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

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

SUBJECT: Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Certain Uncoated Groundwood Paper from Canada

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I. Summary

The Department of Commerce (Commerce) finds that certain uncoated groundwood paper (UGW paper) from Canada is being, or is likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The period of investigation (POI) is July 1, 2016, through June 30, 2017.

We analyzed the comments submitted by interested parties, and have made changes to the *Preliminary Determination*.[1] As a result of our analysis, and based on our findings at verification, we made changes to the margin calculations for Catalyst Pulp and Paper Sales, Inc. and Catalyst Paper General Partnership (collectively, Catalyst); Resolute FP Canada Inc. and Donohue Malbaie Inc. (collectively, Resolute); and White Birch Paper Canada Company, Papier Masson WB LP (Papier Masson), FF Soucy WB LP (Soucy), and Stadacona WB LP (Stadacona) (collectively, White Birch Paper). We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this LTFV investigation for which we received comments from interested parties:

[1] *See Certain Uncoated Groundwood Paper from Canada: Preliminary Affirmative Determination of Sales at Less-Than-Fair-Value, Postponement of Final Determination, and Extension of Provisional Measures*, 83 FR 11960 (March 19, 2018) (*Preliminary Determination*).

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II. Background

On March 19, 2018, Commerce published the *Preliminary Determination* of sales at LTFV of UGW paper from Canada. From March through May 2018, we conducted verification of the sales and cost of production (COP) data reported by Catalyst, Resolute, and White Birch Paper, in accordance with section 782(i) of the Act.[2] In May and June 2018, we requested that Catalyst and Resolute submit revised home market and U.S. sales databases, and that White Birch Paper submit revised home market sales, U.S. sales, and COP databases. We received these revised databases in June 2018.

We invited parties to comment on the *Preliminary Determination*. In June 2018, we received case briefs from Catalyst; Gannett Supply Corporation (Gannett); Kruger Trois-Rivieres L.P., Corner Brook Pulp and Paper Limited, Kruger Publication Papers Inc., and Kruger Bromptonville L.P. (collectively, Kruger); Resolute; and Tembec Inc. (Tembec).[3] We received

[2] *See* Memorandum, "Verification of the Cost Response of White Birch Paper Canada Company in the Antidumping Duty Less Than Fair Value Investigation of Uncoated Groundwood Paper from Canada," dated April 20, 2018; Memorandum, "Verification of the Sales Questionnaire Responses of Catalyst Paper General Partnership and Catalyst Pulp and Paper Sales Inc. (collectively, Catalyst) in the Antidumping Duty Investigation of Certain Uncoated Groundwood Paper from Canada," dated May 18, 2018 (Catalyst SVR); Memorandum, "Verification of the Sales Responses of White Birch Paper in the Antidumping Investigation of Uncoated Groundwood Paper from Canada," dated May 21, 2018; Memorandum, "Verification of the Sales Responses of White Birch Paper in the Antidumping Duty Investigation of Uncoated Groundwood Paper from Canada," dated May 24, 2018; Memorandum, "Verification of the Sales Response of Resolute FP Canada Inc. and Donohue Malbaie Inc. (collectively, Resolute)," dated May 31, 2018 (Resolute SVR); Memorandum, "Verification of the Cost Response of Catalyst in the Antidumping Duty Investigation of Certain Uncoated Groundwood Paper from Canada," dated May 31, 2018 (Catalyst CVR); and Memorandum, "Verification of the Cost Response of Resolute in the Antidumping Duty Investigation of Uncoated Groundwood Paper from Canada," dated June 5, 2018 (Resolute CVR).

[3] *See* "Certain Uncoated Groundwood Paper from Canada: Catalyst's Case Brief," dated June 13, 2018 (Catalyst's Case Brief); "Uncoated Groundwood Paper from Canada: Certain Uncoated Groundwood Paper from Canada: Case

rebuttal briefs from North Pacific Paper Company (the petitioner) and Resolute.[4] On June 21, 2018, we held a public hearing.[5]

Based on our analysis of the comments received, as well as our verification findings, we revised our calculations of the weighted-average dumping margins for Resolute, Catalyst, and White Birch Paper from our calculations in the *Preliminary Determination*.

III. Scope of the Investigation

The product covered by this investigation is UGW paper from Canada. For a complete description of the scope of this investigation, *see* Appendix I of the accompanying *Federal Register* notice.

IV. Changes Since the Preliminary Determination

We calculated export price (EP), normal value (NV), and COP for Catalyst, Resolute, and White Birch Paper using the same methodology as stated in the *Preliminary Determination*,[6] except as follows:[7]

Catalyst

- We relied on Catalyst's revised home market and U.S. sales databases incorporating corrections presented at the sales verification.
- We revised Catalyst's reported cost of manufacturing (COM) to include expenses incurred when scrap is identified and introduced into production.[8]

Brief," dated June 13, 2018 (Gannett's Case Brief); "Uncoated Groundwood Paper from Canada: Case Brief, of the Kruger Parties," dated June 14, 2018 (Kruger's Case Brief); "Uncoated Groundwood Paper from Canada: Resolute's Case Brief," dated June 13, 2018 (Resolute's Case Brief); and "Uncoated Groundwood Paper from Canada: Tembec's Case Brief," dated June 13, 2018 (Tembec's Case Brief).

[4] *See* "Antidumping Duty Investigation of Uncoated Groundwood Paper from Canada: Petitioner's Rebuttal Brief," dated June 18, 2018 (Petitioner's Rebuttal Brief); and "Uncoated Groundwood Paper from Canada: Resolute's Rebuttal Case Brief," dated June 18, 2018 (Resolute's Rebuttal Brief).

[5] *See* Public Hearing Transcript regarding "Antidumping Duty Investigation on Uncoated Groundwood Paper from Canada," dated June 21, 2018.

[6] *See Preliminary Determination*, and accompanying Preliminary Decision Memorandum (PDM), at 10-13 and 19-21. *See also* Memoranda entitled: "Preliminary Determination Margin Calculation for Catalyst," dated March 12, 2018; "Preliminary Determination Margin Calculation for Resolute," dated March 12, 2018; "Resolute's Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination," dated March 12, 2018; and "Preliminary Determination Margin Calculation for White Birch Paper," dated March 12, 2018.

[7] *See* Memoranda entitled: "Final Determination Margin Calculation for Catalyst," dated August 1, 2018 (Catalyst Final Sales Calculation Memorandum); "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Catalyst," dated August 1, 2018 (Catalyst Final COP Calculation Memorandum); "Final Determination Margin Calculation for Resolute," dated August 1, 2018 (Resolute Final Sales Calculation Memorandum); "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination," dated August 1, 2018 (Resolute Final COP Calculation Memorandum); "Final Determination Margin Calculation for White Birch Paper," dated August 1, 2018 (White Birch Paper Final Sales Calculation Memorandum); and "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – White Birch Paper Canada Company" dated August 1, 2018 (White Birch Paper Final COP Calculation Memorandum).

[8] *See* Catalyst Final COP Calculation Memorandum at 1.

- We revised Catalyst's G&A expense ratio to exclude fixed asset impairment losses. *See* Comment 4, below.
- We revised Catalyst's G&A expense ratio to include losses incurred from insurance proceeds. *See* Comment 7, below.
- We revised Catalyst's financial expense ratio to include certain foreign exchange gains to incorporate the correction presented at verification. *See* Comment 10, below.
- We revised certain of Catalyst's reported U.S. rebates based on our findings at the sales verification.[9]
- We corrected certain programming errors in Catalyst's margin program. *See* Comment 9, below.
- We revised certain of Catalyst's reported U.S. direct selling expenses based on our findings at the sales verification.[10]

Resolute

- We relied on Resolute's revised home market and U.S. sales databases incorporating corrections presented at the sales verification.
- We excluded Resolute's home market and U.S. sales of directory paper which are no longer covered by the scope of this investigation.[11]
- We included all of Resolute's reported home market sales shipped to destinations within Canada, and all of Resolute's reported U.S. sales shipped to destinations within the United States, consistent with our treatment of similar U.S. sales reported by Catalyst. *See* Comment 6, below.
- We excluded Resolute's sales of merchandise produced in the United States from the U.S. sales database, based on our findings at verification.[12]
- We recalculated the COP for certain product matching control numbers (CONNUMs) reported by Resolute to exclude directory paper products included in these CONNUMs.[13]
- We revised the COM Resolute reported for certain CONNUMs to account for corrections to: 1) the production quantity for one month at one mill;[14] and 2) an adjustment to electricity costs at one mill.[15]
- We revised Resolute's G&A expense ratio to eliminate the double counting of the paper check-off fee reported as part of both G&A and selling expenses.[16]
- We revised the calculation of Resolute's financial expense ratio to exclude interest income generated from a long-term asset.[17]

[9] *See* Catalyst Final Sales Calculation Memorandum at 1.
[10] *Id*. at 2.
[11] *See* Resolute Final Sales Calculation Memorandum at 2-3.
[12] *See* Resolute SVR at 3 and VE-1 and Resolute Final Sales Calculation Memorandum at 4.
[13] *See* Resolute's Case Brief at 3 and Resolute Final Cost Calculation Memorandum at 2.
[14] *Id*. at 8, and Resolute Final Cost Calculation Memorandum at 2.
[15] *Id*. at 9, and Resolute Final Cost Calculation Memorandum at 2.
[16] *Id*. at 4, and Resolute Final Cost Calculation Memorandum at 3.
[17] *See* Resolute CVR at 22 and Resolute Final Cost Calculation Memorandum at 2-3.

- At verification, Resolute identified a small quantity of unreported U.S. sales.[18] We are, therefore, applying facts available, pursuant to section 776(a)(2)(A) of the Act, because Resolute withheld information Commerce requested of it. We are further applying an adverse inference under section 776(b) of the Act, because we find that, in not reporting the U.S. sales in response to Commerce's questionnaires, Resolute failed to act to the best of its ability in providing Commerce with requested information. Relying on facts available, with an adverse inference, we applied the highest calculated transaction-specific margin for Resolute to the quantity of these unreported U.S. sales.[19]
- For Resolute's home market and U.S. sales, where it noted at verification that it incurred freight revenue,[20] we capped freight revenue by the corresponding amount of inland freight expenses to the customer.[21]
- We recalculated Resolute's home market and U.S. imputed credit expenses to use: 1) the revised shipment and payment dates identified at verification; and 2) for sales made in U.S. dollars, the Federal Reserve POI average U.S. dollar short-term interest rate.[22] *See* Comment 11, below.
- For Resolute's home market and U.S. sales that the original customer did not accept and were subsequently resold,[23] we revised the calculation of inventory carrying costs to calculate an additional cost to account for the period between mill shipment and delivery to the ultimate customer.[24]

White Birch Paper

- We relied on White Birch Paper's revised home market sales, U.S. sales, and cost databases incorporating corrections presented at the sales and cost verifications.
- We revised the G&A expense ratios for Papier Masson and Soucy to reflect the higher transfer price, in comparison to the reported market price, for certain management fees charged to the mills by their affiliate, White Birch Management Corporation.[25]
- For White Birch Paper's reported sales in the home market and U.S. sales databases with missing payment dates, we assigned, as facts available, the last date of verification as the date of payment.[26]
- We recalculated White Birch Paper's home market and U.S. imputed credit expenses for sales in Canadian and U.S. dollars using: 1) either the Bank of Canada's average Canadian dollar interest rate or the Federal Reserve's weighted-average U.S. dollar short-term interest rate for the POI, based on the currency of the sale; 2) the revised shipment and payment dates obtained at verification; and 3) the revised payment date noted above for unpaid sales.[27]

[18] *See* Resolute SVR at 3 and VE-1.
[19] *See* Resolute Final Sales Calculation Memorandum at 4.
[20] *See* Resolute SVR at 3 and VE-11.
[21] *See* Resolute Final Sales Calculation Memorandum at 2 and 4-5.
[22] *Id.* at 3 and 5.
[23] *See* Resolute SVR at 18.
[24] *See* Resolute Final Sales Calculation Memorandum at 3 and 5.
[25] *See* White Birch Paper Final COP Calculation Memorandum at 1-2.
[26] *See* White Birch Paper Final Sales Calculation Memorandum at 1-2.
[27] *Id* at 2.

