and records was unable to assign these costs to a particular mill within the wood segment suggests that they are expenses

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[461] *See e.g., Phosphor Copper from the Republic of Korea: Final Affirmative Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 82 FR 12433 (March 3, 2017) (*Phosphor Copper from Korea (2017)*), and accompanying Issues and Decision Memorandum at Comment 1; *Refrigerator-Freezers from Mexico* IDM at Comment 31.
[462] *See* Resolute Cost Verification Report at 14.
[463] *Id.*
[464] *See* Resolute Rebuttal Brief at 10 (citing *Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Brazil; Final Results of Antidumping Duty Administrative Review*, 70 FR 58683 (October 7, 2005) (*HR from Brazil*)).
[465] *See HR from Brazil* and accompanying Issues and Decision Memorandum at Comment 1.

related to the general operations of the wood segment as a whole, *i.e.*, G&A activities, rather than manufacturing activities. Therefore, we have not reclassified the wood segment corporate level depreciation expenses, pension expenses, and inventory variation gain reported from G&A expenses to manufacturing costs for the final determination.

Comment 40: Resolute's Long-Term Interest Income

The petitioner argues that, in accordance with its long-established practice, the Department should not allow long-term interest income as an offset to Resolute's consolidated financial expenses.

Department's Position:

We agree with the petitioner. In calculating net financial expenses, it is the Department's practice to allow a respondent to offset financial expenses with interest income generated from working capital.[466] In doing so, the Department assumes that working capital interest income is generated from short-term interest bearing assets because such assets are presumed to be readily available for day-to-day cash requirements. In contrast, interest earned on long-term interest bearing assets do not relate to a company's working capital, given that the funds in those accounts are not readily available and cannot be used for a company's day-to-day cash requirements.[467] Consequently, the Department considers interest income generated on long-term assets to be an investment activity, which we exclude as an offset to financial expenses. At verification, we confirmed that the interest in question was generated from long-term interest bearing assets.[468] Therefore, for the final determination, we have excluded the long-term interest income from Resolute's consolidated financial expense rate.

Comment 41: Resolute's Sawing Timber Transport Costs

The petitioner argues that the Department should exclude the "Transport – sawing timber" costs, which appear to be freight-out costs, from the cost of goods sold denominator used to calculate the G&A and financial expense rates for Opitciwan. Resolute rebuts that this line item is related to shipping rough lumber from the Opitciwan mill to other mills where the intermediate lumber product is dried and planed. As such, Resolute claims that the cost of transporting the intermediate product has been included in the reported cost of producing the finished lumber and should not be removed from the Opitciwan cost of goods sold denominator.

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[466] *See, e.g., Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination*, 77 FR 63291 (October 16, 2012) (*Orange Juice from Brazil (2012)*, and accompanying Issues and Decision Memorandum at Comment 11; *Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review, Partial Rescission, and Final No Shipment Determination*, 76 FR 41203 (July 13, 2011), and accompanying Issues and Decision Memorandum at Comment 4.
[467] *See, e.g., Orange Juice from Brazil (2012)*, and accompanying Issues and Decision Memorandum at Comment 11; *Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 65 FR 68976 (November 15, 2000), and accompanying Issues and Decision Memorandum at Comment 7.
[468] *See* Resolute Cost Verification Report at 37.

Department's Position:

We agree with Resolute. At verification, we found that this line item reflects the cost of transporting unfinished lumber between Opitciwan and the Resolute planer and kiln mills for additional processing.[469] Furthermore, our review of the cost buildup worksheets confirms that these transportation costs were included in Opitciwan's reported per-unit cost of manufacturing and were not reported as selling expenses, as the petitioner's comments surmise.[470] Because these transportation costs were included in the reported cost of manufacturing, they should likewise be included in the cost of goods sold denominator for Opitciwan's G&A and financial expense rates. Therefore, we have not adjusted Opitciwan's reported cost of goods sold denominator to exclude the transportation costs related to intermediate lumber products.

Comment 42: Resolute's Minor Cost Corrections

Resolute contends that the Department should rely on the post-verification cost databases which incorporate the Opitciwan and Baie Comeau mill cost changes that were presented as minor corrections on the first day of the cost verification.

Department's Position:

We agree with Resolute and have relied on the post-verification cost databases in the final determination.

Comment 43: Byproduct Offsets

In the event that the Department does not find a particular market situation in Canada, the petitioner asserts that the Department's byproduct offset adjustment from the *Preliminary Determination* should be updated to incorporate the verified corrections to the previously submitted byproduct worksheets. Resolute argues that an adjustment to the reported byproduct offsets is unnecessary since its byproduct transfer prices accurately reflect market values. Nonetheless, should the Department continue to evaluate the arm's length nature of its byproduct transfer prices, Resolute agrees with the petitioner that the analysis should be updated to include the verified corrections to the byproduct worksheets.

Department's Position:

The Department has determined that the record evidence does not support that a particular market situation was present in Canada during the POI.[471] Therefore, we have continued to evaluate the arm's length nature of Resolute's byproduct transfer prices.[472] In doing so, we agree with both parties and have updated our analysis from the *Preliminary Determination* to incorporate the verified corrections to the previously submitted byproduct worksheets.[473] Based

[469] *See* Resolute Cost Verification Report at 9.
[470] *Id.* at CVE 6.
[471] *See* Comment 17.
[472] *See* Resolute Preliminary Cost Calculation Memorandum at 2.
[473] *See* Resolute Final Cost Calculation Memorandum at 1.

on our updated byproduct analysis, we found that Resolute's transfer prices did not reflect market values. Therefore, we have adjusted Resolute's reported byproduct offsets in Ontario and Quebec to reflect market values for the final determination.

Comment 44: Resolute's Offset for Further Processed Byproducts

The petitioner argues that the Department should continue to deny the offset for the net profit generated at the Thunder Bay pellet mill where sawdust byproducts are further processed into wood pellets. According to the petitioner, the byproduct offset should reflect the value of the byproduct generated during lumber production, *i.e.*, sawdust, not the further processed pellet product, since, as the Department has found in similar cases, the pellet mill represents a separate line of business. Furthermore, the petitioner argues that it is not necessary to resort to the sales value of the further processed wood pellet since a market value for the sawdust byproduct generated at the split-off point is readily available.