- We recalculated White Birch Paper's home market and foreign inventory carrying costs to account for the revised total COM reported in the revised cost databases. In addition, we recalculated home market and foreign inventory carrying costs for sales produced by Papier Masson to account for a correction to the number of days in inventory obtained at verification.[28]

V. Discussion of the Issues

Comment 1: Whether There was Sufficient Industry Support to Initiate this Investigation

Gannett's Case Brief

- U.S. trade law requires Commerce to consider whether a petition for the imposition of antidumping duty (AD) and countervailing duties (CVD) has been filed on behalf of the domestic industry producing the domestic like product. The law provides that:
    - if the petition does not establish the support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, Commerce must poll the industry;[29]
    - to determine industry support, Commerce shall disregard the position of domestic producers related foreign producers, unless such producers demonstrate that their interests as domestic producers would be adversely affected by the imposition of an AD or CVD order;[30] and
    - Commerce may disregard the position of domestic producers that are also importers of the subject merchandise.[31]
- Here, while Commerce polled the domestic industry, it failed to take into account all of the views expressed by the domestic industry as required by law. Specifically, Commerce improperly excluded the opposition of certain parties to the petition, despite the fact that these parties clearly demonstrated that their interests as domestic producers would be adversely affected by the imposition of an AD or CVD order.[32]
- Commerce never identified the threshold it used in this investigation or other cases where it excluded opposition to the petition.[33]
- Furthermore, Commerce's analysis of the parties' opposition was deficient because the basis for Commerce's decision-making path was not discernable and the decision lacked adequate evidentiary support.[34] Commerce also cited no legal authority in its reasoning. It is not within Commerce's discretion to simply assert the purpose of the statute or find something inconsistent with that purpose without citing any specific legal authority.

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[28] *Id.*
[29] *See* Gannett's Case Brief at 2 (citing sections 702(c)(4) and 732(c)(4) of the Act).
[30] *Id*. at 3 (citing sections 702(c)(4)(B)(i) and 732(c)(4)(B)(i) of the Act).
[31] *Id*. (citing sections 702(c)(4)(B)(ii) and 732(c)(4)(B)(ii) of the Act).
[32] *See* Gannett's Case Brief at 4-7. Certain of the arguments Gannett raises contain business proprietary information, which cannot be discussed here.
[33] *Id*. at 8.
[34] *Id*. at 3-9 (citing *e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins Co.*, 463 U.S. 29, 43 (1983); *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009); *Calgon Carbon Corp v. United States*, 190 F. Supp. 3d 1224, 1240-41(CIT 2016); and section 516A(b)(1)(B)(i) of the Act).

Congress' purpose in enacting laws is derived from specific legal sources, not from agency pronouncements.[35]

- Thus, because the petition was not filed on behalf of the domestic industry, Commerce unlawfully initiated this investigation.[36]
- Finally, the perilous position of many U.S. newspapers, due to shifts towards digital media and declining readership, has been noted in this investigation. This perilous position is compounded by an increase in the cost of UGW paper. These duties threaten to put many of the customers of the domestic producers out of business.[37]

Resolute's Rebuttal Brief

- Resolute agrees with Gannett that Commerce failed to establish industry support prior to initiating this investigation, as required by statute.[38] Therefore, if Commerce issues an AD order as a result of this investigation, it would be tainted by the investigation's unlawful initiation.[39]

Petitioner's Rebuttal Brief[40]

- Commerce should reject Gannett's arguments regarding the determination of industry support. The statute explicitly precludes Commerce from revisiting its industry support determination after initiating an investigation.[41] Nonetheless, even if it were permissible for Commerce to reconsider industry support at this stage of the investigation, Gannett's arguments against finding industry support lack merit and should be rejected.
- Gannett argues that Commerce has not established a uniform threshold to be applied in every case when determining whether to disregard the position of a domestic producer that is also an importer. However, the statute and the regulations provide Commerce with the discretion on a case-by-case basis to disregard the opposition of certain domestic

[35] *Id*. at 8 (citing, *e.g.*, *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed Cir. 1995) (identifying the purpose of the AD/CVD law by reference to specific statutory provisions)).
[36] *Id.* at 9.
[37] *Id.* at 6 (citing, *e.g.*, Letter from the office of Senator John Cornyn to the Department of Commerce re: Constituent Correspondence, dated January 5, 2018; and Letter from the office of Speaker Ryan to the Department of Commerce re: Constituent Correspondence, dated December 8, 2017).
[38] *See* Resolute's Rebuttal Brief at 2 (citing section 732(c)(4)(D) of the Act).
[39] *Id*.
[40] Certain of the arguments raised in the petitioners' rebuttal brief contain business proprietary information which cannot be discussed here. *See* Petitioner's Rebuttal Brief at 3-4.
[41] *Id.* at 2 (citing section 732(c)(4)(E) of the Act).

parties to a petition, which Commerce did in this case. Gannett has not demonstrated that Commerce abused its discretion in this investigation.[42]

- Moreover, the burden fell on the domestic producers to demonstrate that their interests as domestic producers would be adversely affected by the imposition of an order.[43] However, the domestic producers in question failed to meet that burden.
- Accordingly, Commerce appropriately disregarded the opposition of certain domestic producers and provided detailed and well-reasoned explanations for its findings.[44]

Commerce's Position:

Section 732(c)(4)(E) of the Act directs Commerce as follows regarding the consideration of comments regarding industry support:

> Before the administering authority makes a determination with respect to initiating an investigation, any person who would qualify as an interested party under section 771(9) if an investigation were initiated, may submit comments or information on the issue of industry support. After the administering authority makes a determination with respect to initiating an investigation, the determination regarding industry support shall not be reconsidered.[45]

Therefore, Commerce is statutorily precluded from reconsidering its industry support determination at this stage of the investigation. As a result, we continue to rely on our determination of industry support provided in the Initiation Checklist.[46] We reiterate below our analysis from the Initiation Checklist.

Section 732(c)(4)(A) of the Act states that the administering authority shall determine that a petition has been filed by or on behalf of the industry if the domestic producers or workers who support the petition account for: (1) at least 25 percent of the total production of the domestic like product; and (2) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Based on information provided in the petitions, the share of total estimated U.S. production of the domestic like product in calendar year 2016 represented by the petitioner was equal to or more than 25 percent of total domestic production, but less than 50 percent of total production of the domestic like product.[47]

Pursuant to section 732(c)(4)(D)(i) of the Act, if the petition does not establish the support of domestic producers accounting for more than 50 percent of the total production of the domestic

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[42] *Id.* at 3 (citing section 732(c)(4)(B)(ii) of the Act and 19 CFR 351.203(e)(4)(ii)).
[43] *Id*. at 4.
[44] *Id*. (citing Antidumping Duty Investigation Initiation Checklist: Certain Uncoated Groundwood Paper from Canada, dated August 29, 2017 (Initiation Checklist), at 12-14).
[45] Emphasis added. *See also Hardwood and Decorative Plywood From the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 78 FR 58273 (September 23, 2013), and accompanying IDM at Comment 4.
[46] *See* Initiation Checklist at Attachment II.
[47] *See* Initiation Checklist, Attachment II at 6.

like product, Commerce is required to poll the industry or rely on other information to determine industry support. Thus, because at the time of the filing of the petition, we determined that the petition did not establish the support of domestic producers accounting for more than 50 percent of the total production of the domestic like product, we polled the U.S. industry to establish industry support.[48]

As explained in the Initiation Checklist, section 732(c)(4)(B)(i) of the Act instructs Commerce to "disregard the position of domestic producers who oppose the petition if such producers are related to foreign producers, as defined in section 771(4)(B)(ii) of the Act, unless such domestic producers demonstrate that their interests as domestic producers would be adversely affected by the imposition of an antidumping duty order."[49] In addition, section 732(c)(4)(B)(ii) of the Act states that Commerce "may disregard the position of domestic producers of a domestic like product who are importers of the subject merchandise."[50] The SAA also explains that Commerce excludes members of the domestic industry related to foreign producers from its industry support analysis in order "to eliminate any conflicts of interest that may distort its consideration of the level of industry support for an antidumping or countervailing duty petition. . . ."[51]

Thus, consistent with section 732(c)(4)(B) of the Act and our practice,[52] we disregarded the opposition to the petition of certain producers.[53] Our analysis of the remaining information demonstrated that: 1) the domestic producers and workers who supported the petition accounted for at least 25 percent of total production of the domestic like product; and 2) domestic producers and workers who supported the petition accounted for more than 50 percent of the total production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. As a result, we found that there was adequate industry support for the petition, within the meaning of section 732(c)(4)(A) of the Act.[54]

Comment 2: Respondent Selection and Calculation of the "All Others" Rate

Kruger's Case Brief

- Commerce unlawfully calculated the "all others" rate in the *Preliminary Determination* based exclusively on Catalyst's margin and must correct this error in the final determination.
- Commerce selected Catalyst and Resolute as the two mandatory respondents in this investigation, pursuant to section 777A(c)(2)(B) of the Act, based on quantity and value

[48] *Id.*
[49] *Id*. (citing 19 CFR 351.203(e)(4)(i)).
[50] *Id*. (citing 19 CFR 351.203(e)(4)(ii)).
[51] *Id*. (citing Statement of Administrative Action, H.R. Rep. 103-318, Vol. I at 858 (1994) (SAA)).
[52] *See Initiation of Antidumping Duty Investigation: Liquid Sulfur Dioxide from Canada*,70 FR 69735 (November 17, 2005); *see also Certain Steel Nails from the People's Republic of China and the United Arab Emirates: Initiation of Antidumping Duty Investigations*, 72 FR 38816 (July 16, 2007).
[53] *See* Initiation Checklist, Attachment II at 12-15.
[54] *Id.* at 15-16.