Resolute argues that the Department should accept its net realizable value (NRV) calculation, which relies on the sales of wood pellets to unaffiliated parties, for determining the appropriate offset value for its sawdust byproducts. In support, Resolute contends that the sawdust market rate alluded to by the Department in the Preliminary Determination is a broad market value based on sawdust sales by other Resolute mills, not Thunder Bay, and cannot be considered superior to an NRV calculated with Thunder Bay's actual sales of wood pellets to third parties. According to Resolute, the Department's rejection of its reported NRV methodology for byproducts when the NRV methodology has been heavily relied on in calculating the dumping margins of this case is both inconsistent and illogical. Contrary to the petitioner's allegations, Resolute maintains that the pellet mill is not a separate line of business at Thunder Bay, but rather is part of single seamless operation that results in the finished goods of lumber and pellets.

Department's Position:

While we agree with the petitioner that the profit generated in the Thunder Bay pellet mill should be denied as an offset to the reported Thunder Bay lumber manufacturing costs, our reasoning differs slightly from the arguments made by the petitioner. We note that at Thunder Bay, the sawdust generated during lumber production is transferred to a separate pellet mill, where it is processed into wood burning pellets that are sold to third parties.[474] For reporting purposes, Resolute included as byproduct offsets the value of the sawdust as recorded in the normal books and records of the Thunder Bay sawmill and the net profit as recognized in the normal books and records of the Thunder Bay pellet mill.[475] In the *Preliminary Determination*, the Department denied the Thunder Bay profit as an offset to lumber costs, determining that because a market value was readily available for the product generated at the split off, *i.e.*, for the sawdust generated at the sawmill and subsequently transferred to the pellet mill, there was no reason to resort to the market value of the byproducts after they were transformed into pellets.[476]

[474] *See* Resolute Cost Verification Report at 10 and 15.
[475] *See, e.g.*, Resolute Cost Verification Report at 31.
[476] *See* Resolute Preliminary Cost Calculation Memorandum at 2.

The statute does not expressly provide a specific methodology for valuing byproducts; however, with regard to the cost of production, section 773(f)(1)(A) of the Act directs the Department to rely on a respondent's GAAP-based normal books and records unless such records do not reasonably reflect the costs associated with the production of the merchandise under consideration. Accordingly, the Department's practice is to adhere to a company's normally recorded costs where these statutory criteria are met.[477] At the cost verification, we confirmed that Resolute's records are kept in accordance with GAAP.[478] Additionally, we observed that Resolute maintains separate accounting records, *i.e.*, general ledger, trial balance, variance analysis reports, and lumber operating (LOI) reports for the Thunder Bay sawmill and for the Thunder Bay pellet mill.[479] These mill-specific accounting records ultimately roll up into the GAAP-based consolidated financial statements prepared by RFP, the ultimate parent of the respondent Resolute companies.[480] Furthermore, the mill-specific accounting records for the Resolute sawmills, *i.e.*, the variance analysis reports, were the basis for the reported costs.[481]

In examining the sawmill accounting reports, we found that Resolute normally offsets the Thunder Bay lumber production costs by the market value of the sawdust that is generated at the sawmill and not by an NRV that reflects the further processed wood pellets produced in the pellet mill.[482] In fact, in its response to the Department, Resolute lists the addition of the pellet mill net profit to its reported Thunder Bay lumber costs as a departure from "the costs as normally stated for the Thunder Bay {saw}mill."[483] Thus, when Resolute increased its byproduct offset by the pellet mill net profit, the company openly departed from the byproduct valuation used in its normal books and records. Hence, the question before the Department is whether Resolute's departure from its GAAP-based accounting records is warranted, *i.e.*, whether it rectifies a distortion in the lumber production costs from the company's normal books and records.

Resolute normally treats sawdust as a byproduct.[484] As the Department has explained in prior cases, byproducts are a type of joint product that result from a process whose main objective is the production of another product and not the byproduct itself.[485] As a result, byproducts are treated such that no profit is reported for them; rather, all profits are attributed to the main product.[486] Consequently, byproducts are valued at their NRV (the potential sales value less a reasonable estimate of the costs associated with the sale), unlike main or co-products which are

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[477] *See, e.g., Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea; Final Results of Antidumping Duty Administrative Reviews and Notice of Revocation in Part*, 61 FR 35177, 35179 (July 5, 1996) (*Pet Film from Korea (1996)*) and *Certain Carbon and Alloy Steel Cut-To-Length Plate From Taiwan: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 82 FR 16372 (April 4, 2017), and accompanying Issues and Decision Memorandum at Comment 13.
[478] *See* Resolute Cost Verification Report at 6.
[479] *Id*. at 31 referencing the variance and lumber operating reports (*i.e.*, the cost of manufacturing and cost of goods sold reports) from the sawmill and from the pellet mill.
[480] *Id*. at 11-14.
[481] *See, e.g., id*. at 23.
[482] *Id*. at 30-31.
[483] *See* Resolute's March 20, 2017 response at 53-54.
[484] *Id.* at 18.
[485] *See, e.g., PSC VSMPO-AVISMA Corp. v United States*, 688 F.3d 751 (Fed. Cir. 2012) (*PSC VSMPO*).
[486] *Id.*

valued at their actual production costs.[487] While Resolute cites *PET Film from Korea (1996)* as evidence that a proper NRV calculation commences with the sales of the downstream product, we disagree.[488] In that case, the respondents recycled waste film (the byproduct) as a raw material input into the production of finished goods.[489] In doing so, one respondent assigned zero value to the waste film generated, while another respondent assigned an NRV based on third party sales of the recycled film. The Department ultimately accepted each respondent's methodology, stating that although differing in approach, each respondent's method reasonably captured the cost of producing PET film and was relied on in the respective respondent's GAAP-based normal books and records. Thus, in *PET Film from Korea (1996)*, the byproduct valuations were reasonable and were normally used by the respondents in their accounting records. The Department did not consider in that case whether to rely on a market value for jointly produced byproducts or further processed downstream products. In fact, in selecting the appropriate sales value for an NRV calculation, the Department has previously rejected approaches that rely on the value of a further processed byproduct where the value of the joint products can be separately identified and valued objectively at the split-off point before they enter the further processing stage.[490] In the instant case, sawdust can be clearly identified and valued objectively before it enters the wood pellet production process.[491] In fact, as noted above, Resolute in its normal books and records offsets its lumber production costs with an NRV that reflects the value of the sawdust at the split-off point, and not with an NRV based on the value of the further processed wood pellet.