(Q&V) data for the POI.[55] In addition, Commerce later determined it had the resources to also examine a voluntary respondent, White Birch Paper.[56] During the course of the investigation, the petitioner requested that Commerce exclude certain products from the scope (*i.e.*, construction paper, drawing paper, and directory paper), which Commerce did at the time of the *Preliminary Determination*.[57]

- Catalyst provided information to Commerce noting the effect of the proposed exclusions on the volume of its reported sales.[58] Therefore, the evidence on the record of this investigation indicates that Catalyst is not one of the two largest exporters and producers of subject merchandise to the United States.
- Because Commerce elected to limit its examination to exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can reasonably be examined, pursuant to section 777A(c)(2)(B) of the Act, it must ensure that it examines the largest exporters and producers. Otherwise, Commerce will not have selected for individual examination the exporters and producers accounting for the largest volume of subject merchandise.
- The Act provides that, when selecting respondents using a sampling methodology, Commerce will rely on the information available to it "at the time of selection."[59] However, no such qualification exists in the provision of the Act regarding selecting respondents that account for the largest volume of subject merchandise.[60] Because Congress included specific language in one section of a statute, but omitted it from another section, Commerce must presume that Congress intended this omission.[61]
- Thus, the plain language of the statute makes clear that Commerce must ensure that it calculates individual dumping margins for the exporters and producers accounting for the largest volume of exports, not just at the time of respondent selection, but throughout the investigation until the date of the final determination.
- Commerce and the courts have recognized that Commerce must adjust its selection of respondents when facts or circumstances change after the date of respondent selection, including dropping improperly-selected respondents.[62] Here, the same principle applies

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[55] *See* Kruger's Case Brief at 6 (citing Memorandum, "Respondent Selection for the Less-Than-Fair-Value Investigation of Certain Uncoated Groundwood Paper from Canada," dated September 22, 2017 (Respondent Selection Memo)).

[56] *Id.* at 7 (citing Memorandum, "AD/CVD Investigations of Uncoated Groundwood Paper from Canada," dated October 5, 2017).

[57] *Id.* at 7 (citing Memorandum, "Certain Uncoated Groundwood Paper from Canada: Scope Comments Decision Memorandum for the Preliminary Determination," dated March 12, 2018).

[58] *Id.*, at 7-8 (citing Letter from Catalyst, "Certain Uncoated Groundwood Paper from Canada: Catalyst's Pre-Preliminary Comments Concerning Scope," dated March 7, 2018).

[59] *See* Kruger's Case Brief at 3 (citing section 777A(c)(2)(A) of the Act).

[60] *Id.* (citing section 777A(c)(2)(B) of the Act).

[61] *Id.* (citing *CP Kelco Oy v. United States*, 978 F. Supp.2d 1315, 1322 (CIT 2014) (citing *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003))).

[62] *Id.* at 4 – 6 (citing *Taiwan Semiconductor Mfg. Co. v. United States*, 143 F. Supp. 2d 958 (CIT 2001) (*Taiwan Semiconductor*) (upholding Commerce's decision to exclude a toll processor as a respondent, because it was neither an exporter nor producer); *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Static Random Access Memory Semiconductors from Taiwan*, 62 FR 51442 (October 1, 1997), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Static Random Access Memory Semiconductors from Taiwan*, 63 FR 8909 (February 23, 1998).

when Commerce learns that an exporter's or producer's sales volume is insufficient to consider it among the largest. Under such circumstances, a respondent selected pursuant to section 777A(c)(2)(B) of the Act that is no longer one of the largest exporters or producers of subject merchandise no longer qualifies as a valid mandatory respondent.[63]

- Circumstances like those present here are rare,[64] because changes to the scope of an investigation after initiation rarely have a significant impact on the volume of subject merchandise. Nonetheless, Commerce must comply with the statute's unambiguous requirements.
- In assigning the "all others" rate, Commerce must read section 735(c)(5) of the Act in conjunction with the respondent selection provisions of the Act, which determine the exporters and producers individually investigated. The Court of Appeals for the Federal Circuit (CAFC) has held that when calculating the "all others" rate, "exporters and producers individually investigated" include both mandatory and voluntary respondents.[65]
- Because Resolute and White Birch Paper are the only validly selected respondents for individual examination for purposes of respondent selection, they are also the only respondents that qualify for treatment under section 735(c)(5)(A) of the Act (the "general rule" for calculating the "all others" rate). Under the "general rule," Commerce is required to calculate the "all others" rate by weight averaging the rates for Resolute and White Birch Paper, excluding *de minimis* margins. However, if both of these companies' margins remain zero in the final determination, then Commerce cannot apply the "general rule" and must instead calculate the "all others" rate pursuant to section 735(c)(5)(B) of the Act (*i.e.*, "the exception").
- The CAFC has made clear that Commerce must use zero and *de minimis* margins when calculating the "all others" rate using "the exception."[66] Therefore, if Commerce continues to find that Resolute and White Birch Paper have zero margins for the final determination, Commerce should also determine that the "all others" rate is zero.
- Alternatively, Commerce could calculate the "all others" rate using any other reasonable method, pursuant to section 735(c)(5)(B) of the Act, and weight average the dumping margins calculated for Catalyst, Resolute, and White Birch Paper.
- Where Commerce changes the scope of an investigation and, thus, modifies the definition of subject merchandise, it must implement that change comprehensively, and cannot do so for some purposes, but not others. Specifically, Commerce must eliminate non-subject merchandise from its margin calculations, modify its instructions to U.S. Customs and Border Protection (CBP), and ensure that it has selected exporters representing the largest

[63] *Id*. at 6 – 8.
[64] *Id.* at 8 (citing *Certain Crystalline Silicon Photovoltaic Products from Taiwan: Final Determination of Sales at Less Than Fair Value*, 79 FR 76966 (December 23, 2014) (*Solar Cells from Taiwan*), and accompanying Issues and Decision Memorandum (IDM) at 3 (where the affected respondent sought to be individually investigated, but Commerce found that the respondent could not demonstrate that the scope changes altered its previously-reported sales volumes).
[65] *Id.* at 10 (citing *MacLean-Fogg Co. v United States*, 753 F.3d 1237 (Fed. Cir. 2014) (*MacLean-Fogg*).
[66] *Id.* at 11 (citing *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1353-54 (Fed. Cir. 2016) (*Albemarle*). Kruger also notes that the SAA provides that, under section 735(c)(5)(B) of the Act, it is the expected method to weight average zero and *de minimis* margins, and margins determined using the facts available. *See* SAA at 873.

volume of the redefined subject merchandise for purposes of calculating the "all others" rate.[67] Otherwise, Commerce opens the door to potential manipulation of the respondent selection process,[68] because the petitioner can present one scope in its petition for respondent selection purposes and then modify the scope for margin calculation purposes.

- The CAFC has noted that "the representativeness of the investigated exporters is the essential characteristic that justifies an "all others" rate based on a weighted average for such respondents."[69] Congress dictated that Commerce can achieve such representativeness only by selecting a statistically-valid sample, representative by definition, or the largest producers and exporters, representative by virtue of the volume of exports covered.[70] Both the statute's express requirements, and the due process considerations that underlie them, prohibit Commerce from using Catalyst's margin exclusively as the "all others" rate.

Tembec's Case Brief

- Commerce's calculation of the "all others" rate is inconsistent with the statute.
- This investigation presents a unique set of facts:
    - Commerce limited its examination to the exporters and producers accounting for the largest volume of subject merchandise from Canada (*i.e.*, Catalyst and Resolute);[71]
    - as a result of a modification to the scope, which excluded directory and construction paper, Catalyst no longer qualifies as one of the largest exporters and producers of the subject merchandise;
    - the margin calculated for Catalyst is the only non-zero or non-*de minimis* margin of the three individually investigated companies; and
    - Commerce calculated the "all others" rate based solely on the margin for Catalyst, which is an invalid mandatory respondent.
- Catalyst's margin cannot be the only basis for the weighted-average dumping margin pursuant to section 777A(c) of the Act, which unambiguously provides that Commerce must select the exporters and producers accounting for the largest volume of the subject

[67] Kruger also notes that this problem is one of the petitioner's making and it was not caused by the respondents. Further, it is not administratively burdensome for Commerce to recalculate the "all others" rate. It is too late to add additional mandatory respondents in this investigation, and Kruger is not asking that Commerce do so. However, the remedy Kruger seeks is consistent with the statutory purpose to calculate dumping margins as accurately as possible. *Id.* at 12 (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)).
[68] *Id*. at 12.
[69] *Id*. at 13 (citing *Albemarle*, 821 F.3d at 1353 (quoting *National Knitwear & Sportswear Ass'n v. United States*, 779 F. Supp. 1364, 1373-74 (CIT 1991) (*National Knitwear*)).
[70] *Id.* at 13 (citing *Qingdao Qihang Tyre Co. v. United States*, No. 16-00075, Slip Op. 18-35 (CIT 2018) at 54-55 (finding that examined respondents are treated as representative of other respondents by virtue of being the largest exporters)).
[71] Commerce also examined White Birch Paper as voluntary respondent.

merchandise.[72] If Commerce were to rely *solely* on Catalyst's margin to determine the "all others" rate, it would effectively be ignoring section 777A(c) of the Act.[73]

- Moreover, that interpretation of the statute would create an incentive for parties to seek last minute modifications to the scope to influence the calculation of the "all others" rate when all but one of the respondents have *de minimis* margins.
- Therefore, Commerce should apply the exception for calculating the "all others" rate and weight average the margins of all the individually-investigated exporters and producers[74] (*i.e.*, Catalyst, Resolute, and White Birch Paper), which would give full effect to both sections 777A(c) and 735(c)(5)(B) of the Act.

Gannett's Case Brief

- Commerce mistakenly continued to investigate Catalyst as a mandatory respondent after it modified the scope of the investigation to exclude directory paper. Excluding directory paper from the scope altered the universe of sales covered by this investigation and, as a result, changed which Canadian exporters were properly representative of the Canadian industry.[75]
- After Catalyst, Resolute, and White Birch Paper submitted revised Q&V figures to reflect the exclusion of directory paper from their sales databases, Catalyst no longer met the criteria to qualify as a mandatory respondent, according to Commerce's methodology as set forth in the Respondent Selection Memo.[76]
- Because Catalyst is not a proper mandatory respondent and there is a wide disparity between Catalyst's calculated AD rate and those of Resolute and White Birch Paper, Commerce cannot consider Catalyst's AD margin to be representative of the Canadian industry.[77]
- The CAFC has elaborated on what is required of Commerce in calculating AD rates, specifically regarding the separate rate (or "all others" rate).[78]
- Commerce has found in past cases that changes in scope are directly relevant to the integrity of respondent selection.[79] However, due to facts specific to that case, but not present here, Commerce found that it could not disturb its respondent selection. Moreover, the company seeking to be selected as a mandatory respondent in that case did not ask to be a voluntary respondent. Here, however, Commerce has information available to resolve the deficiencies in the respondent selection process engendered by the scope change and to calculate accurately the "all others" rate.

[72] *See* Tembec's Case Brief at 4 (citing section 777A(c)(2)(B) of the Act).
[73] *Id.* (citing *POSCO v. United States*, 2018 CIT LEXIS 23, Slip Op. 2018-18 (*POSCO*) at 53 ((citing *United States v. Nordic Village Inc.*, 503 U.S. 30, 36 (1992)).
[74] *Id.* (citing the SAA, at 873).
[75] *See* Gannett's Case Brief at 12.
[76] *Id.* at 12-14 (citing Respondent Selection Memo at 6).
[77] *Id.* at 13-14.
[78] *Id.* at 14 (citing *Albemarle,* 821 F.3d at 1354; and *Mueller Comercial de Mexico v. United States*, 753 F.3d 1227, 1235 (Fed. Cir. 2014) (*Mueller*) ("Commerce must have as its primary objective the calculation of an accurate rate.")).
[79] *Id.* at 14-15 (citing *Solar Cells from Taiwan*, and accompanying IDM at Comment 3).

- Commerce has the authority to alter its respondent selection where, as here, the investigation reveals that the initial respondent selection was incorrect.[80] In *Solar Cells from Taiwan*, Commerce was constrained from exercising this authority because of a lack of alternatives, but here, Commerce does have an alternative mandatory respondent and would not be required to reopen respondent selection. Specifically, Commerce can use Resolute's calculated rate as the basis for the "all others" rate because it: 1) participated in this investigation; 2) received a calculated rate in the *Preliminary Determination* on the basis of its submitted information; and 3) completed verification.[81]
- Moreover, Resolute's calculated rate can be used as the basis for the "all others" rate because Commerce regularly relies on the rate of a single cooperating company to calculate that rate.[82]
- There is no basis for Commerce to continue to consider Catalyst to be representative of the non-investigated exporters and producers of subject merchandise from Canada, because Catalyst is no longer one of the two companies accounting for the largest volume of subject merchandise.[83]
- The U.S. Court of International Trade (CIT) has discussed the central role that representativeness plays in calculating the "all others" rate where Commerce has elected to limit the number of individually-investigated companies.[84]
- The CIT also considered the remedial purpose of the antidumping laws, noting that the application of such a high "rate to innocent parties affected by the 'all-others' rate would be contrary to the antidumping law, which is intended to be remedial, not punitive."[85]
- Because the facts of this case are parallel to those of *National Knitwear*, Commerce must also find that Catalyst is not representative of the Canadian industry.[86]
- Moreover, the CIT has held that only proper mandatory respondents that are deemed to be representative of the industry under investigation may serve as the basis for the "all others" rate.[87]

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[80] *Id.* at 15-16 (citing *Taiwan Semiconductor*, 143 F. Supp. 2d at 970 (upholding Commerce's exclusion of a selected company that was revealed to be a subcontractor stating, "in order to reach an accurate conclusion in the final determination, Commerce could no longer treat TSMC as a mandatory respondent")).

[81] *Id.* at 16.

[82] *Id.* (citing *Certain Tool Chests and Cabinets from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 83 FR 15365 (April 10, 2018); *Certain New Pneumatic Off-the-Road Tires from India: Affirmative Amended Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 82 FR 9056 (February 2, 2017); and *Certain Iron Mechanical Transfer Drive Components from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 81 FR 75032 (October 28, 2016)).

[83] *Id*. at 17.

[84] *Id.* (citing *National Knitwear*, 15 CIT at 554 (where the CIT upheld Commerce's decision to exclude a mandatory respondent on the grounds that its rate was not representative of the pricing practices of the non-investigated companies); and *Final Determination of Sales at Less Than Fair Value: Sweaters Wholly or in Chief Weight of Man-Made Fiber from Hong Kong*, 55 FR 30733 (July 7, 1990)).

[85] *Id.* at 17-18 (citing *National Knitwear*, 15 CIT at 558-59 (also noting that the excluded company was the only mandatory respondent to receive such a high rate and, that due in part to irregularities in the respondent selection process, the aberrant company reflected very little of the market)).

[86] *Id*. at 18.

[87] *Id.* (citing *Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. et al. v. United States*, Ct. No. 15-00225, Slip-Op. 18-67 at 61-64 (CIT 2018) (*Jiangsu Senmao*) (where the court rejected removing the calculated rate of a mandatory respondent, Jiangsu Senmao, from the "all others" rate because it was "one of the exporters and

- In the event Resolute's rate remains *de minimis*, Commerce must follow the expected method and weight average the rates of all three respondents, including the voluntary respondent, White Birch Paper, in this investigation in order to determine the "all others" rate.[88] Otherwise, if Commerce excludes the rates calculated for Resolute and White Birch Paper, it is left with no representative company on which to base the "all others" rate.

Petitioner's Rebuttal Brief

- Based on the information available to Commerce at the time it made its respondent selection determination, Commerce lawfully selected Catalyst and Resolute as the two mandatory respondents, because they accounted for the largest volume of the subject merchandise.
- There is no basis to the interested parties' arguments that, after removing sales of directory and construction paper, Catalyst no longer qualifies as one of the largest exporters and producers of the subject merchandise. The other potential mandatory respondents never provided Q&V data exclusive of directory and construction paper; thus, it is not possible to make an apples-to-apples comparison of parties' Q&V data exclusive of directory and construction paper.
- While Kruger claims that it does not export directory paper to the United States and it had excluded construction paper from its reported Q&V data, there is no record evidence to support these assertions. Statements by counsel in case briefs do not constitute record evidence.[89] Kruger suggests that a footnote in its Q&V response shows that it exported no directory paper. However, this footnote says nothing about directory paper and such sales may have been included as part of Kruger's sales of newsprint with lower basis weights.[90] Regarding construction paper, while the footnote in the Q&V response says that sales of this product are out of scope, Kruger does not say that the Q&V of such sales were excluded from its reported totals.
- Kruger never requested to be selected as either a mandatory or voluntary respondent in this investigation, presumably because it believed at the time that its own dumping margin was higher than that of other exporters. Kruger cannot change its mind now because it is unhappy with the "all others" rate it is being assigned.
- Even assuming that the scope modifications would have resulted in Catalyst not being one of the two largest exporters, this would do nothing to undermine the lawfulness of the respondent selection process. It is Commerce's established practice to select respondents using the information available at the time the decision is made, and Commerce does not

producers accounting for the largest volume of the subject merchandise from the exporting country"…"its pricing practices are presumptively representative of the other exporters and producers of subject merchandise")).

[88] *Id*. at 19-20 (citing section 735(c)(5)(B) of the Act; the SAA, at 871; and *MacLean-Fogg,* 753 F.3d 1237).

[89] *Id.* at 6 (citing *Home Meridian Int'l, Inc. v. United States*, 772 F.3d 1289, 1295 (Fed. Cir. 2014)).

[90] *Id.* (noting that there is no clear distinction between newsprint and directory paper, except that directory paper tends to be of lower basis weights. *See* the petitioner's letter, "Certain Uncoated Groundwood Paper from Canada/ Rebuttal Comments on Resolute's and White Birch's Product Characteristics Comments," dated September 28, 2017, at 4; and the petitioner's letter, "Certain Uncoated Groundwood Paper from Canada: Additional Comments on Scope Regarding Directory Paper," dated March 5, 2018, at 1).

revisit respondent selection to account for revised export quantities resulting from modifications to the scope.[91]

- Kruger's argument that, when Commerce selects respondents accounting for the largest volume of exports, it must continuously reevaluate which exporters account for the "largest volume" throughout the investigation, is an absurd construction. Such a construction would make it impossible for Commerce to meet its statutory deadlines. The Court in *Kyocera* recognized that the language in section 777A(c)(2)(A) of the Act supports Commerce's respondent selection practice, pursuant to section 777A(c)(2)(B) of the Act, of using only information available at the time of selection.[92]
- Because Catalyst was properly selected as a mandatory respondent, the argument that its margin cannot be used to determine the "all others" rate is invalid. In any event, the statute requires that Catalyst's margin be used to determine the "all others" rate.
- Catalyst requested that it be individually examined in this investigation, either as a mandatory or voluntary respondent. Thus, even if Commerce were to now classify Catalyst as a voluntary respondent, its margin would still be used to calculate the "all others" rate.[93]
- Contrary to the interested parties' argument, the statutory exception provision does not apply here. This provision applies only where the estimated weighted-average dumping margins established for all exporters and producers individually investigated are zero or *de minimis* or are determined entirely under section 776 of the Act. No interested party provided a citation for the proposition that Commerce may disregard margins calculated for individually-examined exporters when calculating the "all others" rate.
- Here, Catalyst is the only individually-examined exporter and producer with a margin that is not zero or *de minimis*. Thus, as provided by the statute, Commerce should continue to use Catalyst's margin to calculate the "all others" rate.

Commerce's Position:

This investigation presents an unusual set of circumstances. As the parties have noted, the scope of this investigation changed substantially at the *Preliminary Determination*. This change affected the import volumes from the various exporters and producers, which were reported to Commerce at the outset of the investigation for respondent selection purposes. As a result of this change, we find that Catalyst no longer qualifies as a mandatory respondent in this investigation, or an "individually investigated" respondent within the meaning of section 735(c) of the Act. Accordingly, we have not used Catalyst's weighted-average dumping margin in the determination of the "all others" rate in this final determination. The "all others" rate is based on the weighted-average dumping margins of the two remaining "individually investigated" companies, Resolute and White Birch Paper. Further, although Catalyst is not "individually investigated" within the meaning of the Act, we cannot ignore that we have found Catalyst to be

[91] *Id.* at 7 *(*citing *Solar Cells from Taiwan*, and accompanying IDM at Comment 3 (Commerce refused to revisit respondent selection process after scope clarification resulted in revised export quantities); *Certain Magnesia Carbon Bricks from the People's Republic China: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 22230 (April 15, 2013), and accompanying IDM at Comment 1 (*MCB from China*); and *Kyocera Solar, Inc. v. United States*, 253 F. Supp. 3d 1294, 1318 (CIT 2017) (*Kyocera*)).
[92] *Id.* at 8 (citing *Kyocera*, 253 F. Supp. 3d at 1318).
[93] *Id.* at 9-10 (citing *MacLean-Fogg*, 753 F.3d 1237).

making sales at LTFV, within the meaning of sections 731 and 735(a) of the Act. Therefore, we have reached an affirmative final determination of sales at LTFV. Moreover, entries for the companies subject to the "all others" rate will be subject to suspension of liquidation at the "all others" rate.

Section 731 of the Act states that if Commerce "determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," and the U.S. International Trade Commission determines that there is material injury or threat thereof, then antidumping duties shall be imposed. Sections 732 through 735 of the Act then set forth how Commerce shall conduct an investigation of sales at LTFV. Section 735(a) of the Act states that after a preliminary determination, Commerce "shall make a final determination of whether the subject merchandise is being, or is likely to be, sold in the United States at less than its fair value."