Resolute also contends that Thunder Bay is a single operation, whereby the pellet mill merely serves to further process sawdust into a more profitable commercial product, and that therefore, resulting profits should be allowed to reduce lumber production costs. We disagree, and instead find that construction of a pellet mill that transforms sawdust into wood pellets was a business decision intended to maximize overall company profitability and does not inform the appropriate byproduct value that should be used to offset the production costs of the main products produced at the sawmill (lumber). More pertinent, and in keeping with the Department's expressed preference, is whether there is a market value for the byproduct that is generated at the sawmill (*i.e.*, the split-off point).[492] The record clearly demonstrates that sawdust has commercial value, and that market value was readily available to Resolute.[493] Indeed, Resolute relies on this value in its normal GAAP-based accounting records.[494] Therefore, we find that Resolute's reported byproduct methodology unnecessarily introduces a profit element to the value of the sawdust byproducts. Accordingly, we find that a departure from Resolute's normal books and records in this regard is unwarranted. Thus, for the final determination, we have excluded the additional byproduct offset for the profit earned at the Thunder Bay pellet mill, and instead relied on the

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[487] *See, e.g., E.I. DuPont De Nemours & Co. v. United States*, 932 F. Supp. 296 (CIT 1996) (*E.I. Dupont*).
[488] *See* Resolute Case Brief at 7 (citing *PET Film from Korea (1996)*, 61 FR at 35177).
[489] *See PET Film from Korea (1996)*, 61 FR, at 35179.
[490] *See PSC VSMPO* where the Department stated that Avisma's proposed approach created an inflated value of the joint product chlorine that creates "distortion [by] tying the value of chlorine to the profits earned on titanium."
[491] *See* Resolute Cost Verification Report at 30 (describing how Resolute values sawdust at the split-off point).
[492] *See PSC VSMPO*.
[493] *See* Resolute Cost Verification Report at 30 (describing how Resolute values sawdust at the split-off point).
[494] *Id.*

byproduct values used in Resolute's normal books and records, as maintained for the Thunder Bay sawmill.

As a final remark, we agree with Resolute that the petitioner's case citations are not on point.[495] In *Mushrooms from Indonesia (1998)*, the offset in question was not related to a byproduct generated during production, but rather the production and resale of a raw material that was also used in the production of the main product.[496] Accordingly, the Department denied the use of the raw material revenue as an offset to mushroom production costs and instead allowed the exclusion of the underlying costs of producing the raw materials that were sold. Similarly, *Sulfur from Canada (1996)* is also unrelated to byproducts since, in that case, the Department denied respondent's offset to its own sulfur processing costs for the profits earned from sulfur processing performed for third parties.[497]

Comment 45: Resolute's Startup Adjustments

Resolute argues that both the Atikokan and Ignace mills meet the statutory criteria for a startup adjustment. Specifically, Resolute argues that the Atikokan mill was a newly constructed facility whose production was limited by technical factors through August 2016, and that the Ignace mill constitutes a substantially complete retooling of an existing plant where production was limited by technical factors associated with that retooling through March 2016. Where a company has met the statutory criteria, section 773(f)(1)(C)(i) of the Act states that "{c}osts shall be adjusted … ." Concluding that the statute's use of the word "shall" is directive, not discretionary, Resolute argues that the Department must enact startup adjustments for the Atikokan and Ignace mills.

On rebuttal, the petitioner argues that the record contains no basis for granting either mill a startup adjustment since Resolute failed throughout the proceeding to provide the data and information necessary to support such a conclusion under section 773(f)(1)(C)(ii) of the Act. Specifically, the petitioner contends that the Ignace mill fails to satisfy the statute's first criterion since it was not a complete and substantial retooling, and further, that both mills fail to satisfy the second criterion since any limitation in production levels due to startup-related technical

[495] *See* Petitioner Case Brief, at 85 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from Indonesia*, 63 FR 72268 (December 31, 1998) (*Mushrooms from Indonesia (1998)*; *Elemental Sulphur from Canada: Final Results of Antidumping Finding Administrative Review*, 61 FR 8239 (March 4, 1996) (*Sulfur from Canada (1996)*.
[496] *See Mushrooms from Indonesia (1996)*, 63 FR, at 72280.
[497] *See Sulfur from Canada (1996)*, 61 FR, at 8245.

factors was over prior to the POI. The petitioner also argues that Resolute's submitted startup adjustments should be rejected because they are based on budgeted, rather than actual, figures.

Department's Position:

We agree with the petitioner that the startup adjustments reported by Resolute for its Atikokan and Ignace mills should be rejected in the final determination. The data provided by Resolute do not support that the Atikokan and Ignace mills were in a startup phase during the POI.

Section 773(f)(1)(C)(ii) of the Act sets forth the criteria that a respondent must satisfy in order for the Department to grant an adjustment for startup operations. According to the statute, an adjustment is warranted if: (1) a producer is using new production facilities or producing a new product that requires substantial additional investment and (2) production levels are limited by technical factors associated with the initial phase of commercial production. The SAA clarifies that the term "new production facilities" may also include startup operations involving "the substantially complete retooling of an existing plant" which involves "the replacement of nearly all production machinery or the equivalent rebuilding of existing machinery."[498] Thus, in order for an existing facility to be considered a new production facility within the meaning of section 773(f)(1)(C)(ii) of the Act, the SAA provides that it must be retooled to the extent that it becomes a brand new facility in virtually all respects. Indeed, the "replacement of nearly all production machinery or the equivalent rebuilding of existing machinery" would result in nothing less than an essentially new facility. Hence, the SAA makes clear that, in analyzing these situations, an adjustment for startup costs is warranted only in those circumstances wherein the renovations result in a nearly new facility.

In reporting to the Department, Resolute argued that its Atikokan and Ignace mills were new and completely retooled facilities, respectively, and that both mills were in a startup phase during the POI, requiring implementation of startup adjustments. For the *Preliminary Determination*, the Department rejected Resolute's reported startup adjustments, stating that Atikokan's monthly production data did not support a startup period that extends through the entire POI, and that Ignace's "significant retooling" was unsupported by the record evidence.[499] For the final determination, it is undisputed by the parties that the Atikokan mill was a new facility and, thus, meets the first statutory criterion for a startup adjustment. With regard to the Ignace mill, although restarting a long dormant facility takes considerable effort, we continue to find that the facility was not significantly retooled such that it resulted in a nearly new facility. Rather, Resolute "initially replaced or installed only certain new machinery prior to commencing production and was later compelled to replace other existing equipment that was found to be faulty or have compromised functionality after log processing was underway (*i.e.*, December 2014)."[500] While Resolute did install a completely new kiln and green energy system at the Ignace mill, we find that installation of a single processing stage at a mill, though a significant investment, does not equate to an entirely new facility. The SAA sets a high bar for startup adjustment claims when it states that, "'{n}ew production facilities' includes the substantial

[498] *See* Statement of Administrative Action (SAA) accompanying the URAA, H.R. Rep. No. 103-316 (1994) at 836.
[499] *See* Resolute Preliminary Cost Calculation Memorandum at 1-2.
[500] *See* Resolute Cost Verification Report at 32.

retooling of an existing plant. Substantial retooling involves the replacement of nearly all production machinery or the equivalent rebuilding of existing machinery."[501] As such, we do not find that the new kiln installation and the replacement of limited pieces of equipment at the Ignace sawmill satisfy the statute's definition of a new production facility.[502] In addition, the throughput data for the Ignace mill demonstrate that the mill had reached commercial production levels, and would have exited the startup phase prior to the start of the POI.[503]

At the Resolute cost verification, we reviewed the various technical problems that it experienced with the commencement of production operations at the Atikokan and Ignace mills.[504] We do not dispute that Resolute experienced technical issues at its Atikokan and Ignace mills, however, at issue is whether these technical issues limited production levels during the initial phase of commercial production. The SAA directs the Department to measure the units processed to determine whether commercial production levels have been reached, indicating the end of the start-up period.[505] Furthermore, the SAA instructs that "the attainment of peak production levels will not be the standard for identifying the end of the start-up period, because the start-up period may end well before a company achieves optimum capacity utilization." The SAA also directs the Department "to examine other factors, including historical data reflecting the same producer's or other producers' experiences in producing the same or similar products."[506] Accordingly, our determination of the startup period was based, in large part, on a review of the log inputs at all of Resolute's sawmills, *i.e.*, those sawmills that Resolute argues were in a startup phase and those which inarguably were not, which represents the best measure of the sawmills' ability to produce at commercial production levels and reflects consideration of historical data concerning Resolute's experience producing the subject merchandise.

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[501] *See* SAA, at 836.

[502] *See, e.g., Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Reviews*, 64 FR 12927, 12950 (March 16, 1999) where the Department denied a startup adjustment for a new production line stating that substantial modifications must be made to the total production process; and, *Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from Romania: Final Results of Antidumping Duty Administrative Review and Final Determination Not To Revoke Order in Part*, 70 FR 7237 (February 11, 2005) and accompanying Issues and Decision Memorandum at Comment 12, where the Department found that the respondent's replacement and retooling of a significant amount of equipment did not warrant a startup adjustment since it did not include substantial modifications to the entire production plant.

[503] We dispute Resolute's contention that the full, verified record demonstrates that "the Ignace facility is, in effect, a new rebuilt facility and the retooling of the facility was certainly 'significant … such that a startup adjustment is warranted.'" *See* Resolute Case Brief, at 13. We are unable to find this quote in the referenced document; however, it appears to have been derived from the Department's Preliminary Cost Calculation Memorandum. The complete statement actually reads as follows: "With regard to the Ignace mill, we do not find that the information on the record supports there was a significant retooling of the facility such that a startup adjustment is warranted."[503] *See* Resolute Preliminary Cost Calculation Memorandum, at 2.

[504] *See* Resolute Cost Verification Report, at 32-33.

[505] *See* SAA at 836 (166) stating that "{t}o determine when a company reaches commercial production levels, Commerce will consider first the actual production experience of the merchandise in question. Production levels will be measured based on units processed." *See also Agro Dutch Foods Ltd. v. United States*, 110 F.Supp.2d 950, 956 (Ct. Int'l Trade, 2000) ("Congress unambiguously expressed its intent in the SAA where it stated that "{p}roduction levels will be measured based on units processed").

[506] *Id.*

At our request, Resolute provided the data for log inputs (*i.e.*, production starts) to the Atikokan and Ignace sawmills for each month from the commencement of production through March 2017 (the POI extends from October 2015 through September 2016).[507] In addition to comparing the month-to-month starts within the Atikokan and Ignace mills, we also performed an analysis of the average POI monthly starts at Resolute's other mills, which were not undergoing startup operations. Additionally, we calculated the value of the logs that were introduced into production at the Atikokan and Ignace mills during each month of the POI. Based on the totality of these analyses, we find that the Atikokan and Ignace mills reached commercial production levels prior to the POI.[508] Particularly persuasive were the monthly quantities and values of the logs that were started through production. These figures suggest that, by the beginning of the POI, Resolute had sufficient confidence in the Atikokan and Ignace sawmills to devote significant raw material resources to production there, commensurate with those devoted to sawmills not undergoing startup operations.[509] Further, while the POI log inputs at the Atikokan and Ignace mills may not have reflected the sawmills' optimum capacity, our analysis shows that the Atikokan and Ignace log inputs were not uncharacteristic of the average log inputs of other Resolute sawmills.[510] Although Resolute argues that technical issues at Atikokan persisted through at least August 2016 and at Ignace through March 2016, the mere existence of technical issues does not satisfy the statute's second criterion. Rather, these issues must impede the factory from operating at commercial production levels. Based on our analysis of the record evidence, we find that both mills reached the SAA's definition of commercial production levels prior to the start of the POI. Accordingly, we have denied Resolute's claim for startup adjustments at the Atikokan and Ignace mills.

Finally, though moot due to our decision that the Atikokan and Ignace mills do not meet the criteria for a startup adjustment, we also disagree with Resolute's reported startup adjustments, which were based on budgeted figures.[511] Where the criteria for making a startup adjustment are satisfied, section 773(f)(1)(C)(iii) of the Act specifies that the adjustment "shall be made by substituting the unit production costs incurred at the end of the startup period for the unit production costs incurred during the startup period," *i.e.*, the adjustment should be based on actual, not budgeted, production costs. While Resolute originally contended that the Atikokan and Ignace mills had not exited the startup period at the time that the startup adjustments were calculated, the statute also anticipates a situation where the startup period extends beyond the period of investigation. In such cases, the statute directs the Department to use the most recent cost of production data available.[512] Thus, again, the statute has an express preference for actual, not budgeted, production costs. Accordingly, we disagree with Resolute's reported startup adjustment methodology, which is based on budgeted figures. Because we have rejected the startup adjustments outright, we have not addressed the parties' comments on alternate calculation methodologies.

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[507] *See* Resolute's May 11, 2017 response, at Exhibit SD-30.
[508] *See* Resolute Final Cost Calculation Memorandum, at 3.
[509] *Id.*
[510] *Id.*
[511] *See* Resolute May 11, 2017 response, at 38.
[512] *See* section 773(f)(1)(C)(iii) of the Act stating that "{i}f the startup period extends beyond the period of the investigation or review under this title, the administering authority shall use the most recent cost of production data that it reasonably can obtain, analyze, and verify without delaying the timely completion of the investigation or review."

Company-Specific Issues: Tolko

Comment 46: Whether the Department Should Adjust Tolko's U.S. Prices to Reflect Losses on Futures Contracts

At verification, the Department found that certain U.S. sales invoices during the POI were deliveries pursuant to a futures contract held by Tolko as the seller at the time of maturity. The petitioner argues that the Department should adjust U.S. price downward for the loss Tolko incurred on these transactions.