The Act specifies the actions Commerce shall take in the event of an affirmative final determination of sales at LTFV. Among other things, section 735(c)(1)(B)(i) of the Act provides that if Commerce's final determination is affirmative, then Commerce shall:

> (I) determine the estimated weighted average dumping margin for each exporter and producer individually investigated, and
> (II) determine, in accordance with {sections 735(c)(5) of the Act}, the estimated all-others rate for all exporters and producers not individually investigated.

Section 735(c)(5) of the Act, which governs the calculation of the "all others" rate, states:

> (A) GENERAL RULE – For purposes of this subsection and section 733(d), the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776.
>
> (B) EXCEPTION – If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or *de minimis* margins, or are determined entirely under section 776, the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.

The Act also specifies how to determine which companies to investigate for purposes of arriving at the "individually investigated" companies within the meaning of section 735(c) of the Act. Section 777A(c) of the Act states:

> (1) GENERAL RULE – In determining weighted average dumping margins under section 733(d), 735(c), or 751(a), the administering authority shall determine the

> individual weighted average dumping margin for each known exporter and producer of the subject merchandise.
>
> (2) EXCEPTION – If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation…, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—
> (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
> (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

In this investigation, Commerce determined that it was not practicable to determine weighted-average dumping margins for all known exporters and producers.[94] Rather, we determined to limit our investigation to a reasonable number of companies that represented the largest exporters or producers based on the quantity of subject merchandise sales to the United States during the POI, pursuant to section 777A(c)(2)(B) of the Act. At the time of respondent selection, Catalyst and Resolute represented the largest exporters or producers of subject merchandise to the United States during the POI, based on the volume of sales reported in the Q&V questionnaire responses.[95] Commerce also selected White Birch Paper as a voluntary respondent in this investigation.[96]

However, subsequent to our initial respondent selection determination, the petitioner proposed certain changes to the scope of the investigation. As most relevant here, the petitioner requested that directory paper be excluded from the scope of the investigation.[97] Accordingly, in the *Preliminary Determination*, affording our normal deference to the petitioner in setting the scope, Commerce made certain changes to the scope of the investigation, including the removal of directory paper from the scope.[98] These changes continue to be reflected in the final determination, as well.

The changes to the scope of the investigation, from the time of the initial respondent selection determination to this final determination, are substantial. At the time of Commerce's initial respondent selection determination, we were operating under a significantly different scope than now. This means that when exporters and producers of subject merchandise reported the quantity and value of their U.S. exports to Commerce at the outset of this investigation, they reported sales of a significantly different universe of merchandise than what is actually subject to the scope of the investigation. The exact Q&V figures, and the effect of the change to the scope

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[94] *See* Respondent Selection Memo.
[95] *See* Respondent Selection Memo at 3-7.
[96] *See* Memorandum, "AD/CVD Investigations of Uncoated Groundwood Paper from Canada," dated October 5, 2017.
[97] *See* petitioner's letter, "Certain Uncoated Groundwood Paper from Canada: Additional Comments on Scope Regarding Directory Paper," dated March 5, 2018.
[98] *See Preliminary Determination*, 83 FR at 11961.

on those figures, are business proprietary information. Thus, they are discussed in a separate memorandum.[99]

Normally, Commerce does not revisit respondent selection determinations after they are made. Rather, the selection process is intended for Commerce to examine a reasonable number of exporters or producers based on information available at the time the analysis is conducted, rather than information that becomes available during the course of a proceeding. It is not uncommon that there are scope changes throughout an investigation that might have affected this process. There is nothing in the statutory framework that requires Commerce to revisit its respondent selection determination based on subsequent modifications to the scope or information obtained during the course of the investigation. In fact, the CIT in the past has affirmed Commerce's determination not to revisit respondent selection determinations late in a proceeding.[100]

At the same time, the statute does not prevent Commerce from revisiting a respondent selection determination when that determination was based on the selection of the largest exporters or producers. The statute is simply silent on this point.[101] Further, Commerce is always permitted to deviate from its normal practice, provided the deviation is explained and is not inconsistent with the statute.[102]

In this investigation, we find that deviation from our normal practice is warranted. As mentioned, the change to the scope of the investigation is substantial. Had Commerce been operating under the current scope of the investigation at the time of respondent selection, we would have selected a different set of two mandatory respondents, because Catalyst would not have been one of the top two exporters or producers in terms of volume shipped to the United States.[103] Further, the change to the scope in this investigation was not a result of Commerce's need to clarify the scope for, *e.g.*, enforcement purposes or other administrability reasons. Rather, it was a change requested by the petitioner. Finally, because of concerns expressed on the record about the reliability of the CBP data pertaining to import volumes, we relied on Q&V questionnaires to select the largest respondents.[104] Having the volume data in this format has allowed Commerce to evaluate the effect of the scope change more easily. For these reasons, we find this investigation unique.

Therefore, Catalyst is not a proper mandatory respondent in this investigation. Moreover, we find that it is too late to select a substitute mandatory respondent at the final determination.[105]

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[99] *See* Memorandum, "Revised Respondent Selection Quantity Data in the Antidumping Duty Investigation of Certain Uncoated Groundwood Paper from Canada," dated August 1, 2018 (Revised Data Memorandum).
[100] *See Kyocera*, 253 F. Supp. 3d at1318.
[101] *See* section 777A(c) of the Act.
[102] *See Association of American School Paper Suppliers v. United States*, 33 CIT 1742, 1755 (2009) (affirming deviation from practice when it was supported by substantial evidence and adequately explained and reasoned).
[103] *See* Revised Data Memorandum at Attachment II.
[104] *See* Respondent Selection Memo.
[105] Even if we would have made this finding regarding Catalyst at the *Preliminary Determination*, it would have been too late in the investigation at that point to select a substitute mandatory respondent. Specifically, if Commerce selected an additional respondent in this investigation on the date it published the *Preliminary*

Given that Catalyst does not qualify as a mandatory respondent in this investigation, and that we did not select it as a voluntary respondent in this investigation, it is not an "individually investigated" exporter or producer within the meaning of section 735(c) of the Act. The term "individually investigated," as used in the Act, generally means one of two things: 1) a company investigated pursuant to section 777A(c) of the Act;[106] or 2) a company investigated as a voluntary respondent under section 782(a) of the Act.[107] Thus, the only "individually investigated" companies remaining in this investigation are Resolute and White Birch Paper.

However, this does not mean that we can ignore the verified evidence on the record of this investigation with respect to Catalyst. Commerce's fundamental responsibility under the statute is to determine whether sales have been made, or are likely to be made, at LTFV.[108] Section 735(a) of the Act instructs Commerce to make a final determination "of whether the subject merchandise is being, or is likely to be, sold in the United States at less than fair value." This is the first question in a final determination; only if the answer to that question is affirmative does the Act then instruct Commerce to calculate the weighted-average dumping margins for the "individually investigated" exporters and producers.[109] Ignoring the record evidence of Catalyst's sales at LTFV would be an abdication of our investigatory duties under the statute.

Accordingly, despite our "de-selection" of Catalyst as a mandatory respondent and "individually investigated" company, we find that Catalyst has made sales at LTFV, and we reach an affirmative final determination under section 735(a) of the Act with respect to Catalyst. We have continued to rely on the record evidence and our verification findings to calculate Catalyst's weighted-average dumping margin.

Turning to the "all others" rate, as mentioned above, the only remaining "individually investigated" exporters or producers are Resolute and White Birch Paper. Their dumping margins are zero percent. This means that the "all others" rate must be determined pursuant to section 735(c)(5)(B) of the Act, which provides that, if all of the individually investigated companies' margins are zero or *de minimis* or based entirely on facts available, then Commerce

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Determination (*i.e.*, March 19, 2018), then the questionnaire response would have been due on April 18, 2018. The petitioner would have 14 days (*i.e.*, until May 2, 2018) to submit comments and rebuttal factual information regarding this response. Additionally, Commerce would have to analyze the questionnaire response fully, issue supplemental questionnaires, and finally verify the sales and cost information provided in the questionnaire response. In sum, Commerce would be required to complete a process that normally takes between five and seven months in less than three months in order to meet the fully-extended statutory deadline established in this investigation of August 1, 2018.

[106] Section 777A(c) of the Act states that it governs the determination of weighted average dumping margins under, *inter alia*, section 735(c) of the Act. In other words, the general rule in section 777A(c)(1) of the Act and the exception for limited respondent selection in section 777A(c)(2) of the Act are rules explaining how Commerce determines the "individually investigated" companies within the meaning of section 735(c) of the Act.

[107] See *MacLean-Fogg*, 753 F.3d 1237. Although Catalyst requested voluntary respondent treatment at the outset of this investigation, Commerce did not select Catalyst as an "individually investigated" company on that basis.

[108] *See* sections 731 and 735(a) of the Act.

[109] In most investigations, the question under section 735(a) of the Act as to whether there is dumping and the question under section 735(c) of the Act as to whether the "individually investigated" exporters or producers are dumping have the same answer. Therefore, in most investigations, Commerce does not separate the two analyses. But as mentioned at the outset, this investigation presents an unusual set of circumstances.

may use any reasonable method to establish the estimated "all others" rate. One such reasonable method is to average the margins of the individually investigated companies, and the SAA, in fact, states that the "expected" reasonable method is to average these zero or *de minimis* margins or based entirely on facts available.[110]

For this final determination, we are following the "expected" method and averaging the zero percent margins of Resolute and White Birch Paper to arrive at the estimated "all others" rate. This method is feasible, and there is no basis on the record to suggest that the result of this method will not be reasonably reflective of the potential dumping margins of the companies subject to the "all others" rate.[111] Finally, because the estimated "all others" rate is not an individual zero or *de minimis* weighted-average dumping margin within the meaning of 19 CFR 351.204(e)(1), entries of companies subject to the "all others" rate will remain subject to suspension of liquidation at that rate, and these companies will not be excluded from any antidumping duty order that Commerce issues in the event of an affirmative final determination by the U.S. International Trade Commission.[112]

Comment 3: Differential Pricing Methodology

Resolute's Case Brief

- Resolute submitted comments regarding Commerce's differential pricing methodology and the potential use of zeroing in this case.[113]

No other party commented on this topic.

Commerce's Position:

For the final determination, Commerce used the standard average-to-average method to calculate Catalyst's, Resolute's, and White Birch Paper's weighted-average dumping margins.[114] Therefore, the comments regarding Commerce's differential pricing methodology are moot.

Comment 4: Fixed Asset Impairment for Catalyst

Catalyst's Case Brief

- Commerce should adjust Catalyst's COP to account for an extraordinary, one-time asset impairment that happened to occur during the POI.
- The extraordinary event should not be permitted to inflate artificially Catalyst's COP because: 1) it does not "reasonably reflect" the costs associated with the production of

[110] *See* SAA at 873.
[111] *Id*.
[112] *See Changzhou Hawd Flooring Co. v. United States*, Court No. 12-00020, Slip Op. 18-82 (CIT July 3, 2018).
[113] *See* Resolute's Case Brief at 14-22.
[114] *See* Catalyst Final Sales Calculation Memorandum; Resolute Final Sales Calculation Memorandum; and White Birch Paper Final Sales Calculation Memorandum.

UGW paper; and 2) it generates an excessively high G&A expense that, in turn, distorts the dumping margin calculation.

- The antidumping statute authorizes Commerce to adjust recorded costs that do not reasonably reflect the costs associated with the production and sale of the merchandise.[115]
- The extreme impact of the cost associated with the impairment was unique to Catalyst's 2016 calendar year and Commerce should exclude the G&A costs associated with the impairment from Catalyst's COP.

Petitioner's Rebuttal Brief

- Commerce should continue to include the impairment loss in Catalyst's G&A expense ratio. Commerce has an established practice of treating impairment losses as general expenses and including the total amount recorded in the respondent's financial statements in the G&A expense ratio calculation.[116]
- Commerce has made it clear that impairment costs are not extraordinary expenses and should not be excluded from the G&A expense ratio.[117]
- Catalyst's impairment costs are not exceptional and do not merit departure from established practice. To the contrary, as shown in the Catalyst 2016 audited financial statements at note 4, the 2016 impairment losses were the result of a routine analysis.[118]

Commerce's Position:

While we agree with the petitioner that our practice is to include the full amount of the fixed asset impairment costs in the calculation of Catalyst's G&A expense ratio, based on our analysis of the record evidence, we have not included the loss for the final determination. Commerce's practice under section 773(f)(1)(A) of the Act is to rely on data from a respondent's normal books and records where those records are prepared in accordance with generally accepted accounting principles (GAAP) of the producing country and reasonably reflect the costs of producing merchandise.[119] Catalyst prepared its books and records in accordance with U.S. GAAP, not Canadian GAAP and, therefore, recognized the fixed asset impairment loss in accordance with U.S. GAAP. Catalyst argues that, while the fixed asset impairment costs were recorded in its normal books and records, the one-time extraordinary event was so extreme that it

[115] *See* Catalyst's Case Brief at 8 (citing section 773(f)(1)(A) of the Act).
[116] *See* Petitioner's Rebuttal Brief at 11 (citing *Certain Hot-Rolled Steel Flat Products from the United Kingdom, Final Determination of Sales at Less Than Fair Value,* 81 FR 53436 (August 12, 2016) (*Hot-Rolled Steel from the U.K.)*, and accompanying IDM at Comment 5; *Certain Cold-Rolled Steel Flat Products from the United Kingdom, Final Determination of Sales at Less Than Fair Value*, 81 FR 49929 (July 29, 2016) (*Cold-Rolled Steel from the U.K.)*, and accompanying IDM at Comment 8; and *Certain Oil Country Tubular Goods from Ukraine*, *Final Determination of Sales at Less Than Fair Value*, 79 FR 41969 (July 18, 2014), and accompanying IDM at Comment 8).
[117] *Id.* at 12 (citing *Hot-Rolled Steel from the U.K.* and accompanying IDM at Comment 5; and *Cold-Rolled Steel from the U.K.*, and accompanying IDM at Comment 8).
[118] *Id.* at 12-13 (citing Catalyst's October 23, 2017, Section A Questionnaire Response at Exhibit A-16).
[119] *See Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago*, *Final Determination of Sales at Less Than Fair Value,* 67 FR 55788 (August 30, 2002), and accompanying IDM at Comment 5.

distorts the COP. Catalyst proposes that we depart from its normal books and records by excluding the entire impairment loss on the basis that it does not reasonably reflect the cost of producing merchandise.

We disagree that the fixed asset impairment is an extraordinary event. Per Accounting Standard Codification (ASC) 360-10, *Impairment and Disposal of Long-Lived Assets* (ASC 360-10), an impairment loss is reported as a component of income from continuing operations before income taxes and recognized upon the determination by management that the recorded historical value of an asset is unrecoverable through future use of the asset, *i.e.*, that the asset's productive value is impaired. Commerce's established practice is to consider an expense to be an extraordinary item only if the event that gave rise to the expense is both unusual in nature and infrequent in occurrence.[120] Impairment losses are not unusual in nature, and magnitude alone does not deem an item extraordinary.[121]

We disagree with the petitioner's characterization of the impairment analysis as a routine test. Per Catalyst's 2016 audited financial statements at note 4 and in accordance with ASC 360-10, fixed assets, such as property, plant and equipment, are tested for recoverability when events or changes in circumstances indicate that its carrying value may not be recoverable. Data and analysis pertaining to the entity's operations are the primary sources for determining if an indicator of impairment is present. Because the impairment loss represents the loss in value incurred to the assets during the financial statement reporting period, it is a period cost like other similar general expenses. Commerce's practice under section 773(b)(3)(B) of the Act is to include such period costs in the G&A expense ratio of the cost of production of subject merchandise.[122] However, in this case, due to the fact that the company is a going concern, the loss was computed in accordance with U.S. GAAP and not Canadian GAAP, combined with the fact that the fiscal year financial statements reporting the loss do not cover the majority of the POI, we do not consider it reasonable to include the loss in the reported costs. We, therefore, excluded the fixed asset impairment loss from Catalyst's COP for the final determination.

Comment 5: Treatment of Catalyst's Home Market Barter Sales

Catalyst's Case Brief

- At verification, Commerce determined that certain home market sales which Catalyst reported as free samples were provided to the customer in exchange for advertising services.[123]

[120] *See Stainless Steel Bar from France, Final Results of Antidumping Duty Administrative Review*, 70 FR 46482 (August 10, 2005), and accompanying IDM at Comment 1.
[121] *Id.*
[122] *See Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea, Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement of the Antidumping Duty Order*, 73 FR 18259 (April 3, 2008), and accompanying IDM at Comment 8.
[123] *See* Catalyst's Case Brief at 11 (citing Catalyst SVR at Verification Exhibit 21).

- Commerce should continue to exclude these sales from the calculation of NV, because these transactions were made outside the ordinary course of trade, as defined by section 771(15) of the Act.
- Commerce has a "totality of the circumstances" test when determining whether transactions exhibit characteristics that are extraordinary for the market that should therefore be excluded.[124] One of the characteristics that may place a sale outside the ordinary course of trade is if the merchandise is sold pursuant to unusual terms of sale.[125]
- Commerce's practice regarding barter transactions is to find that they are "unusual terms of sale" that are outside the ordinary course of trade.[126]
- In situations where Commerce included barter transactions in its analysis, such sales were either not truly barter sales or represented modest departures from the respondent's normal sales process.[127] Finally, even if Commerce concludes that the fact that these sales were barter transactions does not in itself place them outside the ordinary course of trade, the "totality of the circumstances" surrounding them does. Specifically, both their unusual nature and the fact that they account for an extremely small percentage of Catalyst's home market sales demonstrates that they were made pursuant to unusual terms of sale.

No other party commented on this topic.

Commerce's Position:

Section 771(15) of the Act defines "ordinary course of trade" as:

> …the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind.

Catalyst's normal practice for its home market sales is to sell UGW paper in exchange for a monetary payment from its customer. However, the sales at issue were provided to the customer in exchange for the provision of advertising services, and Catalyst did not receive a monetary payment from its customer for them. Moreover, these barter transactions represent a very small

[124] *Id.* at 10-11 (citing *Murata Mfg. Co. v United States*, 820 F. Supp. 630, 607 (CIT 1993); and *U.S. Steel Group v. United States*, 177 F. Supp. 2d 1325, 1333 (CIT 2001)).
[125] *Id.* at 11 (citing 19 CFR 351.102(b)(35)).
[126] *Id.* at 11-12 (citing *Final Determination of Sales at Less Than Fair Value: Sulfur Dyes, Including Sulfur Vat Dyes, from the United Kingdom*, 58 FR at 3256 (*Sulfur Dyes from the United Kingdom*); *Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Argentina*, 58 FR 7066 (February 4, 1993), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Argentina*, 58 FR 37062 (July 9, 1993) (*Cold-Rolled Steel from Argentina*); and *Final Determination of Sales at Less Than Fair Value: Certain All-Terrain Vehicles from Japan*, 54 FR 4864, 4869-70 (January 31, 1989) (*All-Terrain Vehicles from Japan*)).
[127] *Id.* at 12-13 (citing *Magnesium Metal from the Russian Federation: Final Determination of Sales at Less-than-Fair Value*, 70 FR 9041 (February 24, 2005), and accompanying IDM at Comment 3; and *Gray Portland Cement and Clinker from Mexico: Final Results of Antidumping Duty Administrative Review*, 68 FR 54203 (September 16, 2003), and accompanying IDM at Comment 9).

percentage of Catalyst's reported home market sales.[128] Thus, in accordance with Commerce's practice,[129] we find that these barter transactions were not made in the ordinary course of trade, as defined by section 771(15) of the Act. Accordingly, we continued to exclude Catalyst's home market barter sales from our NV calculation for purposes of the final determination.

Comment 6: Treatment of Catalyst's Sales Which May Have Been Destined for Mexico

Catalyst's Case Brief

- At verification, Commerce found that certain of Catalyst's reported U.S. sales appeared to be destined ultimately for Mexico.[130]
- Commerce should continue to include these sales in its margin calculations for the final determination because: 1) the merchandise in question was purchased by an unaffiliated customer for delivery to the United States; and 2) the entry documentation indicated that the sales entered the United States for consumption.
- Commerce interprets sales for exportation to the United States to mean any sale to an unaffiliated party which is delivered to a U.S. destination, regardless of indicia of subsequent export to a third country.[131]
- Since the CIT's decision in *Hiep Thanh 2012*, Commerce has limited its application of the "knowledge test" to situations where there are multiple entities involved in the transaction prior to importation, a fact pattern not present here.[132]
- Commerce has only excluded merchandise that entered the United States when the "ship to" location of the sales was outside the United States.[133] In this case, Catalyst's sales documentation shows only a U.S. shipping and delivery address.
- Because Catalyst's merchandise entered the United States for consumption, consistent with *Hiep Thanh 2012*, this must be the end of Commerce's analysis, regardless of whether the merchandise was subsequently resold outside of the United States.[134]

[128] *See* Catalyst SVR at 2 and 11 and Verification Exhibits 1 and 21. Because this is business proprietary information, it cannot be disclosed here.
[129] *See, e.g., Sulfur Dyes from the United Kingdom*; *Cold-Rolled Steel from Argentina*; and *All-Terrain Vehicles from Japan*.
[130] *See* Catalyst's Case Brief at 16 (citing Catalyst SVR at 12-13).
[131] *Id*. at 13-14 (citing *Certain Oil Country Tubular Goods from the Republic of Turkey: Final Determination of Sales at Less than Fair Value and Affirmative Final Determination of Critical Circumstances, in Part*, 79 FR 41971 (July 18, 2014), and accompanying IDM at Comment 3; *aff'd sub nom. Maverick Tube Corp. v. United States*, Slip Op. 15-107 (CIT 2015) at 20-21; Final Results of Remand Redetermination Pursuant to *Hiep Thanh Seafood Joint Stock Co. v. United States*, Ct. No. 09-00270 (June 23, 2011) (Hiep Thanh Remand Redetermination) at 7; and *Hiep Thanh Seafoods Joint Stock Co. v. United States*, 821 F.Supp. 2d 1335, 1339-40 (CIT 2012) (*Hiep Thanh 2012*)).
[132] *Id*. at 15 (citing Hiep Thanh Remand Redetermination at 6 and 8-9; and *Hiep Thanh 2012*).
[133] *Id.* at 16 (citing *Certain Oil Country Tubular Goods from Ukraine: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 79 FR 41969 (July 18, 2014) and accompanying IDM at 6).
[134] *Id.* at 18 (citing Hiep Than Remand Redetermination at 7).