Tolko argues in rebuttal that this adjustment should be regarded as an insignificant adjustment under 19 C.F.R. § 351.413.

Department's Position:

We agree with the petitioner. In the *Preliminary Determination*, we applied gains and incurred losses on the sale of futures contracts in the home market, in certain circumstances, with respect to West Fraser.[513] Thus, based upon verification findings of similar transactions by Tolko, for the final determination, we will apply the same methodology as that applied to West Fraser.[514]

Section 351.413 of the Department regulations does not require the Department to disregard insignificant adjustments, but merely permits it to do so.[515] In the interest of treating Tolko and other mandatory respondents in a uniform manner, and because the information was verified as accurate, we will adjust Tolko's U.S. prices for the gains and losses incurred on these transactions.

Comment 47: Cost of Discontinued Operations in Tolko's G&A Expenses

The petitioner argues that the Department should revise Tolko's G&A expenses to include certain costs related to the closure and/or sale of mills located in Manitoba and Nicola Valley. The petitioner notes that, on the unconsolidated financial statements that are used for the G&A expense calculation, these items are recorded as asset impairment charges and losses on disposal of assets, expenses that the Department typically includes in G&A expenses. The petitioner asserts that the fact that they are described as pertaining to discontinued operations on the consolidated financial statements is irrelevant to Tolko's company-specific G&A expenses.[516]

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[513] *See* Memorandum, "Preliminary Determination Analysis for West Fraser Mills Ltd.," dated June 23, 2017, at 4.
[514] *See* Memorandum, "Final Determination Analysis for Tolko Marketing and Sales Ltd. and Tolko Industries Ltd.," dated concurrently with this memorandum (Tolko Final Analysis Memorandum).
[515] *See* 19 CFR 351.413. Groups of insignificant adjustments are only disregarded under this regulation if they are "adjustments for differences in circumstances of sale under § 351.410, adjustments for differences in the physical characteristics of the merchandise under § 351.411, and adjustments for differences in the levels of trade under § 351.412." *See* 19 CFR 351.413.
[516] The petitioner provides several cases in support of its arguments. *See* Petitioner Case Brief, at 89-90.

Tolko responds that it is the Department's well-established practice to not include in G&A expenses the costs related to the permanent closure or sale of entire production facilities.[517] Tolko asserts that, even though these expenses are not identified as being related to discontinued operations on the unconsolidated financial statements, it is the nature of these expenses that is relevant.

Department's Position:

We disagree with the petitioner that the costs at issue should be included in Tolko's G&A expenses for the final determination. The Department's longstanding practice has been to exclude costs that are related to the permanent closure or sale of entire production facilities, as they no longer relate to the normal, ongoing operations of a company.[518] In the petitioner's view, the Department should base its decision regarding the proper treatment of these expenses on the manner in which they are recorded in Tolko's unconsolidated financial statements. However, in deciding whether an expense should be included or excluded from a respondent's costs, the Department considers the underlying nature of the item at issue.[519] The record clearly shows that these charges were incurred by Tolko as a direct result of (i) the permanent closure and subsequent sale in November 2016 of the Manitoba Kraft Paper Mill, (ii) the sale in November 2016 of the Manitoba Solid Wood Sawmill, and (iii) the permanent closure in December 2016 of the Nicola Valley Sawmill.[520] Accordingly, as these expenses relate to the permanent closures and/or sales of entire production facilities, they are appropriately excluded from G&A expenses.

Further, we disagree with the petitioner's assertion that because these costs were incurred before the plants were permanently closed or sold, they should be included in G&A expenses, as they are not "associated with the closure/sale of entire production facilities." When a company sells an entire production facility, it is not unusual for the company to incur and record various expenses connected with the sale. Additionally, prior to the actual sale, companies typically incur costs to shut the facility down and prepare it for sale. During the 2016 fiscal year, in connection with the permanent closures of the Nicola Valley and Manitoba facilities, Tolko recognized impairment charges resulting from the write-down to zero of certain assets.[521] Regardless of when these expenses were actually booked by Tolko, the record is clear that they all relate to the permanent closure and/or sale of these mills. A production facility that has been permanently closed or sold no longer supports a company's normal, ongoing operations, and as such any expenses associated with these events should not be included as part of G&A expenses. Regarding the Nicola Valley sawmill, which the petitioners point out had not yet been sold by

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[517] Tolko provides several cases in support of its arguments. *See* Tolko Rebuttal Brief, at 4.
[518] *See, e.g., Lumber IV* at Comment 8. *See also Certain Polyester Staple Fiber from Korea: Final Results of the 2006-2007 Antidumping Duty Administrative Review*, 73 FR 74144 (December 5, 2008) and accompanying Issues and Decision Memorandum, at Comment 3.
[519] *See, e.g., Certain Polyester Staple Fiber from Korea: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 58581 (October 4, 2006) and accompanying Issues and Decision Memorandum, at Comment 3.
[520] *See* Tolko's May 11, 2017 response, at SD1-21-SD1-25 and at Exhibit SD-21 (Tolko's Consolidated 2016 Financial Statements and accompanying notes).
[521] *Id*., at SD1-24.

the end of 2016, we note that all expenses related to the production of lumber at that mill prior to its permanent closure were included in the costs reported to the Department.[522] The asset impairment charges at Nicola Valley that were excluded from Tolko's G&A expenses were incurred as a direct result of this facility's permanent closure.[523]

For the final determination, we find that the expenses at issue relate to the permanent closure and/or sale of entire production facilities and have excluded them from Tolko's G&A expenses, in accordance with our established practice.[524]

Comment 48: Depreciation on Tolko's Idle Assets

For the Preliminary Determination, the Department revised Tolko's G&A expense ratio to include depreciation expenses associated with idle assets at the Manitoba Solid Wood sawmill and the High Prairie Oriented Strand Board (OSB) facility.[525] The petitioner argues that the Department should continue to include in G&A expenses the depreciation on idle assets at the OSB plant for the final determination. With respect to the Manitoba sawmill, however, the petitioner asserts that the idle asset depreciation should instead be classified as fixed overhead because the expenses relate to the production of lumber. Tolko responds that these items constitute G&A expenses that were already included by the Department in the Preliminary Determination.