Petitioner's Rebuttal Brief

- Catalyst does not dispute its knowledge that these sales were destined for Mexico.
- Catalyst's position that these sales must be treated as U.S. sales pursuant to *Hiep Thanh 2012* is incorrect.
- The extent to which the sales in question entered the United States as Type "1" entries (*i.e.*, free and dutiable entries for consumption) is unclear because there is no indication that the selected sale examined at verification is indicative of all of Catalyst's sales ultimately destined for Mexico. These sales should have entered as Type "61, 62, or 63" entries (*i.e.*, transportation entries for immediate transportation, transportation and exportation, or immediate exportation, respectively), given that they were simply being transported through the United States on the way to Mexico and this may be the fact pattern of Catalyst's other sales.
- Even assuming *arguendo* that all of the merchandise at issue entered the United States as Type "1" entries, this is not the end of Commerce's inquiry under *Hiep Thanh 2012*. When merchandise sold to a Mexican customer is delivered to a U.S. destination, that sale will be treated as an export to the United States, unless the administrative record would "lead a reasonable person to draw one and only conclusion: the sales were for exportation to Mexico and not the United States."[135]
- The facts of this case can be distinguished from those of *Hiep Thanh 2012*, where the importer of record was unaffiliated with the exporter and the transfer of title took place at the port of entry; thus, in that case, the Mexican customer was free to distribute the merchandise in both the U.S. and Mexican markets.[136] Here, Catalyst makes no claim that the merchandise in question could have remained in the United States, rather than being reexported to Mexico.
- Accordingly, Commerce should exclude the sales at issue from Catalyst's U.S. sales database.

Commerce's Position:

We continue to treat Catalyst's sales which may be ultimately destined for Mexico as U.S. sales for the purposes of our final determination margin calculations. It is Commerce's established practice to treat as "sales for exportation to the United States" sales made to unaffiliated parties which are delivered to a U.S. destination, regardless of whether any underlying paperwork may indicate possible subsequent export to a third country.[137] In such instances, Commerce has held that:

> …if a sale is made for delivery of merchandise to the United States (and record evidence clearly indicates that the disputed sales were made as such), there is a significant potential for it to enter the U.S. market for consumption…If {Commerce} were not to take this approach, it would place certain respondents in

[135] *See* Petitioner's Rebuttal Brief at 14 (citing *Hiep Thanh 2012*, 821 F. Supp. 2d at 1340).
[136] *Id.* at 15 (citing *Hiep Thanh 2012*, 821 F. Supp. 2d at 1340).
[137] *See* Hiep Thanh Remand Redetermination at 6.

> a position to exclude U.S. sales from reporting requirements by claiming them as sales to be shipped through the United States when, in reality, the merchandise is entered for consumption and thus enters the commerce of the United States subject to antidumping duties.[138]

Commerce further explained that:

> Once such goods enter the commerce of the United States, they compete with U.S. goods and thus, an entry for consumption must be the end of our analysis, regardless of any subsequent resale either within or outside of the United States.[139]

The facts in this investigation parallel those found in *Hiep Thanh 2012*. Specifically, Catalyst's U.S. sales at issue were purchased by an unaffiliated customer, delivered to a location in the United States, and entered the United States for consumption.[140] Given these facts, and consistent with Commerce's established practice, we find that these sales should be treated as U.S. sales and, thus, continue to include them in our analysis for purposes of Catalyst's final determination margin calculations. This decision is consistent with *Solar Cells from Taiwan,* in which we included as U.S. sales shipments sent to a U.S. address, even though the respondent stated the merchandise was destined for a foreign trade zone for further transit to Mexico, but had insufficient documentary evidence demonstrating that this was the case.[141]

Finally, as Resolute reported sales in both its home and U.S. market sales databases under a nearly identical fact pattern,[142] we included those Resolute sales in our final determination margin calculation.[143]

Comment 7: Insurance Recovery Costs for Catalyst

Catalyst's Case Brief

- Commerce should not adjust Catalyst's reported COM upward by the amount of insurance proceeds received during the POI, even though the underlying losses were incurred prior to the POI.[144]

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[138] *Id*.
[139] *Id*. at 7.
[140] *See* Catalyst's SVR at Verification Exhibit 27. *See also* Catalyst's Case Brief at 3, 14, and 16. While the petitioner argues that Catalyst's U.S. sales at issue should have entered the United States at transportation entries (*i.e.*, Type 61, 62, 63), there is no evidence on the record that any of these sales entered the United States in this manner.
[141] *See Certain Crystalline Silicon Photovoltaic Products from Taiwan: Final Results of Antidumping Duty Administrative Review; 2014-2016,* 82 FR 31555 (July 7, 2017), and accompanying IDM at comment 1.
[142] *See* Resolute's December 19, 2017, Supplemental Sections B and C Questionnaire Response at SBC-6 – SBC-7 and SBC-41 – SBC-42.
[143] *See* Resolute Final Sales Calculation Memorandum at 1 and 3.
[144] *See* Catalyst's Case Brief at 18 (citing Catalyst CVR at 2 and 11).

- If Catalyst incurred the losses during the POI, but recovered the insurance proceeds outside the POI, Commerce would, nonetheless, increase Catalyst's expense. Therefore, the fact that an underlying loss occurred before the POI does not provide a basis to reject offsets for insurance proceeds.
- Commerce has an established precedent of allowing offsets to account for the value of insurance proceeds that relate to the general operation of the company and that are not deemed extraordinary.[145] Thus, the insurance proceeds in the instant case should be included as an offset to COM because they do not arise from an extraordinary event and are modest in size.

Petitioner's Rebuttal Brief

- Commerce's established practice precludes allowing respondents to offset their costs by insurance proceeds arising from losses incurred in prior years.[146] Accordingly, Commerce should increase Catalyst's costs by the amount of insurance proceeds.

Commerce's Position:

As discussed in the cost verification report, in the third quarter of fiscal year 2016 during the POI, Catalyst incurred an additional insurance loss related to the same event, which the company excluded from both G&A expenses and COM.[147] While Catalyst correctly excluded this insurance loss when reconciling fiscal year cost of goods sold (COGS) to its reported per-unit COM, the loss was a period expense and it should, nonetheless, be included in COP. Therefore, for the final determination, we included this loss in the calculation of the G&A expense ratio.

As it relates to the parties' arguments, we agree with the petitioner that Commerce would disallow a decrease to Catalyst's costs by the amount of insurance proceeds received during the POI arising from losses incurred in prior years. Commerce has an established practice of excluding insurance proceeds received during the POI arising from losses incurred in prior periods, but that is not the fact pattern here.[148] Record evidence shows that both the underlying loss event and the insurance recoveries were accrued during the second quarter of fiscal year 2016, prior the POI. Thus, the issue here is not related to a timing difference between when the

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[145] *Id.* (citing *Silicomanganese from India, Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances Determination*, 67 FR 15531 (April 2, 2002), and accompanying IDM at Comment 14 (*Silicomanganese from India)*); *Stainless Steel Bar from India; Final Results of Antidumping Duty Administrative Review*, 68 FR 47543 (August 11, 2003), and accompanying IDM at Comment 5 (*SSB from India*); and *Final Negative Determination in the Less than Fair Value Investigation of Steel Concrete Reinforcing Bar from Turkey*, 79 FR 54965 (September 15, 2014) and accompanying IDM at Comment 17 (*Rebar from Turkey*)).
[146] *See* Petitioner's Rebuttal Brief at 16 (citing *Melamine from Trinidad and Tobago, Final Determination of Sales at Less Than Fair Value*, 80 FR 68846 (November 6, 2015), and accompanying IDM at Comment 3; *Chlorinated Isocyanurates from Spain, Final Results of Antidumping Duty Administrative Review*, 73 FR 79789 (December 30, 2008), and accompanying IDM at Comment 4; and *Certain Steel Concrete Reinforcing Bars from Turkey, Final Determination of Sales at Less Than Fair Value,* 72 FR 62630 (November 6, 2007), and accompanying IDM at Comment 5).
[147] *Id.*
[148] *Id.*

underlying losses occurred and the insurance proceeds were recorded.[149] In the event the losses are incurred in the same period as the proceeds are received, Commerce will allow an offset for insurance reimbursements up to the amount of losses incurred during the same reporting period.[150] Finally, none of the cases Catalyst cites directly deals with the issue of the matching of costs incurred as a result of the insured event with insurance proceeds received. For example, in *Silicomanganese from India,* Commerce addressed the issue of whether insurance payments constitute extraordinary income, but not the timing of the insurance proceeds versus the related losses from the insurance claim.[151] In *SSB from India*[152] and *Rebar from Turkey*,[153] while Commerce had the opportunity at verification to determine whether the underlying losses were included in reported costs, it elected not to do so due to the insignificant value of these losses. As such, in both *SSB from India* and *Rebar from Turkey*, Commerce permitted the insurance proceeds offset. Because Commerce was able to determine at verification that the insurance loss was excluded from Catalyst's reported cost, both *SSB from India* and *Rebar from Turkey* are inapposite.

Comment 8: Catalyst's Home Market Bank Charges

Catalyst's Case Brief

- Catalyst included bank charges incurred on its home market sales in its G&A expense ratio,[154] instead of reporting them as direct selling expenses.
- According to the statute[155] and its established practice,[156] Commerce should disregard Catalyst's home market bank charges as a direct selling expense and, instead, disregard them as insignificant adjustments, because they represent a miniscule percentage of the value of Catalyst's home market sales during the POI.
- If Commerce declines to treat these bank charges as insignificant adjustments and, instead, treats them as direct selling expenses, it should exclude the bank charges from Catalyst's reported G&A expenses to avoid double counting them.

No other party commented on this topic.

[149] *See* Catalyst CVR at 2 and 11.
[150] *See Chlorinated Isocyanurates from Spain, Final Results of Antidumping Duty Administrative Review*, 73 FR 79789 (December 30, 2008), and accompanying IDM at Comment 4.
[151] *See Silicomanganese from India*, and accompanying IDM at Comment 14.
[152] *See SSB from India* and accompanying IDM at Comment 5.
[153] *See Rebar from Turkey* and accompanying IDM at Comment 17.
[154] *See* Catalyst's Case Brief at 21 (citing Catalyst SVR at 11).
[155] *Id.* at 21 (citing section 777A(a)(2) of the Act).
[156] *Id.* (citing *Seamless Refined Copper Pipe and Tube from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 60725 (October 1, 2010) (*Copper Pipe from China*), and accompanying IDM at Comment 8).