Department's Position:

We agree with the petitioner that depreciation expenses on idle assets at the High Prairie OSB facility should be included in Tolko's G&A expense calculation, consistent with the Preliminary Determination. However, we disagree that the depreciation expenses on idle assets at the Manitoba Solid Wood sawmill should instead be classified as a fixed overhead expense. The Department normally includes expenses associated with idle assets as part of G&A expenses.[526] Because assets that have been idled by a company are not in productive use, we consider the depreciation on such assets to be general in nature and more closely related to the operations of the company as a whole rather than to current manufacturing costs for specific products.[527] The assets at Tolko's Manitoba Solid Wood sawmill were idled in 2009 and remained so throughout the POI.[528] As such, they do not relate to the production of lumber or to any other products, and we do not find it appropriate to include depreciation expenses on these assets in manufacturing costs as part of fixed overhead. Therefore, consistent with our normal practice, we have

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[522] *See* Tolko's March 22, 2017 response at Exhibit D-7.
[523] *See* Tolko's May 11, 2017 response at SD-24 (note 19 of the consolidated 2016 financial statements).
[524] *See* Lumber IV, at Comment 8.
[525] Tolko reported an amount for deprecation on certain classes of idle assets (*e.g.*, buildings) at the Manitoba mill in its G&A expenses. *See* Tolko's May 11, 2017 response at Exhibit SD-15. In the Preliminary Determination, the Department included an additional amount related to other asset classes.
[526] *See*, *e.g.*, *Certain Pasta from Italy: Final Results of Antidumping Duty Administrative Review*, 81 FR 91120 (December 16, 2016) and accompanying Issues and Decision Memorandum at Comment 7.
[527] *Id*.
[528] *See* Tolko's May 11, 2017 response, at SD1-5.

continued to include the depreciation expenses on idle assets at the Manitoba and High Prairie facilities in Tolko's G&A expenses for the final determination.

Comment 49: Exclusion of Long-term Interest Income from Tolko's Financial Expenses

The petitioner argues that, consistent with its established practice, the Department should exclude from Tolko's financial expense rate calculation the long-term portion of interest income that was identified at the cost verification.[529]

Department's Position:

We agree with the petitioner and have revised Tolko's financial expense rate calculation to exclude interest income generated by long-term assets, in accordance with our normal practice.[530,531]

Comment 50: Byproduct Offset Adjustments for Tolko

The petitioner argues that in the event the Department does not find that a particular market situation exists (*see* Comment 17) and accepts the respondents' by-product offsets for the final determination, it should continue to apply the necessary transactions disregarded adjustments under section 773(f)(2) of the Act related to Tolko's sales of by-products to affiliates. The petitioner further asserts that the Department should consider in its analysis the omitted by-product sales discovered during the cost verification.

Department's Position:

As discussed at Comment 17 above, the Department has determined that the record evidence does not support a finding that there is a particular market situation. Accordingly, we have not denied the respondents' by-product offsets in our margin calculations for the final determination. However, we agree with the petitioner that Tolko's by-product offsets should be adjusted as necessary to reflect the results of our transactions disregarded analysis, in accordance with section 773(f)(2) of the Act. Further, we have revised our analysis for the final determination to reflect the proper classification of certain affiliated by-product sales identified during the cost verification that Tolko had incorrectly reported as unaffiliated transactions.[532] Based on this

[529] The petitioner cites *Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 72 FR 12762 (March 19, 2007) and accompanying Issues and Decision Memorandum at Comment 3g in support of its argument.
[530] *See* Tolko Final Cost Calculation Memo, at 2.
[531] *See*, *e.g.*, *Sugar from Mexico: Final Determination of Sales at Less Than Fair Value*, 80 FR 57341 (September 23, 2015) and accompanying Issues and Decision Memorandum, at Comment 10 ("The Department does not permit offsets to financial expenses for interest earned on long-term assets….").
[532] The petitioner characterizes these by-product sales as "omitted" data. We note that these sales had been reported by Tolko in its original section D submission but were erroneously classified as unaffiliated transactions. *See* Tolko Cost Verification Report, at 19.

analysis, we have adjusted Tolko's reported by-product offsets so that the sales prices charged to affiliated parties reflect the market price for these products.[533]

Comment 51: Offset for the Revenue Earned by Tolko on Sales of Self-Generated Electricity

The reported costs for Tolko's Kelowna sawmill are offset by revenue earned on sales of excess self-generated electricity. For the Preliminary Determination, the Department eliminated from the offset the portion of the revenue that represented Tolko's profit on these sales. The petitioner argues that the Department should continue to apply this adjustment for the final determination, in accordance with our well-established practice of not allowing costs to be offset by separate lines of business.[534]

Department's Position:

We agree with the petitioner and have continued to adjust Tolko's reported costs to eliminate the profit earned by the Kelowna sawmill on sales of excess self-generated electricity. For the preliminary determination, we derived an estimated amount for profit on these sales because the related costs were not on the record at that time.[535] During the cost verification, we examined and obtained information related to the costs incurred at the Kelowna mill to produce the electricity that was sold.[536] Therefore, for the final determination, we have revised the calculation of the profit on these sales to incorporate this information.[537]

Comment 52: Yield Loss in Tolko's Cost of Manufacturing

For the Preliminary Determination, the Department adjusted Tolko's reported cost of manufacturing for four sawmills, finding that "it is not clear from the record that Tolko has accounted for yield loss at each production stage in its calculations."[538] Tolko asserts that the Department specifically examined whether the per-unit costs reflected yield loss during the cost verification, and determined that they did. Tolko concludes that, because all costs, including all yield losses, were reported, the Department should reverse these adjustments for the final determination.

Department's Position:

We agree with Tolko. During the cost verification, we examined the underlying inventory and production records Tolko used to develop the reported per-unit costs submitted to the Department.[539] Based on this testing, we confirmed that the quantities used in these per-unit calculations represented fully yielded figures. Therefore, we are not making this upward adjustment for the final determination.

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[533] *See* Tolko Final Cost Calculation Memo, at 2.
[534] The petitioner provides several cases in support of its argument. *See* Petitioner Case Brief, at 94.
[535] *See* Tolko Prelim Cost Calculation Memo, at 2.
[536] *See* Tolko Cost Verification Exhibit 12, at 57 and 58.
[537] *See* Tolko Final Cost Calculation Memo, at 2 and Attachment 3.
[538] *See* Tolko Prelim Cost Calculation Memo, at 2.
[539] *See* Tolko Cost Verification Report, at 15.

Company-Specific Issues: West Fraser

Comment 53: U.S. Price Adjustment

West Fraser argues that the Department incorrectly calculated U.S. net price by multiplying a West Fraser expense field by the quantity of the related sale. West Fraser claims that it is unnecessary to multiply this expense by quantity because this expense is already reported on a per-MFB (*i.e.*, quantity) basis in the U.S. sales database. Accordingly, West Fraser argues that this expense, as reported in the U.S. sales database, should be deducted from U.S. price. Due to the proprietary nature of this expense, additional details are contained in the West Fraser final analysis memorandum.[540] The petitioner did not comment on this issue.

Department's Position:

We agree with West Fraser. In the preliminary determination, we did not intend to multiply the U.S. sales database expense by quantity in the margin calculation program. Accordingly, for the final determination, we have corrected this inadvertent error. Additional details can be found in the West Fraser final analysis memorandum.

Comment 54: Billing Adjustments

West Fraser argues that the Department incorrectly deducted billing adjustments from HM and U.S. gross unit price. West Fraser contends that because the gross unit price used by the Department in its HM and margin analysis programs (GRSUPR2H and GRSUPRIU, respectively) are already net of billing adjustments, it is unnecessary to make this adjustment to gross unit price. The petitioner did not comment on this issue.

Department's Position:

We agree with West Fraser. In the preliminary determination, we did not intend to deduct billing adjustments from the gross unit price for the HM and U.S. price in either the HM or margin calculation programs. We agree that the HM and U.S. prices used in the HM and margin calculation programs are net of billing adjustments. Therefore, for the final determination, we have removed billing adjustments from the calculation of HM and U.S. net unit price.[541]

[540] *See* Memorandum, "Antidumping Duty Investigation of Certain Softwood Lumber Products (Softwood Lumber) from Canada: Analysis of the Final Affirmative Determination Margin Calculation for West Fraser Mills Ltd.," dated concurrently with this memorandum (West Fraser Final Analysis Memorandum).
[541] *See* West Fraser Final Analysis Memorandum.

Comment 55: West Fraser Reported Millcode

The petitioner argues that the West Fraser cost program incorrectly calculated cost for one West Fraser mill because the mill code name was reported in the cost dataset in lower case instead of uppercase.[542] The petitioner contends that failing to account for this mill reported in lower case leads to unintended results in the cost program. West Fraser did not comment on this issue.

Department's Position:

We agree with the petitioner. For the final determination, we have adjusted the language in the cost program to change the reported mill name from lower case to upper case.[543]

Comment 56: Financial Expenses

In the *Preliminary Determination*, the Department adjusted West Fraser's financial expense ratio calculation to exclude financial income for "Accretion on long-term liabilities." The petitioner argues that the Department should continue to apply this adjustment for the Final Determination. Further, the petitioner argues that the Department should revise West Fraser's cost of goods sold denominator for the G&A and financial expense ratios to exclude depreciation expenses captured as a part of G&A expenses. West Fraser did not comment on this issue.

Department's Position:

For the final determination, we continue to exclude the financial income for "Accretion on long-term liabilities" from West Fraser's financial expense ratio calculation. The Department's practice is to allow a respondent to offset financial expenses with short-term interest income generated from a company's current assets and working-capital accounts.[544] At verification, West Fraser indicated that the "Accretion on long-term liabilities" represents the interest portion of the accretion on the company's long-term environmental liability (*e.g.*, the cost of future reforestation, timber damage, landfill).[545] We note that, as the name of this item implies, the underlying liability on which this interest amount was calculated is long-term in nature and, as such, it does not represent interest income from short-term sources.

We have also removed the total amount of depreciation expenses, reclassified from the cost of goods sold to G&A expenses, from the cost of goods sold denominator used in West Fraser's calculation of its financial expense and G&A expense ratios.[546]

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[542] *See* Petitioner Case Brief, at 73-74.
[543] *See* West Fraser Final Analysis Memorandum.
[544] *See Certain Frozen Warmwater Shrimp from India: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination*, 77 FR 40848 (July 11, 2012), at Comment 6.
[545] *See* Verification of the Cost Response of West Fraser Mills Ltd in the Antidumping Duty Investigation Certain Softwood Lumber from Canada (July 27, 2017) (West Fraser Cost Verification Report), at 11, 23.
[546] Because this analysis involves West Fraser's business proprietary information, *see* Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – West Fraser Mills Ltd," dated concurrently with this memorandum (West Fraser Final Cost Calculation Memorandum), for further details.

Comment 57: Byproduct Offset for Sales of Byproducts to Affiliated Companies

In the event that the Department does not find a particular market situation, the petitioner asserts that the Department's wood chip byproduct offset adjustment for West Fraser from the *Preliminary Determination* should not change for the final determination. In addition, the petitioner argues that the Department should make an adjustment to the reported shavings byproduct offset based on the minor corrections presented at West Fraser's cost verification. Further, the petitioner notes that the Department analyzed the issue of defining byproduct markets by province in *Lumber IV* and that West Fraser has not provided any new information to indicate that wood chips should be treated differently than the cost of wood.

West Fraser asserts that the Department confirmed at verification that West Fraser sells wood chips to affiliated and unaffiliated parties at equivalent prices making the transactions disregarded adjustment inappropriate. Further, West Fraser argues that the Department should revise its affiliated party analysis performed in the *Preliminary Determination* and split the sawmills into Northern British Columbia/Alberta and Southern British Columbia groups rather than using a province-by-province delineation. In addition, West Fraser states that no adjustment for shavings is necessary because the minor correction related to shavings only affected the further processing costs and not the price of the sales.

Department's Position:

The Department has determined that the record evidence does not support the petitioner's allegation that a particular market situation was present in Canada during the POI.[547] Therefore, we have continued to evaluate the arm's length nature of West Fraser's byproduct affiliated transfer prices.[548] In doing so, we disagree with West Fraser that we should alter our analysis of the respondent's by-product offsets for wood chips and hog fuel revenue received from affiliated parties.

The Department has determined that record evidence shows that wood costs vary significantly by province.[549] This is due, in part, to differing stumpage and harvesting costs associated with obtaining logs in different provinces. As wood chips are a by-product of the logs, it is reasonable to assume that the wood chip market tends to follow the log market. Supply and demand factors also can cause variances in the province woodchip markets, whereby one province could be a net importer of chips and another province a net exporter due to oversupply. Further, while arguments could be made to delineate the by-product price comparisons in several different ways (*i.e.*, northern and southern provinces, northern and southern Canada, east coast and west coast, *etc.*), comparing by-product prices on a province-specific basis is reasonable when considering that stumpage costs are charged by province.[550] As explained in West Fraser's section D response, stumpage costs related to logging are charged by each Provincial Government. Further, the record does not provide any specific evidence to warrant stepping

[547] *See* Comment 17.
[548] *See* West Fraser Preliminary Cost Calculation Memorandum, at 1.
[549] *See* West Fraser's April 7, 2017 response, at Exhibit D-3.
[550] *See* West Fraser's March 21, 2017 Section D submission, at D-7.

away from our decision in *Lumber IV AR1*[551] and also in *Lumber IV Final Determination*.[552] Therefore, consistent with *Lumber IV AR1* and *Lumber IV Final Determination*, we have continued to conduct our analysis of West Fraser's by-product sales offsets on a province-wide basis and have applied the same adjustment we made from the *Preliminary Determination* for the final determination.[553]

West Fraser contends that the transactions disregarded analysis is unnecessary because of the wood chips purchase agreement examined at verification, which runs between three of West Fraser's mills and an affiliated buyer, Cariboo Pulp and Paper (CPP). The purchase agreement uses as a benchmark the price CPP pays unaffiliated suppliers of wood chips. According to West Fraser, this establishes that West Fraser sells wood chips to affiliates and unaffiliated parties at equivalent prices. However, the language and terms of the purchase agreement do not alone satisfy the Department's transactions disregarded analysis.