Commerce's Position:

Section 777A(a)(2) of the Act provides that Commerce may "decline to take into account adjustments that are insignificant in relation to the price or the value of the merchandise." Further, 19 CFR 351.413 defines an "insignificant adjustment" as:

> Ordinarily under section 777A(a)(2) of the Act, an "insignificant adjustment" is any individual adjustment having an *ad valorem* effect of less than 0.33 percent, or any group of adjustments having an *ad valorem* effect of less than 1.0 percent, of the export price, constructed export price, or normal value, as the case may be.

The information obtained at verification demonstrates that Catalyst's total bank charges as a percentage of the value of its home market sales during the POI would have an insignificant *ad valorem* effect, as defined by 19 CFR 351.413, on Catalyst's NV.[157] Therefore, for the final determination, we: 1) disregarded these bank charges as an "insignificant adjustment in the calculation of Catalyst's NV," in accordance with our practice;[158] and 2) continued to include them as part of Catalyst's reported G&A expenses.

Comment 9: Errors in Catalyst's *Preliminary Determination* Margin Program

Catalyst's Case Brief

- Commerce incorrectly calculated Catalyst's home market packing costs in its preliminary calculations due to an error in the margin program.[159] As a result of this error, Commerce understated Catalyst's home market packing costs.
- Commerce inadvertently converted the currency of the variables INDDOL (home market indirect selling expenses in dollars), COMMDOL (home market commissions in dollars), and ICOMMDOL (home market indirect commissions in dollars) twice, treating them as Canadian dollar values when they had already been converted into U.S. dollars.[160]

No other party commented on this topic.

Commerce's Position:

We agree that that we incorrectly converted the variables INDDOL, COMMDOL, and ICOMMDOL to U.S. dollars twice in Catalyst's preliminary margin program. Therefore, we corrected this error in our calculations for the final determination.[161] However, we disagree that we made an error in calculating Catalyst's home market packing costs. Therefore, we made no adjustment to this variable for the final determination.

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[157] *See* Catalyst SVR at 11.
[158] *See Copper Pipe from China*, and accompanying IDM at Comment 8.
[159] *See* Catalyst's Case Brief at 22.
[160] *Id*. at 23.
[161] For further discussion, *see* Catalyst Final Sales Calculation Memorandum at 2.

Comment 10: Verification Corrections for Catalyst

Catalyst's Case Brief

- Commerce should implement the corrections presented at the start of the sales and cost verifications in its calculations for the final determination.[162]

No other party commented on this topic.

Commerce's Position:

We incorporated the corrections presented prior to the sales and cost verifications, as outlined in the Catalyst SVR and Catalyst CVR,[163] in our calculations for the final determination.

Comment 11: Resolute's Short-Term U.S. Dollar Borrowing Rate

Resolute's Case Brief

- At verification, Commerce observed that Resolute calculated its U.S. dollar short-term interest rate based on credit facilities recorded as long-term debt in Resolute's financial statements.[164]
- Commerce should rely on Resolute's reported U.S. dollar interest rate, because it accepted these same borrowings as the basis for the U.S. dollar short-term interest rate in *Softwood Lumber from Canada*.[165] To reject that rate in this case when the same facts apply would result in inconsistent treatment, which would be unfair and contrary to law.[166]
- Using Resolute's reported U.S. dollar borrowing rate satisfies Commerce's clear preference for relying on the actual borrowing experiences of the respondent, rather than a surrogate rate.[167]
- If Commerce were to reject Resolute's reported borrowing rate, it should rely on the published Federal Reserve U.S. dollar short-term interest rate submitted by Catalyst.

No other party commented on this topic.

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[162] *Id.* (citing Catalyst SVR at Verification Exhibit 1; and Catalyst CVR at COSTVE-1).
[163] *See* Catalyst SVR at Verification Exhibit 1; and Catalyst CVR at COSTVE-1.
[164] *See* Resolute's Case Brief at 11-12 (citing Resolute SVR at 16-17).
[165] *See* Resolute's Case Brief at 11-13 (citing *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 82 FR 51806 (November 8, 2017) (*Softwood Lumber from Canada*), and accompanying IDM at Comment 33).
[166] *Id.* at 13 (citing *Anderson v. U.S. Sec'y of Agric.*, 30 CIT 1742, 1749 (2006) ("Agencies have a responsibility to administer their statutorily accorded powers fairly and rationally, which includes not 'treat{ing} similar situations in dissimilar ways.'"); and *Sunpower Corp. v. United States,* 179 F. Supp. 3d 1286, 1295 n.52 (CIT 2016) (citing *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 537 (2009) ("an agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate")).
[167] *Id.* at 13 (citing *Softwood Lumber from Canada* and accompanying IDM at Comment 33).

Commerce Position:

Commerce Bulletin 98.2 describes our practice with respect to imputed credit expenses and interest rates, stating that Commerce:

> …typically makes a circumstance of sale adjustment to normal value (NV) to account for differences in credit terms…To calculate the credit expense on U.S. sales, {Commerce} generally uses the weighted-average borrowing rate realized by a respondent on its U.S. dollar-denominated short-term borrowings.[168]

Commerce's regulations define a short-term loan as "the loan, the terms of repayment for which are one year or less,"[169] and a long-term loan as "the loan, the terms of repayment for which are greater than one year."[170] Thus, a term of repayment of no more than one year is the threshold for distinguishing short-term and long-term loans.

While Commerce relied on Resolute's reported U.S. dollar interest rate in *Softwood Lumber from Canada*, we note that these borrowings were characterized as "short-term" in that case.[171] In any event, the matter at issue in *Softwood Lumber from Canada* was not the long-term nature of the specific borrowings but, rather, the borrowing experience of the respondent's affiliate. Specifically, Commerce considered whether the borrowings made by Resolute's U.S. affiliate provided an appropriate measure of the opportunity cost associated with extending credit to its customers in the United States. In *Softwood Lumber from Canada*, Commerce determined that it was appropriate to rely on an affiliate's borrowings to calculate a respondent's credit expenses, but it did not examine the nature of those borrowings.[172] In the instant investigation, the use of the borrowings of Resolute's U.S. affiliate is not in dispute. Nonetheless, the record in this investigation demonstrates that these U.S. dollar borrowings do not meet the regulatory definition of short-term loans.

At the Resolute sales verification, we found that the U.S. dollar borrowings upon which Resolute based its reported short-term interest rate were actually long-term borrowings due in six years and recorded in Resolute's financial statements as long-term debt.[173] Because these borrowings reflected debt of greater than one year, they are not short-term borrowings as defined under 19 CFR 351.102(b)(48). Further, we observed at verification that Resolute had no short-term borrowings in U.S. dollars.[174] Because Resolute did not have short-term borrowings in U.S.

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[168] *See* https://enforcement.trade.gov/policy/bull98-2.htm (emphasis added).
[169] *See* 19 CFR 351.102(b)(48).
[170] *See* 19 CFR 351.102(b)(32).
[171] *See Softwood Lumber from Canada* and accompanying IDM at Comment 33. As in this investigation, "{d}uring the POI, Resolute FP US had two bank credit facilities through which it drew U.S. dollar funds on a short-term basis. Based on these borrowings, Resolute provided a weighted-average calculation of its short-term credit expenses…" However, Commerce did not discuss the nature of these borrowings further in *Softwood Lumber from Canada.*
[172] *Id.*
[173] *See* Resolute SVR at 17. *See also* Resolute's October 18, 2017, Section A Questionnaire Response at Exhibit A-13.
[174] *Id*.

dollars, Commerce's practice is to use rates for 31 to 365-day loans published by the Federal Reserve.[175] Accordingly, we have recalculated Resolute's imputed credit expenses for U.S. sales and Canadian sales denominated in U.S. dollars using the short-term Federal Reserve rate for the POI.[176]

Comment 12: Treatment of Resolute's Corporate-Level Costs

Resolute's Case Brief

- Resolute reported certain G&A expenses of its parent company, which are not normally recorded in Resolute's financial statements but, rather, in the financial statements of its parent company, Resolute Forest Products Inc. (RFP). Commerce included these expenses in Resolute's G&A expense ratio in the *Preliminary Determination*.
- Commerce erred by including these corporate-level expenses in the G&A ratio calculation because Commerce's practice is to calculate G&A expenses based on the unaudited financial statements of the producing company.[177]
- For the final determination, Commerce should not include these corporate-level expenses booked only at RFP in Resolute's G&A ratio.

No other party commented on this topic.

Commerce Position:

In the *Preliminary Determination*, we relied on the G&A expense ratio calculation reported by Resolute, which included the corporate-level G&A expenses at issue. We do not contest Resolute's argument that we rely on the G&A expenses of the producing entity, which is the starting point in Resolute's G&A expense calculation. In addition to these G&A expenses incurred by Resolute, we added corporate-level expenses. The corporate-level expenses include depreciation, pension, and other miscellaneous expenses.[178] 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 COGS. Commerce's practice is to include an amount for administrative services performed by the parent company, or other

[175] *See, e.g., Carbon and Alloy Steel Wire Rod from the Republic of Korea: Final Affirmative Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 83 FR 13228 (March 28, 2018), and accompanying IDM at Comment 4; and *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 IDM at Comment 9.
[176] *See* Resolute Final Sales Calculation Memorandum; *see also* Catalyst's November 14, 2017, Section C Questionnaire Response at Exhibit C-16.
[177] *See* Resolute's Case Brief at 5-8 (citing sections 773(b)(3)(B) and 773(f)(1)(A) of the Act; *Solvay Solexis S.p.A. v. United States,* 33 CIT 1179, 1183 (2009); *Structural Steel Beams from South Africa: Final Determination of Sales at Less Than Fair Value,* 67 FR 35485 (May 20, 2002), and accompanying IDM at Comment 6; *Silicomanganese from India*, and accompanying IDM at Comment 24; and *Certain Softwood Lumber Products from Canada: Final Determination of Sales at Less Than Fair Value*, 67 FR 15539 (April 2, 2002), and accompanying IDM at Comment 19).
[178] *See* Resolute CVR at 18-19.

affiliated party, on the behalf of the respondent in the numerator of a respondent's G&A expense ratio.[179] It is consistent with our longstanding practice to include the portion of these corporate expenses that relates to Resolute Canada. Additionally, this treatment is consistent with our calculation of the G&A expenses for Resolute in *Softwood Lumber from Canada*.[180] Therefore, consistent with Commerce's practice, we continued to include the G&A expenses incurred by RFP on Resolute's behalf in the numerator of Resolute's G&A expense ratio.[181]

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

8/1/2018

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

[179] *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), and accompanying IDM at Comment 15.
[180] *See Softwood Lumber from Canada*, and accompanying IDM at Comment 35.
[181] *See* Resolute Final Cost Calculation Memorandum at 2.