For purposes of the transactions disregarded analysis, when the respondent purchases inputs from an affiliated supplier or, as in this case, sells a byproduct to affiliated parties, we compare the transfer price (*i.e.*, to the affiliated purchaser) with actual market prices (*i.e.*, to unaffiliated purchasers).[554] Therefore, in accordance with our normal practice, we conducted the transactions disregarded analysis by comparing the prices West Fraser actually charged affiliated and unaffiliated parties, on a province-specific basis. Accordingly, for the final determination, we adjusted West Fraser's sales of byproducts to affiliated parties to reflect market prices. [555]

West Fraser contends that the shavings/sawdust further processing costs incurred at certain mills in Alberta should not be incorporated into the transactions disregarded analysis because the analysis is a comparison of prices and not costs. We find West Fraser's argument misplaced. While West Fraser is correct that the transactions disregarded analysis is a comparison of prices, the prices must be for comparable products. In this instance, West Fraser further processes the shavings/sawdust at certain mills but not at all mills. Therefore, to ensure that the affiliated and unaffiliated shavings/sawdust prices being compared are for the comparable product, we adjusted the affiliated and unaffiliated shavings/sawdust prices by the further processing costs incurred at the mills engaged in further processing.[556]

Comment 58: Purchases of Seeds

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[551] *See Notice of Final Results of Antidumping Duty Administrative Review and Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products from Canada*, 69 FR 75921 (December 20, 2004) ((*Lumber IV AR 1*) and the accompanying Issues and Decision Memorandum, at Comment 7 (*Lumber IV AR 1*).
[552] *See Lumber IV Final Determination*, at Comment 11.
[553] *See* West Fraser Final Cost Calculation Memorandum for further details.
[554] *See Certain Carbon and Alloy Steel Cut-To-Length Plate from Belgium: Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances, in Part*, 82 FR 16378 (April 4, 2017) and accompanying Issues and Decision Memorandum, at Comment 6.
[555] *See* West Fraser Final Cost Calculation Memorandum for further details.
[556] *See id*. for further details.

In the *Preliminary Determination*, the Department adjusted West Fraser's cost for the purchase of seeds from an affiliate in accordance with the transactions disregarded rule.[557] West Fraser argues that the Department should include, among the market prices used for the transactions disregarded analysis, prices from unaffiliated government-owned entities, because the record does not demonstrate that the government-owned entities are subsidized.

The petitioner asserts that, at the cost verification, West Fraser officials stated that the seeds from government-owned entities are lower quality, and therefore not comparable to purchases of seeds from non-government-owned entities. The petitioner contends that the Department should continue to exclude purchases from government-owned entities in its transactions disregarded analysis.

Department's Position:

At the cost verification, West Fraser officials indicated that "government-owned seed producers…harvest seeds from the wild and such seeds have less genetic worth and lower yields."[558] Further, "seeds produced by private orchards are more valuable because significant work goes into research and rearing the seedlings, and private orchards guarantee a 90% germination ratio (*i.e.*, the viability of a population of seeds)."[559]

Because the seeds obtained from government entities are from the wild, of lower quality, and do not contain a guaranteed germination ratio, we have determined that they are not comparable to the seeds obtained from affiliated and unaffiliated suppliers that are not government-owned.[560] Therefore, for the final determination, we have updated our calculations to include the minor corrections related to West Fraser's purchases of seeds, but continue to exclude purchases from government-owned entities in our transactions disregarded analysis.[561]

Comment 59: West Fraser's Cost Reconciliation/Non-Operating Expenses

The petitioner argues that the Department should include freight costs related to the movement of rough lumber between mills and expenses related to the accretion of long-term silviculture/environmental liabilities (log elimination) in West Fraser's reported costs.

Additionally, the petitioner argues that the Department should include non-operating expenses of the permanently closed Houston, BC mill in West Fraser's G&A expenses.

West Fraser contends that the Houston facility was permanently closed in 2014 and that the Department's practice is to not include the costs associated with facilities that are permanently closed as part of G&A expenses.

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[557] *See* section 773 (f)(2) of the Act.
[558] *See* West Fraser Cost Verification Report, at 21.
[559] *Id.*
[560] *See Certain Hot-Rolled Steel Flat Products from the Netherlands: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 81 FR 53421 (August 12, 2016) and accompanying Issues and Decision Memorandum, at 13.
[561] *See* West Fraser Final Cost Calculation Memorandum for further details.

Department's Position:

We agree with the petitioner, in part. At verification, we found that the cost of freight related to the movement of unfinished lumber (*i.e.*, rough lumber) between mills for further processing was not included in the reported COM. Likewise, we found that expenses associated with silviculture/environmental liabilities were not included in the reported COM. Because these expenses are directly associated with wood costs, we have increased West Fraser's reported COM by the expenses in question.[562]

With regard to the expenses related to the permanently closed Houston sawmill, we agree with West Fraser and have not included these expenses in the calculation of the G&A expense ratio. The Department's longstanding practice has been to exclude costs that are related to the permanent closure or sale of entire production facilities, as they no longer relate to the normal, ongoing operations of a company.[563] Here, the permanent nature of the Houston sawmill shut down is not in question and is supported by the record evidence.[564] Therefore, consistent with *Softwood Lumber from Canada (2005)*, we have not included in West Fraser's G&A expenses the costs associated with the permanently shut down Houston sawmill.

[562] *Id*. for further details.
[563] *See*, *e.g.*, *Softwood Lumber from Canada (2005)* and accompanying Issues and Decision Memorandum, at Comment 8; *see also Certain Polyester Staple Fiber from Korea: Final Results of the 2006-2007 Antidumping Duty Administrative Review*, 73 FR 74144 (December 5, 2008), and accompanying Issues and Decision Memorandum, at Comment 3.
[564] *See* West Fraser Cost Verification Report, at 8.

VI. RECOMMENDATION

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

☒	☐
Agree	Disagree

11/1/2017

X

Signed by: GARY TAVERMAN

Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance