ARTICLE 1904
BINATIONAL PANEL REVIEW UNDER
THE UNITED STATES-CANADA FREE TRADE AGREEMENT

In the Matter of:

SOFTWOOD LUMBER
FROM CANADA

USA-92-1904-02

DECISION OF THE PANEL

REVIEWING THE FINAL DETERMINATION OF

THE U.S. INTERNATIONAL TRADE COMMISSION

July 26, 1993

Before: Joseph F. Dennin (Chairman)
Steven W. Baker
Harry B. Endsley
James F. Grandy
Donald M. McRae

Appearances:

Michael H. Stein, John A. Ragosta, and Harry Clark, on behalf of the Coalition for Fair Lumber Imports. With them on brief were Alan Wm. Wolff, Harry L. Clark, Robert H. Griffen, William A. Noellert, Susan B. Hester, Gregory I. Hume, Howard M. Shanker, and Keith A. Matthews.

Judith M. Czako and James Toupin, on behalf of the U.S. International Trade Commission. With them on brief was Lyn M. Schlitt.

M. Jean Anderson and Douglas A. Nave, on behalf of the Government of Canada. With them on brief were Bruce H. Turnbull, David W. Oliver, and Deborah E. Siegel.

Susan G. Esserman, Mark A. Moran, and Shara Aranoff, on behalf of the Canadian Forest Industries Council and affiliated companies. With them on brief were Charlene Barshefsky and Gracia M. Berg.

Elliot J. Feldman and Matthew J. Clark, on behalf of the Gouvernement du Québec. With them on brief were Michael A. Hertzberg, Juliana M. Confrancesco, F. Alexander Amrein, Thomas J. Trendl, and Jonathan D. Cahn.

Randolph J. Stayin and Mark J. Andrews, on behalf of the Quebec Lumber Manufacturers' Association and members of the Canadian Lumbermen's Association located in Quebec. With them on brief was David L. Lubitz.

Claire E. Reade and Michael T. Shor, on behalf of the Government of the Province of Alberta. With them on brief were Lawrence A. Schneider and Matthew Frumin.

Homer E. Moyer and Stuart E. Benson, on behalf of the Government of British Columbia. With them on brief was Paul Maguffee.

Mark S. McConnell and Leslie A. Delagran, on behalf of the Government of Ontario. With them on brief were Lynn G. Kamarck and Deanna Tanner Okun.

Richard L. Cys and Edward B. Cohen, on behalf of J.D. Irving, Limited.

Gary Horlick, Craig McKee, Eleanor Shea, Donald Cameron, Leonard Santos, Ryan Trainer, and Anthony Essaye, on behalf of Noranda Forest, Incorporated.

TABLE OF CONTENTS

OPINION AND ORDER OF THE PANEL

I. INTRODUCTION

This Binational Panel was constituted under Article 1904(2) of the United States-Canada Free Trade Agreement ("FTA") and Title IV of the United States-Canada Free Trade Agreement Implementation Act,[1/] in response to a request for panel review of the final affirmative injury determination of the United States International Trade Commission ("Commission" or "ITC") in the matter of Softwood Lumber From Canada.[2/] Complaints contesting the Commission's final determination were filed by the Government of Canada, the provincial governments of Alberta, British Columbia, and Ontario, the Gouvernement du Québec, the Canadian Forest Industries Council and affiliated companies ("CFIC"), the Quebec Lumber Manufacturers' Association ("QLMA"), and members of the Canadian Lumbermen's Association located in Quebec (collectively, "Canadian Complainants").

The products at issue in this review are imports of softwood lumber from Canada. For purposes of the ITC investigation and this Panel's review, softwood lumber means articles of coniferous wood of the type provided for in subheadings 4407.10.00, 4409.10.10, 4409.10.20, and 4409.10.90 of the Harmonized Tariff Schedule of the United States.

1/ 19 U.S.C. § 1516a(g)(2).

2/ Softwood Lumber From Canada, 57 Fed. Reg. 31,389 (July 15, 1992) (Aff. Final); Softwood Lumber From Canada, Inv. No. 701-TA-312, USITC Pub. 2530 (July 1992) (Aff. Final) [hereinafter ITC Final].

II. BACKGROUND

The ITC final determination subject to review by this Panel is the latest in a series of countervailing duty investigations conducted by the ITC and the Department of Commerce ("Commerce") over the past decade with respect to softwood lumber imported from Canada.[3/] An overview of the historical trade dispute surrounding imports of Canadian softwood lumber provides useful background and context for the Panel's review of the ITC determination challenged here.

A. Lumber I

In October 1982, the U.S. Coalition for Fair Canadian Lumber Imports filed a petition with the ITC and Commerce alleging that the federal and provincial governments of Canada were subsidizing the Canadian forest products industry, including the softwood lumber industry. The ITC initiated an investigation and, in November of 1982, issued a preliminary determination finding a reasonable indication of material injury due to imports of allegedly subsidized softwood lumber from Canada.[4/] In May 1983, however, Commerce issued a final negative countervailing duty determination, resulting in the termination of the Commerce

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3/ Other investigations involving imports of softwood lumber from Canada also have been conducted by the Commission and the United States Trade Representative. See Initiation of Section 302 Investigation: Canadian Exports of Softwood Lumber, 56 Fed. Reg. 50,738 (Oct. 8, 1991); Conditions Relating to the Importation of Softwood Lumber Into the United States, Inv. 332-210, USITC Pub. 1765 (Oct. 1985); Conditions Relating to the Importation of Softwood Lumber Into the United States, Inv. No. 332-134, USITC Pub. 1241 (Apr. 1982).

4/ Softwood Lumber from Canada, Inv. No. 701-TA-197, USITC Pub. 1320 (Nov. 1982) (Aff. Prelim.).

and ITC investigations.[5/] The 1982 investigations commonly are referred to as "Lumber I."

B. Lumber II and the MOU

Three years after Commerce's negative determination in Lumber I, the Coalition for Fair Lumber Imports filed a countervailing duty petition with the ITC and Commerce alleging once again that a United States industry was being materially injured or threatened with material injury by reason of subsidized softwood lumber imported from Canada.[6/] Commerce and the ITC initiated investigations in response to these allegations ("Lumber II"). In July 1986, the ITC made an affirmative preliminary determination, finding a reasonable indication of material injury to a United States industry by reason of imports from Canada of allegedly subsidized softwood lumber.[7/] In October 1986, Commerce issued its preliminary determination, finding that softwood lumber imported from Canada was being subsidized within the meaning of U.S. countervailing duty law.[8/] Commerce specifically found that subsidies of 14.5 percent ad valorem were being provided on exports of softwood lumber from Canada.

5/ Certain Softwood Products from Canada, 48 Fed. Reg. 24,159 (May 31, 1983) (Neg. Final).
6/ The petition filed by the Coalition for Fair Lumber Imports alleged that there was new evidence regarding Canadian subsidies, and that the applicable law had changed since Commerce's determination in Lumber I.
7/ Softwood Lumber from Canada, Inv. No. 701-TA-274, USITC Pub. 1874 (July 1986) (Aff. Prelim.).
8/ Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453 (Oct. 22, 1986) (Aff. Prelim.).

The Lumber II investigations concluded when the United States and Canadian Governments arrived at a settlement of the subsidy dispute and, on December 30, 1986, signed a Memorandum of Understanding ("MOU") with respect to softwood lumber. Pursuant to the MOU, the Government of Canada agreed to collect a 15 percent charge on certain softwood lumber exported to the United States.[9/] In return, the Coalition for Fair Lumber Imports agreed to withdraw its countervailing duty petition, and Commerce terminated its investigation.

III. PROCEDURAL HISTORY

A. Lumber III-The Contested Determination

In 1991 the Government of Canada conducted a study of various provincial stumpage regimes, and examined the replacement measures instituted by the provincial governments. On the basis of that study, the Canadian Government concluded that the MOU had served its purpose. Accordingly, on September 3, 1991, the Canadian Government announced that effective October 4, 1991 it would terminate the MOU, exercising the right to unilateral termination provided for in that agreement.

9/ The charge imposed by the Canadian Government could be reduced or eliminated if corresponding "replacement" measures were implemented by the provincial governments. Several provinces instituted such replacement measures. For instance, in 1987 British Columbia initiated a new system of timber pricing. The United States determined that the resulting increased costs constituted a total replacement of the export charge imposed by the Canadian Government. Consequently, the MOU was amended to eliminate the export charge on softwood lumber from British Columbia. Quebec also established a new pricing system, resulting in two U.S. sanctioned reductions in the export charge imposed on softwood lumber from Quebec.

On October 31, 1991, Commerce self-initiated the latest in the series of countervailing duty investigations of softwood lumber from Canada ("Lumber III").[10/]

1. The Commerce Department's Determination

On March 6, 1992, Commerce notified the Commission that it had preliminarily determined that subsidies were being provided to softwood lumber manufacturers, producers, or exporters in Canada.[11/] On May 28, 1992, Commerce published its final affirmative determination.[12/] Commerce found two types of programs pertaining to stumpage, and log export restrictions to jointly confer a weighted-average 6.51 percent "country-wide" subsidy on exports of certain softwood lumber products from Canada.[13/]

2. The Commission's Determination

Pursuant to Commerce's self-initiation, the Commission on October 31, 1991, initiated a countervailing duty investigation to determine whether there was a reasonable indication that a United States industry was suffering material injury by reason of imports from Canada of allegedly subsidized softwood lumber. The

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10/ Certain Softwood Lumber Products from Canada, 56 Fed. Reg. 56,055, 56,058 (Oct. 31, 1991) (Init.).

11/ Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 8800 (Mar. 12, 1992) (Aff. Prelim.).

12/ Certain Softwood Lumber Products from Canada, 56 Fed. Reg. 22,570 (May 28, 1992) (Aff. Final).

13/ The Commerce Department's final determination is subject to review by a separate Binational Panel. The results of that Panel's review were issued on May 6, 1993. Certain Softwood Lumber Products From Canada, USA-92-1904-02 (May 6, 1993).

Commission published an affirmative preliminary determination on December 27, 1991, finding that it could not "conclude that there is clear and convincing evidence on the record of no material injury ... and that there is no likelihood that contrary evidence will be developed in a final investigation."[14/] Following Commerce's preliminary affirmative determination, the Commission on March 6, 1992, instituted its final investigation, and published the results of that investigation on July 15, 1992.[15/] A majority of the Commission_Chairman Newquist, Vice Chairman Watson, and Commissioners Rohr and Crawford_found that an industry in the United States was being materially injured by reason of imports from Canada of softwood lumber products determined by Commerce to be subsidized.[16/] Commissioners Brunsdale and Nuzum disagreed, finding that the evidence did not support an affirmative determination.[17/]

It is this final Commission determination that presently is subject to review by the Panel.

The Commission in its final determination found that the like product consisted of all softwood lumber, and that there was one domestic industry

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14/ Softwood Lumber From Canada, Inv. No. 701-TA-312, USITC Pub. 2468, at 20 (Dec. 1991) (Aff. Prelim.). As noted in the ITC's preliminary determination, "[w]hile the definition of 'material injury' is the same in both preliminary and final investigations, the standard of determination is different. In preliminary investigations an affirmative determination is based on a 'reasonable indication' of material injury or threat, as opposed to the finding of actual material injury or threat required for an affirmative determination in a final determination." Id. at 14.

15/ Softwood Lumber From Canada, 57 Fed. Reg. 31,389 (July 15, 1992).

16/ ITC Final, supra note 2.

17/ Id. at 37, 55.

producing the like product_mill operators.[18/] It noted that the domestic industry is comprised of almost 6,000 producers, most of whom are small, and that the production of softwood lumber is concentrated in the West and South.[19/]

In assessing the condition of the domestic industry, the Commission found that due to various environmental regulations and wildlife preservation programs prohibiting logging on federal land (as well as some state and private lands), access to timber supplies had been significantly reduced and the price of logs had increased sharply during the period of investigation.[20/] It also recognized the significant decline in U.S. demand for softwood lumber during the period of investigation, as a result of the recession and the decline in housing starts.[21/]

The Commission determined that "Canadian imports were significant in terms of both absolute volume and market share throughout the period of investigation."[22/] It further noted that in light of the highly substitutable nature of, and inelastic demand for, softwood lumber, the volume of Canadian imports had a significant impact on U.S. lumber prices and sales.[23/] The Commission also found that "the inability of the industry to raise prices, commensurate with rapidly increasing costs [due to the reduced supply of timber resulting from environmental restrictions], demonstrates significant price suppression."[24/]

18/ Id. at 10-11.
19/ Id. at 14 n.41, 15.
20/ Id. at 15.
21/ Id. at 16.
22/ Id. at 27.
23/ Id.
24/ Id. at 32.

Although the Commission gathered pricing information, it concluded that such information had only limited use in making direct price comparisons.[25/]

25/ The Commission's final determination made the following comments regarding the pricing data:

> While we are satisfied that our pricing information is accurate and reflects pricing trends in the market, its usefulness for reflecting comparative prices of domestic and imported lumber is limited. [footnote omitted]. The information reported in questionnaire responses is simply not sufficient to ensure that anomalies resulting from the volatility of the market are dampened so as to allow us to make a reasoned judgment concerning under- or over- selling. Nor is publicly available price information suitable for purposes of assessing comparative prices. Prices are reported in Random Lengths for purposes of reporting general trends and price levels for the information of producers and purchasers. Consequently, they are not reported with the degree of specificity and consistency necessary to enable us to rely on them for developing price comparisons. Similarly, while price indices inform us about trends in prices, they are not suitable for comparing price levels.
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> Softwood lumber is sold as a commodity and prices change daily, and even hourly. Producers quote prices to purchasers on a spot basis, relying on internal price lists or industry sources such as Random Lengths as a guide. The day-to-day volatility of the market, combined with the relative difficulty of obtaining specific price information from producers, importers, and purchasers, complicates the gathering and interpretation of price information. Moreover, while U.S. producers often quote prices on an f.o.b. mill basis, the practice in Canada has changed in the past few years, and Canadian mills now generally quote prices on a delivered basis. [footnote omitted]. The different bases used for quoting prices by Canadian and U.S. producers makes developing price comparisons particularly difficult.
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> Id. at 30-31.

The Commission's conclusion that the pricing data was unreliable for price comparison purposes in effect deprived it of certain traditional tools for proving causation (i.e., underselling, price leadership, etc.).

Notwithstanding these difficulties, the Commission found that it was able to conclude that "[p]rices for Spruce-Pine-Fir (SPF) are a 'bellwether' in the market," and that the substantial volume of Canadian SPF imported into the United States limited potential increases in U.S. softwood lumber prices.[26/] The Commission further stated that Canadian producers' log costs did not increase as steeply as U.S. producers' log costs, and that the Canadian subsidies affected Canadian log costs.[27/] The Commission concluded that "[t]he significant volume of subsidized Canadian lumber ... has contributed to the inability of the U.S. producers to increase lumber prices in the face of significant cost increases, resulting in material injury."[28/]

To "confirm" the conclusion that Canadian imports suppressed U.S. softwood lumber prices, and that "the recession and timber supply constraints [were] not the sole causes of material injury to the domestic industry," the Commission compared the performance of "U.S. producers on their softwood lumber operations and their operations producing other wood products and building materials ...."[29/]

26/ Id. at 31.

27/ Id. at 32-33.

28/ Id. at 33. "In these circumstances, it is clear that U.S. producers' inability to raise prices commensurate with rising costs is attributable, at least in part, to sales of imported subsidized Canadian lumber." Id. at 34-35.

29/ Id. at 33. The Commission argued that the wood products and building materials industry was "insulated to a degree" from the effects of subsidized Canadian imports (citing the existence of a U.S. tariff on plywood imports), and that the industry's relatively more favorable financial performance over the period of investigation must be due to the adverse impact of Canadian softwood lumber imports on the domestic industry, which did not enjoy similar tariff protection.

B. Procedural History Before The Panel

Subsequent to the request for panel review of the Commission's final determination, and the filing of complaints, the following events occurred.

By motion dated November 13, 1992, the Canadian Complainants requested an extension of time to submit briefs in support of their joint complaint. The Panel granted this request on November 17, 1992, and further ordered that the schedule for rebuttal and reply briefs, as well as oral argument, be extended by twenty-eight days. By motion dated February 23, 1993, the Coalition for Fair Lumber Imports ("Coalition") filed an emergency request for leave to file out of time the public version of their injury brief. The Panel granted this request on March 4, 1993.

By motion dated November 20, 1992, the Coalition sought to dismiss the Panel for lack of jurisdiction. The Coalition's "jurisdiction" motion was followed by motions on behalf of the Canadian Complainants for leave to file out of time and for an extension of time to respond to the dismissal request. The Panel granted the motions of the Canadian Complainants on November 30, 1992. The Canadian Complainants timely responded to the Notice of Motion to Dismiss, as did the Commission.

On March 4, 1993, upon review and consideration of all written submissions filed by the parties with regard to the Motion to Dismiss for lack of jurisdiction, the Panel denied the Coalition's motion. The Panel Opinion on this matter is provided in Appendix A.

By Order dated March 29, 1993, the Panel established April 27, 1993, as the date for oral argument on the merits of the Commission's final determination. That Order also stated that in light of the extensions that had been granted during the Panel's proceedings, the Panel Opinion on the merits would be issued on or before July 27, 1993.

Pursuant to the Panel's March 29, 1993 Order, a hearing was convened in Washington, D.C. on April 27, 1993 for oral argument. Arguments were made on behalf of the Canadian Complainants,

the Coalition, and the Commission. Separate arguments addressing issues unique to Quebec were made on behalf of the Gouvernement du Québec, the Quebec Lumber Manufacturers' Association, and members of the Canadian Lumbermen's Association located in Quebec.

IV. STANDARD OF REVIEW

Article 1904(3) of the FTA requires that this Panel apply the standard of review and "general legal principles"[30/] that a U.S. court would apply in its review of a Commission determination.[31/] The standard of review that must be applied by a reviewing court and, consequently, this Panel, is dictated by § 516A(b)(1)(B) of the Tariff Act of 1930.[32/] That standard requires the Panel to "hold unlawful any determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."[33/]

30/ These principles include, for instance, "standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies." FTA art. 1911.

31/ Under the FTA, an Article 1904 Binational Panel Review of an injury determination in a U.S. countervailing duty action must be conducted in accordance with U.S. law. FTA art. 1902(1).

32/ 19 U.S.C. § 1516a(b)(1)(B).

33/ Id. For purposes of Panel review, the "law" consists of "relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing Party would rely on such materials." FTA art. 1904(2). The "substantial evidence" standard mandated by the FTA refers specifically to evidence "on the record," and Article 1904(2) of the FTA expressly limits the Panel's review to the "administrative record" filed by the Commission.

A. Substantial Evidence

The contours of the substantial evidence standard are well established in United States case law. Substantial evidence has been defined by the Supreme Court as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[34/] In a subsequent case the Supreme Court elaborated on this standard, stating that substantial evidence is "something less than the weight of the evidence."[35/]

In assessing the substantiality of the evidence, the Panel must consider the "evidence on the record as a whole,"[36/] including "the body of evidence opposed to the [agency's] view."[37/] As noted by the Binational Panel in New Steel Rails from Canada, the Panel's role is "not to merely look for the existence of an individual bit of data that agrees with a factual conclusion and end its analysis at that."[38/] Rather, the Panel must take into account evidence which detracts from the weight of the evidence relied upon by the agency in reaching its conclusions.[39/] Moreover,

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34/ Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)); see also Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984).

35/ Consolo v. Federal Maritime Commission, 383 U.S. 607, 620 (1966).

36/ USX Corp. v. United States, 11 Ct. Int'l Trade 82, 84, 655 F. Supp. 487, 489 (1987); SSIH Equip. S.A. v. United States Int'l Trade Comm'n, 718 F.2d 365, 382 (Fed. Cir. 1983). (Emphasis in original).

37/ Universal Camera Corp., 340 U.S. at 488.

38/ USA-89-1904-09, at 8 (Aug. 13, 1990).

39/ Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1562 (Fed. Cir. 1984); see also Suramerica de Aleaciones Laminadas, C.A. v. United States, No. 88-09-00726, slip op. 93-35, at 5 (Ct. Int'l Trade Apr. 5, 1993) ("In other words, it is not enough that the evidence supporting the agency decision is 'substantial' when considered by itself.").

as recently noted by the Court of International Trade, "the Court need not show that each Commission finding on each factor [of the statute] is not based on substantial evidence so long as the Court finds that the sum total of the Commission's findings do [sic] not rise to the level of substantial evidence of injury or threat of injury."[40/]

The Panel however is conscious of its obligation under the substantial evidence standard not to reweigh the evidence, or substitute its judgment for that of the Commission.[41/] It is well settled that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."[42/] The reviewing authority therefore may not "displace the [agency's] choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before it de novo."[43/]

40/ Suramerica de Aleaciones Laminadas, C.A., slip op. 93-35, at 8.

41/ Fresh, Chilled and Frozen Pork from Canada, USA-89-1904-11, at 8 (Aug. 24, 1990); see also Metallverken Nederland B.V. v. United States, 13 Ct. Int'l Trade 1013, 1017, 728 F. Supp. 730, 734 (1989).

42/ Consolo, 383 U.S. at 619-20; see also Matsushita Elec. Indus. Co., 750 F.2d at 933 ("The Commission's decision does not depend on the 'weight' of the evidence, but rather on the expert judgment of the Commission based on the evidence of record.").

43/ Universal Camera Corp., 340 U.S. at 488; accord American Spring Wire Corp. v. United States, 8 Ct. Int'l Trade 20, 590 F. Supp. 1273, 1276 (1984), aff'd sub nom., Armco, Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985).

B. Deference

The substantial evidence standard generally requires the reviewing authority to accord deference to an agency's factual findings, its statutory interpretations, and the methodologies selected and applied by the agency. In particular, "deference must be accorded to the findings of the agency charged with making factual determinations under its statutory authority."[44/] Deference also must be afforded a permissible interpretation by an agency of the statute it is charged with administering. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[45/] The reviewing authority need not conclude that "[t]he agency's interpretation is the only reasonable construction or the one [the reviewing authority] would adopt had the question initially arisen in a judicial proceeding."[46/] Finally, deference must be given to the methodologies selected and applied by the agency to carry out its statutory mandate.[47/]

44/ Fresh, Chilled and Frozen Pork from Canada, USA-89-1904-11, at 6 (Aug. 24, 1990) (citing Red Raspberries from Canada, USA-89-1904-01, at 18-19 (Dec. 15, 1989)).

45/ Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984); Chaparral Steel Co. v. United States, 901 F.2d 1097, 1101 (Fed. Cir. 1990). For an analysis of the Supreme Court's application in subsequent cases of the statutory deference standard discussed in Chevron, see Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969 (1992).

46/ American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986) (citing Chevron, 467 U.S. at 843 n.11).

47/ See Brother Industries, Ltd. v. United States, 771 F. Supp. 374, 381 (Ct. Int'l Trade 1991) ("Methodology is the means by which an agency carries out its statutory mandate and, as such, is generally regarded as within its discretion.").

Commission determinations are presumed to be correct, and the burden of demonstrating otherwise is on the party challenging a determination.[48/] Furthermore, the substantial evidence standard effectively "frees the reviewing [authority] of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute."[49/] Thus, an agency's determination generally must be accorded deference.[50/]

C. Limitations On Deference

Although review under the substantial evidence standard is by definition limited, application of that standard does not result in a wholesale abdication of the Panel's authority to conduct a meaningful review of the Commission's determination. Indeed, a contrary conclusion would result in the evisceration of the purpose for reviewing agency determinations, rendering the appeal process superfluous. The deference to be accorded an agency's findings and conclusions therefore is not unbounded.

It is well established, for instance, that an agency's determination must have a reasoned basis.[51/] The reviewing authority may not defer to an agency

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48/ 28 U.S.C. § 2639(a)(1). See Hannibal Industries, Inc. v. United States, 13 Ct. Int'l Trade 202, 207, 710 F. Supp. 332, 337 (1989).

49/ Consolo, 383 U.S. at 620.

50/ See, e.g., Chr. Bjelland Seafoods A/C v. United States, No. 91-05-00364, slip. op. 92-196 (Ct. Int'l Trade Oct. 23, 1992).

51/ American Lamb Co., 785 F.2d at 1004 (citing S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 638); see also Fresh, Chilled and Frozen Pork, USA 89-1904-11, at 13 (Aug. 24, 1990).

determination premised on inadequate analysis or reasoning.[52/] The extent of deference to be accorded is dependent upon "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements."[53/]

Furthermore, a rational connection must be present between the facts found and the choice made by the agency.[54/] There must be an adequate explanation of the bases for the agency's decision in order for the reviewing authority to meaningfully assess whether it is supported by substantial evidence on the record. The Commission therefore must clearly articulate the reasons for its conclusions.[55/]

Finally, deference to an agency's interpretation of the statute it is charged with implementing also may be limited. A reviewing authority may not, for instance, permit an agency "under the guise of lawful discretion or interpretation to

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52/ Chr. Bjelland Seafoods A/C, slip. op. 92-196, at 15; USX Corp., 11 Ct. Int'l Trade at 87, 655 F. Supp. at 492.

53/ Ceramica Regiomontana, S.A. v. United States, 10 Ct. Int'l Trade 399, 404, 636 F. Supp. 961, 965 (1986), aff'd, 810 F.2d 1137 (Fed. Cir. 1987) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

54/ Bando Chem. Indus., Ltd. v. United States, 787 F. Supp. 224, 227 (Ct. Int'l Trade 1992) (citing Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285 (1974), and Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)); Avesta AB v. United States, 13 Ct. Int'l Trade 13, 17, 724 F. Supp. 974, 978 (1989), aff'd, 914 F.2d 233 (Fed. Cir. 1990), cert. denied, 111 S. Ct. 1308 (1991).

55/ See, e.g., Mitsubishi Materials Corp. v. United States, 820 F. Supp. 608 (Ct. Int'l Trade 1993); USX Corp., 11 Ct. Int'l Trade at 84-85, 655 F. Supp. at 490; SCM Corp. v. United States, 487 F. Supp. 96, 108 (Cust. Ct. 1980); Maine Potato Council v. United States, 9 Ct. Int'l Trade 293, 300-02, 613 F. Supp. 1237, 1244-45 (1985); Bando Chem. Indus., Ltd., 787 F. Supp. at 227.

contravene or ignore the intent of Congress."[56/] Moreover, the methodology selected and applied by the agency to carry out its statutory mandate "must still be lawful, which is for the courts finally to determine."[57/]

* * *

The standard of review and established principles articulated above and elaborated upon throughout have been thoroughly considered and applied by the Panel in rendering its opinion.[58/]

56/ Cabot Corp. v. United States, 12 Ct. Int'l Trade 664, 669, 694 F. Supp. 949, 953 (1988).

57/ Brother Industries, Ltd., 771 F. Supp. at 381. See also Gifford-Hill Cement Co. v. United States, 9 Ct. Int'l Trade 357, 363, 615 F. Supp. 577, 582 (1985) ("If the use of [a submarket] analysis was improper, then the Commission's findings would not be supported by substantial evidence.").

58/ As recently noted by an Article 19 Extraordinary Challenge Committee, a Binational Panel not only must accurately articulate the standard of review, but must conscientiously apply the appropriate standard of review so as not to exceed its jurisdiction. Live Swine from Canada, ECC-93-1904-01USA, slip op. at 11 (April 8, 1993) (citing Fresh, Chilled, and Frozen Pork from Canada, ECC 91-1904-01USA, at 21 (June 14, 1991)).

V. SUMMARY OF ISSUES AND PANEL DECISION

The Commission's determination of material injury by reason of Canadian imports is based on the finding that those imports contributed to the significant suppression of U.S. softwood lumber prices. The Canadian Complainants challenge the Commission's determination, arguing that the evidence and rationale offered to support the findings allegedly linking material injury to the Canadian imports are inadequate. They further argue that the Commission's analysis establishes no more than a "likelihood" that the Canadian imports had an effect on U.S. lumber prices. Without specific evidence "to establish a legally cognizable link between the imports and the condition of the domestic industry," the Commission's determination is unsupported by substantial evidence on the record and otherwise not in accordance with law.[59/]

The Commission argues that the significant volume of highly substitutable, price inelastic merchandise renders material injury more likely. Furthermore, according to the Commission price suppression is demonstrated by the significant volume of Canadian imports in a product category_SPF_which assertedly influences U.S. lumber prices. The Commission also argues that the suppression of domestic lumber prices is "confirmed" by its cross-sectoral analysis, which compares the performance of the softwood lumber industry to that of the "wood products and building materials" industry. The Canadian Complainants challenge each of these findings.

The Panel notes at the outset that the Commission has not supported its affirmative determination in this case on any of the grounds traditionally relied on by it (i.e., increased imports by volume or market share, decreased prices,

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59/ Canadian Complainants' Joint Reply Brief, at 3.

underselling, confirmed lost sales, or price leadership).[60/] The unreliability of the pricing data in this case made certain of these traditional tools unavailable to the Commission, while other indicia, particularly increased imports (by volume), simply did not exist. The Panel therefore has specifically sought to discern what other "concrete evidence" and "verifiable events" might support the Commission's finding of price suppression by reason of Canadian imports.[61/] The Panel notes, and the Commission recognizes, that in a final investigation the Commission is required to support an affirmative injury determination with specific evidence of injury by imports, as opposed to the mere probability of injury considered sufficient for preliminary determinations.[62/]

As detailed below, the Panel agrees that the Commission's finding that subject products from Canada and the United States are highly substitutable is supported by substantial evidence on the record. Similarly, substantial evidence supports the Commission's finding that the volume of Canadian imports during the period of investigation was "significant." The Panel notes, however, that the mere presence of a significant volume of unfairly traded imports is not sufficient to support an affirmative injury determination. In the absence of increases in quantities or shares, or other indicia, the volume of imports alone does not constitute substantial evidence of injury by reason of imports.

With respect to the Commission's finding that imports of Canadian SPF limit potential increases in U.S. softwood lumber prices, the Panel finds that the evidence

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60/ See Republic Steel Corp. v. United States, 8 Ct. Int'l Trade 29, 31, 591 F. Supp. 640, 642 (1984).
61/ Id. at 35, 591 F. Supp. at 646.
62/ See Softwood Lumber From Canada, Inv. No. 701-TA-312, USITC Pub. 2468, at 14 (Dec. 1991) (Aff. Prelim.).

cited by the Commission does not rise to the level of substantial evidence needed to support that finding. The evidence in fact does not indicate what effect, if any, SPF has on the market. Without evidence demonstrating the current price effect of SPF, the Panel cannot accept the Commission's finding that SPF prices influence lumber prices generally, or the consequent finding that imports of Canadian SPF limit potential increases in U.S. softwood lumber prices.

Finally, the Panel notes that it has serious concerns as to the legal authority per se of the Commission to conduct cross-sectoral comparisons. Furthermore, the Panel finds that the methodology applied by the Commission in conducting the cross-sectoral comparison in this case was seriously flawed. A cross-sectoral comparison of an investigated industry with non-investigated industries in the circumstances of this case is considered by the Panel to be laden with data collection and methodological problems. The Panel determines that the Commission's cross-sectoral comparison in this case neither produced substantial evidence of significant price suppression by reason of Canadian imports, nor reliably confirmed the Commission's finding of such suppression.

* * *

The Panel concludes that the Commission's determination of material injury by reason of subsidized Canadian imports is not supported by substantial evidence on the record. Accordingly, the Panel remands the Commission's final determination for reconsideration.

VI. DISCUSSION

A. Introduction-The Statutory Scheme

The Canadian Complainants' challenge to the Commission's final determination does not question the findings that the like product made by U.S. producers was all softwood lumber, and that there was one domestic industry producing the like product. Nor do the Canadian Complainants disagree that the condition of the domestic industry had deteriorated substantially during the period of investigation. Instead, the Canadian Complainants focus their challenge on the lack of a causal connection between the subsidized imports from Canada and the injury being suffered by the domestic industry.

The Canadian Complainants assert that alternate causes, specifically but not exclusively citing the curtailment of the lumber harvest due to environmental restrictions, and the significant decline in U.S. demand for softwood lumber as a result of the recession, can fully explain the domestic industry's condition.[63/] They assert that no substantial evidence on the record links imports of Canadian softwood lumber to the injury to the U.S. industry. They further argue that the affirmative determination effectively was based solely on the large share of the U.S. softwood lumber market maintained by Canadian imports.

63/ The Commission found that over the past few years environmental regulations prohibiting logging on western federal land, as well as on some state and private lands, have restricted Western lumber producers' access to timber supplies. This restriction in the supply of timber has caused a nationwide increase in the price of logs_the principal input and cost in the production of lumber. (See ITC Final, at 15.) Concurrent with the decline in the supply of U.S. softwood lumber, the demand for lumber in the United States decreased significantly. Housing starts, which generally constitute the largest single demand factor for softwood lumber, fell significantly during the period of investigation, registering a decline of 43.8 percent from 1986 to 1991. Id. at 16.

Counsel for the Commission and the Coalition argue in support of the determination that the injury was caused, at least in part, by imports of the Canadian merchandise, specifically claiming that U.S. softwood lumber prices were suppressed to a significant degree by Canadian softwood lumber imports.

In addressing whether the domestic industry has been materially injured by subsidized imports, the Commission is required by the Tariff Act of 1930 to consider three factors:

a) the volume of the imported products subject to investigation;

b) the effect of such imports on prices of the like products in the United States; and

c) the impact of such imports on domestic producers of like products.[64/]

Each of these factors is further expounded upon in the statute.

The statute specifically requires the Commission to assess "volume" by considering "whether the volume of imports, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant."[65/] With respect to the effect of imports on U.S. prices, the Commission

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64/ 19 U.S.C. § 1677(7)(B)(i). The cited statute is a relatively faithful incorporation into U.S. law of Article 6 of the GATT Subsidies Code. (Agreement on the Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, opened for signature April 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, 1186 U.N.T.S. 204, B.I.S.D. 26th Supp. 56-83 (entered into force January 1, 1980)). Article 6(1) of the Code provides that "[a] determination of injury for purposes of Article VI of the General Agreement shall involve an objective examination of both (a) the volume of subsidized imports and their effect on prices in the domestic market for like products and (b) the consequent impact of these imports on domestic producers of such products."

65/ 19 U.S.C. § 1677(7)(C)(i).

must consider whether there has been significant price underselling by the imported products, and whether "such products otherwise depress[ ] prices to a significant degree or prevent[ ] price increases, which otherwise would have occurred, to a significant degree."[66/] Finally, the assessment of the impact of imports on domestic producers requires the Commission to evaluate all "relevant economic factors which have a bearing on the state of the industry in the United States," within the context of the "business cycle and conditions of competition that are distinctive to the affected industry."[67/]

B. The Analytical Framework

A determination of material injury to the domestic industry "by reason of imports"[68/] requires that a causal link be established between the subsidized imports and the material injury. The requisite causation typically is established through direct evaluation of the statutory factors noted above. In this case,

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66/ 19 U.S.C. § 1677(7)(C)(ii).

67/ 19 U.S.C. § 1677(7)(C)(iii).

68/ 19 U.S.C. § 1671d(b). Art. 6(4) of the GATT Subsidies code provides that "[i]t must be demonstrated that the subsidized imports are through the effects [footnote omitted] of the subsidy, causing injury within the meaning of this Agreement. There may be other factors [fn. 20] which at the same time are injuring the domestic industry, and the injuries caused by other factors must not be attributed to the subsidized imports." (Emphasis supplied). Footnote 20, referenced in the above quoted language, elaborates: "Such factors can include inter alia the volume and prices of non-subsidized imports of the product in question, contraction in demand or changes in the pattern of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry." Within the framework of the Subsidies Code, therefore, the contraction of U.S. demand for softwood lumber as a result of the decline in housing starts, the recession, and the decline in the supply of U.S. softwood lumber, would constitute such "other factors."

however, the Commission also employed an "analytical framework" to facilitate its evaluation of the relationship between the injury to the domestic industry and imports of Canadian softwood lumber. That framework specifies that "the impact of imports on domestic sales and prices [generally] is greater when:"[69/]

a) the imports are significant in volume, whether absolutely or relative to total consumption;

b) demand is inelastic (i.e., consumers are unwilling to purchase significantly more of the product as prices decrease); and

c) the products are considered by consumers to be close substitutes.

The Commission further noted that in the case of "fungible price sensitive commodity products, 'the impact of seemingly small import volumes and penetrations is magnified in the marketplace.' This is particularly true when, as here, the demand is inelastic and there is negligible third-country import competition."[70/]

The Commission found that all three conditions of the framework were satisfied in this case. The Canadian Complainants, however, contest the presence of one of the framework's conditions, arguing that the condition of "high substitutability" between U.S. and Canadian softwood lumber has not been met. The framework, in their view, is therefore inapplicable to this case.

69/ ITC Final, at 27.

70/ Id. at 28 (quoting Certain Carbon Steel Products from Spain, Inv. Nos. 701-TA-155, 157-160 & 162, USITC Pub. 1311, at 17 (Dec. 1982) (Final)).

1. Substitutability

The Commission found that, in general, lumber is a commodity product, with a substantial proportion of all lumber, regardless of origin, competing on the basis of price.[71/] It noted that this finding clearly was borne out within species groups, and that evidence on the record also demonstrated a significant degree of competition among species.[72/] In support of its finding, the Commission stated that "[b]oth U.S. and Canadian building codes treat softwood lumber species as almost entirely substitutable for common applications."[73/] In addition, the Commission noted that the U.S. Forest Service, in its forest management model ("TAMM"), considers the principal Canadian species group, SPF, to be fully substitutable with southern yellow pine ("SYP"), the principal U.S. species.[74/] The Commission further noted that in both its 1986 and 1982 investigations of softwood lumber from Canada it found softwood lumber to be a substitutable commodity product.[75/]

The Commission also found, citing to price correlations, that among species prices tend to move together, maintaining fairly consistent price differentials.[76/] It noted that despite long-held consumer preferences for certain species, variations in price differentials among species will cause purchasers to

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71/ Id. at 28.
72/ Id.
73/ Id.
74/ Id.
75/ Id. at 28 n.98.
76/ Id. at 28 n.101, A-89 n.73.

switch to a different species.[77/] On the basis of this information the Commission concluded that United States and Canadian softwood lumber are "highly substitutable" products.

The Canadian Complainants challenge this finding, arguing that it is unsupported by substantial evidence on the record, and refuted by substantial record evidence demonstrating that even significant price changes do not cause purchasers to switch from domestic softwood products to imports. Specifically, the Canadian Complainants argue that different species of softwood lumber do not trade on price; that they are not physically similar; and that they are not perceived by consumers to be nearly identical. In their view, consumer testimony shows that non-price factors, such as regional preferences and the suitability of particular species for specific end-uses, also are inconsistent with a finding of high substitutability.

The Canadian Complainants further assert that the Commission's finding that among species prices tend to maintain consistent price differentials is incorrect, arguing that the differentials varied from region to region and over time.[78/] They also challenge the Commission's reliance on building codes, the TAMM model, and the Commission's findings in the 1982 and 1986 softwood lumber investigations, contending that the cited materials do not constitute reliable evidence of a high degree of substitutability, or even any evidence of substitutability.

77/ Id. at 28-29.

78/ Complainants cite as an example a .64 correlation between the price of SPF, which accounted for 75 percent of Canadian exports in 1991, and the price of SYP, which accounted for 37 percent of United States production in 1991. Canadian Complainants' Joint Brief, at IV-42. This figure is challenged by the Coalition, which states that the correlation is in fact .71. Coalition Brief, at IV-46.

Finally, the Canadian Complainants dispute the Commission's substitutability finding on the basis of the differentiation in the Canadian and U.S. softwood lumber product mix. Counsel for the Canadian Complainants point out that the four species constituting 77 percent of United States production in 1991 made up only 5 percent of Canadian production, while SPF, which constitutes 77.7 percent of Canadian production, made up only 6.9 percent of United States production.[79/] According to the Canadian Complainants, this directly contradicts the Commission's finding that U.S. and Canadian softwood lumber are highly substitutable.

The Panel concludes that the difference in opinion between the Commission and the Canadian Complainants is one of degree. The Canadian Complainants accept that U.S. and Canadian softwood lumber are "moderately" substitutable,[80/] but argue that there is no basis for a finding that the products are "highly" substitutable. The Canadian Complainants are, however, prepared to accept the conclusion of the Commission's staff in its economic memorandum, which estimated the elasticity of substitution between U.S. and Canadian softwood lumber as falling in a range of 3 to 5. Counsel for the Commission argues that on the basis of the Commission's previous practice, that range represents moderate to high substitutability between products.[81/]

In considering this issue, the Panel was conscious of its obligation not to substitute its judgment for that of the Commission. It is for the Commission to

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79/ Panel Hearing Transcript, at 76; see also Canadian Complainants' Joint Brief, at IV-38, 39.
80/ Panel Hearing Transcript, at 84.
81/ Id. at 135-136.

weigh the evidence and reach a conclusion on the facts,[82] and it is not for the reviewing court, or this Panel, to displace the agency's choice "even though the [reviewing authority] would justifiably have made a different choice had the matter been before it de novo."[83] In this case, however, the Panel finds that the Commission's conclusion that U.S. and Canadian softwood lumber are "highly substitutable" is supported by substantial evidence on the record. In the Panel's view, a "reasonable mind might accept as adequate"[84] the evidence before the Commission offered in support of its finding of high substitutability.

2. The Analytical Framework Is Not Substantial Evidence

While the Panel concludes that the Commission's finding of high substitutability is supported by substantial evidence on the record, the Panel wishes to stress that the analytical framework, its conditions having been satisfied, does not in and of itself constitute substantial evidence of material injury by reason of Canadian imports. The analytical framework merely posits a greater likelihood of material injury due to imports. Indeed, the Commission itself states that when the conditions of the framework are satisfied, the impact of imports is "greater," not that the framework, in and of itself, establishes causation.[85]

In the Panel's view the analytical framework does not, and cannot, preordain a finding of causation. Nor can an economic theory, at least in a final injury investigation, substitute for specific facts or evidence on the record. In the

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82/ Metallverken Nederland B.V. v. United States, 13 Ct. Int'l Trade 1013, 1017, 728 F. Supp. 730, 734 (1989).
83/ Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).
84/ Id. at 477.
85/ ITC Final, at 27; see also Commission Brief, at 25.

latter respect, the Panel notes that the disposition of final investigations differs from determinations in preliminary investigations, principally in the evidentiary standard the Commission applies in assessing the effect and impact of subsidized imports on domestic prices and the domestic industry.

Specifically, in final investigations the Commission adopts conclusions supported by substantial evidence on the record. In preliminary investigations, however, the Commission's practice is to continue investigations unless persuaded that the evidence gathered supports only a determination that injury has not occurred, and that no further evidence would likely be gathered in a final investigation to support a contrary finding. Thus, the Commission may reach an affirmative preliminary determination on the basis of a factual record which clearly would not support such a decision at the final stage of a proceeding.

The courts are clearly of a similar view. In Republic Steel Corp. v. United States, the Court of International Trade noted that "the injury must be connected to importations from a country,"[86/] and then stated:

> For the ultimate enforcement of such a law, the Court distinguishes between evidence such as the behavior of supply and demand curves and the theoretical effect of increases in supply on prices (which may be sufficient to show a reasonable indication of injury), and evidence of specific actions and reactions in the market. The law is written to place final reliance on the detection of verifiable events .... Reliance on concrete evidence

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86/ 8 Ct. Int'l Trade 29, 591 F. Supp. 640, 646 (1984). Although the case concerned the proper standard for preliminary determinations, and while its holding on that standard subsequently was reversed (see American Lamb v. United States, 785 F.2d 994 (Fed. Cir. 1986)), the comments on the evidentiary requirements for a final determination remain unchallenged.

and verifiable events benefits all parties. It prevents preordained, formulated results of all types.[87/]

Other Court of International Trade decisions are to similar effect.[88/]

Thus, even if the analytical framework's conditions are satisfied, in order to reach an affirmative determination the Commission must make findings,

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87/ Id. (Emphasis supplied).

88/ In Daewoo Electronics Co., Ltd. v. United States, 15 Ct. Int'l Trade 124, 130, 760 F. Supp. 200, 206 (1991), the Court of International Trade made clear the necessity of an "adequate connection between a crucial determination and the evidence in the administrative record." In finding that the econometric technique relied upon by Commerce was divorced from the underlying data in the record, the Court stated: "It may have a theoretical basis and it may have support in the literature but it has not been shown to be sufficiently supported by facts in the record. In the absence of reliance on evidence derived from the data, which justifies the choice of one demand curve over another, the Court cannot affirm the results of this remand. Unless that is done, the results have the appearance in the end of being ordained by selection of the demand curve rather than arising from, and being based on, the data in the record .... [There is an] obligation to base such findings on substantial evidence." See also China Nat'l Arts and Crafts Import & Export Corp. v. United States, 15 Ct. Int'l Trade 417, 422, 771 F. Supp. 407, 411 (1991) (requiring "concrete evidence on the record.").

The parties have discussed in this context the concept of "positive evidence," which is included in the GATT Subsidies Code. (Canadian Complainants' Joint Brief, at IV-7 n.16; Commission Brief, at 42 n.83; Coalition Brief, at IV-19 n.61.) While this Panel is required to apply U.S. law (FTA art. 1904(2)), and U.S. law prevails over contrary GATT provisions (19 U.S.C. § 2504(a)), the Panel presumes that the "positive evidence" requirement of the Subsidies Code merely expresses the common sense view that economic theory is not a substitute for evidence on the record, and that, as the courts have stated, an affirmative decision by an agency must rest on concrete evidence and verifiable events. The Panel also notes the "necessity and desirability whenever possible, of harmonizing [the unfair trade law] with the international agreements it was intended to implement." Matsushita Elec. Indus. Co., Ltd. v. United States, 6 Ct. Int'l. Trade 25, 31, 569 F. Supp. 853, 859 (1983). The Court of International Trade also has commented favorably on the consistency of the "positive evidence" standard with U.S. subsidy law. Rhone Poulenc, S.A. v. United States, 8 Ct. Int'l Trade 47, 52 n.16, 592 F. Supp. 1318, 1324 n.16 (1984).

supported by substantial evidence, with respect to all three statutory factors (the volume of imports, the effect of the imports on domestic prices, and the impact of the imports on the domestic industry).

The Panel's views on the contested aspects of the Commission's causation analysis with respect to these factors are presented below.

C. Causation - The Statutory Factors

1. Volume

The Commission found that Canadian imports retained a significant share of apparent U.S. consumption in a declining U.S. market for softwood lumber throughout the period of investigation. In absolute terms, "[i]mports of Canadian softwood lumber increased from 14.1 billion board feet in 1986 to 14.6 billion board feet in 1987, and then declined to 11.7 billion board feet in 1991."[89/] In 1987, following the execution of the MOU on softwood lumber, the Canadian share of U.S. softwood lumber consumption showed a decline from its 1986 level as measured both by quantity and value.[90/] Furthermore, the Canadian market share thereafter continued to decrease in terms of quantity, registering a market share of 28.9 percent in 1987, and a share of 27.5 percent in 1991.[91/] When measured in terms of value, however, the Canadian market share increased from 26.9 percent to 28.3 percent during the same period.[92/] The Commission concluded on the basis of

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89/ ITC Final, at 26.
90/ Id. In 1986 Canadian market share stood at 29.5 percent by quantity, and 30.0 percent by volume. Id. at A-24.
91/ ITC Final, at 26.
92/ Id. at 27.

this information that the volume of Canadian imports was "significant" during the period of investigation, both absolutely and in terms of the share of the U.S. market held by Canadian imports.[93/]

The Canadian Complainants state their belief, citing the numerous Commission references to the volume of Canadian imports, that the Commission's determination effectively was based on volume alone.[94/] They argue that the volume of subject imports can be used as support for an injury determination when volumes are increasing, either absolutely or as a percentage of market share,[95/] but in the face of declining absolute volumes and static market share the presence of a significant volume of imports, in and of itself, is not evidence of injury.

In the Panel's view the law is clear. Causation cannot be proved by volume alone. As noted in Iwatsu Electric Co. v. United States, "the Court cannot envision a case in which causation could be proven by volume alone."[96/] The Commission itself has recognized this. In Animal Feed Grade DL-Methionine from France the Commission held that a sizable volume of sales into the United States and a corresponding market share "alone, however, [are] not indicative of a causal

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93/ Id.

94/ Canadian Complainants' Joint Reply Brief, at 31-32.

95/ See, e.g., Certain Stainless Butt Weld Pipe Fittings from Taiwan, Inv. No. 731-TA-564, USITC Pub. 2641 (June 1993) (Final) ("The increased market share of cumulated imports occurred both when consumption, by quantity, increased from 1990-1991 and was sustained as consumption decreased in interim 1992. [footnote omitted.] The significant increase in market share of the subject imports during the entire period of investigation leads us to conclude that the recession is not solely responsible for the decline in the condition of the domestic industry."). Id. at 11.

96/ 15 Ct. Int'l Trade 44, 51, 758 F. Supp. 1506, 1512-13 (1991), and other cases cited in Canadian Complainants' Joint Brief, at IV-104; see also SCM Corp. v. United States, 4 Ct. Int'l Trade 7, 12, 544 F. Supp. 194, 199 (1982).

relationship between the imports and the condition of the domestic industry in this investigation."[97] A Binational Panel in New Steel Rails from Canada also has affirmed that "the mere presence of imports is not sufficient to establish material injury."[98]

The Panel in fact does not understand the Commission to be arguing that causation in this case was based solely on the volume of Canadian softwood lumber imported into the United States. While the volume of Canadian imports was a required consideration under the statute, and constituted an important part of the Commission's analytical framework, it was not, according to the Commission, the only evidence of causation. Counsel for the Commission stated at the Panel hearing that "the Commission's decision isn't grounded on the volume of imports alone. It's grounded on the effects of those imports at the prices at which they are

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97/ Inv. No. 731-TA-255, USITC Pub. 1699, at 7 n.17 (May 1985) (Prelim.); see also Coated Groundwood Paper from Belgium, Finland, France, Germany and the United Kingdom, Inv. Nos. 731-TA-487-490 and 494, USITC Pub. 2467, at 53 (Dec. 1991) (Final). The Commission's position on this issue is long-standing. See Portable Electric Typewriters from Japan, Inv. No. AA-1921-145, TC Pub. 732, 40 Fed. Reg. 27,079 (1975) ("[I]mport penetration alone is not an adequate basis for determining injury."), and Hand-Operated Plastic Pistol-Grip Liquid Sprayers from Japan, Inv. No. AA-1921-138, TC Pub. 662 (1974) (in the absence of any other indication of injury, import penetration by itself is not an adequate basis for injury). See also Statement of U.S. International Trade Commission in Compliance with Remand Order dated September 23, 1981, in connection with SCM Corp. v. United States, 2 Ct. Int'l Trade 1, 519 F. Supp. 911 (Ct. Int'l Trade 1981) ("This conclusion really follows automatically from the statutory construction. If increasing penetration alone were adequate to show injury, such a conclusion could be reached by a computer, negating the need for the conceived scheme of economic analysis and weighing of all factors such as production, shipments, capacity utilization, employment and profitability by a collegial body of human beings .... [T]he mere fact of significant import penetration is not by itself capable of demonstrating injury. This is even more the case since the data show that import penetration dropped sharply in the last year for which information was collected.").

98/ USA-89-1904-09 and USA 89-1904-10, slip op. at 58, 87 (Aug. 13, 1990).

sold on the domestic industry and the domestic prices, the domestic market, and the domestic producers."[99/]

2. Price Effects (Suppression)

Although the Commission is not required to assess the effect of imported products on U.S. prices in any particular manner,[100/] such effects typically are established on the basis of pricing and other data, which may reveal the presence of significant price underselling, depression or suppression, or confirmed instances of lost sales. The Commission in this case undertook its review of the price effects of Canadian imports by evaluating a substantial quantity of both public and confidential questionnaire data. It noted that as part of its investigation it had gathered pricing information for seven domestic and imported products sold in different market areas during the period of January 1990 through March 1992.[101/] It also reviewed prices from the lumber industry publication Random Lengths, as well as price indices of the Bureau of Labor Statistics.[102/] Despite this wealth of information, the Commission concluded that while its pricing information was "accurate and reflected pricing trends in the market, its usefulness for reflecting comparative prices of domestic and imported lumber [was] limited."[103/]

99/ Panel Hearing Transcript, at 141-42; see also Panel Hearing Transcript, at 10, 178.
100/ Cemex, S.A. v. United States, 790 F. Supp. 290, 299 (Ct. Int'l Trade 1992), aff'd mem., 989 F.2d 1202 (Fed. Cir. 1993).
101/ ITC Final, at 29.
102/ Id.
103/ Id. at 30.

The information from questionnaire responses was found to be insufficient to ensure that pricing anomalies in the volatile softwood lumber market were kept in check so as to permit the Commission to make a valid determination regarding under- or over- selling.[104/] It also was noted that U.S. and Canadian producers often quote prices on different bases, the former generally quoting prices on an F.O.B. basis and the latter on a delivered basis. Furthermore, publicly available price information from Random Lengths was considered unsuitable for evaluating comparative prices, because the prices are not reported with the necessary degree of specificity and consistency.[105/]

As the pricing information was determined by the Commission to be of limited use in making direct pricing comparisons, the Commission was unable to make any finding concerning underselling by Canadian imports. The Commission also found that "prices of softwood lumber, both imported and domestic, generally increased during the period under investigation ...."[106/] Accordingly, the Commission could not make a finding with respect to price depression.

The Commission did, however, make a finding as to price suppression. The Commission determined that the cost of domestic softwood logs increased substantially during the period of investigation, "far out strip[ping]" any price increases,[107/] and found that "the inability of the industry to raise prices, commensurate with rapidly increasing costs, demonstrates significant price

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104/ Id.
105/ Id.
106/ Id. at 31.
107/ Id.

suppression."[108] It also concluded that imports of Canadian softwood lumber contributed to this price suppression. "The significant volume of subsidized Canadian lumber sold in the U.S. market has contributed to the inability of U.S. producers to increase lumber prices in the face of significant cost increases, resulting in material injury."[109]

The Canadian Complainants contest the Commission's determination, arguing that there is no substantial evidence on the record to support a finding that Canadian imports contributed to the suppression of U.S. prices, and, consequently, the injury to the U.S. industry.[110] The Canadian Complainants, while indicating that the Commission must make an affirmative determination that there is significant price suppression due to subject imports, also point out that alternate causes-the drop in demand caused by the reduction in housing starts, and the effects of the recession-can fully explain any price suppression in this case.[111]

The Panel has scrutinized the Commission's determination, and the arguments of counsel for the Commission and the Coalition, and is unable to discern any evidence (as distinguished from theory, argument, supposition, or assumption), factually demonstrating that imports of Canadian softwood lumber significantly suppressed U.S. softwood lumber prices during the period of investigation.

108/ Id. at 32.
109/ ITC Final, at 33; see also Commission Brief, at 59.
110/ Canadian Complainants' Joint Brief, at IV-26.
111/ Id. at 133-38.

a) SPF as a "Bellwether"

In its final determination the Commission found that imports of subsidized Canadian lumber suppressed prices of U.S. softwood lumber, thereby contributing to the material injury of the domestic industry.[112/] The link asserted by the Commission to establish price suppression by reason of Canadian lumber imports was the "significant influence on price movements in the U.S. market" of SPF.[113/] Specifically, the Commission found that:

> Prices for spruce-pine-fir (SPF) are a bellwether in the market, serving as a reference point for pricing .... The substantial volume of imported Canadian lumber in this important segment of the market limits potential increases in prices not only of U.S. produced SPF, but other species as well.[114/]

The meaning of the term "bellwether" and the specific scope or significance of the Commission's bellwether finding has been the subject of much debate in this case.[115/] Its

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112/ "The inability of the industry to raise prices, commensurate with rapidly increasing costs, demonstrates significant price suppression." ITC Final, at 32. "The significant volume of subsidized Canadian lumber sold in the U.S. market has contributed to the inability of U.S. producers to increase lumber prices in the face of significant cost increases, resulting in material injury to the industry." Id. at 33.

113/ Id. at 34; see also Commission Brief, at 92; Panel Hearing Transcript, at 170-71.

114/ ITC Final, at 31. (Emphasis supplied.)

115/ See, e.g., Panel Hearing Transcript, at 36, 140. The Panel has found four other Commission determinations in which the term "bellwether" appears. Carton-Closing Staples and Nonautomatic Carton-Closing Staple Machines from Sweden, Inv. Nos. 731-TA-117, USITC Pub. 1454, at 68 (Dec. 1983) (Final); Certain Carbon Steel Products from Austria and Sweden, Inv. No. 731-TA-219, USITC Pub. 1759, at 34 (Sept. 1985) (Final); Minivans from Japan, Inv. No. 731-TA-522, USITC Pub. 2402, at 91 (July 1991) (Prelim.); Minivans from Japan, Inv. No. 731-TA-522, USITC Pub. 2429, at 175 (July 1992) (Final). Each of these cases involved a very generic use of the term, and none involved use of the term in the context of pricing.

meaning in this context is not plain or obvious. The

term is not, for example, included in any of the several economic and legal dictionaries consulted by the Panel, and thus it appears that the term has no precise or even particular economic or legal significance. The American Heritage Dictionary, Third Edition, defines a "bellwether" as "one that serves as a leader or as a leading indicator of future trends."[116/] In the context in which the term was used by the Commission, a reasonable inference might have been that the Commission viewed SPF as a "[price] leader" or as a "leading indicator of future [price] trends." At the Panel hearing, however, counsel for the Commission stated that:

> The Commission didn't find that SPF prices are always the first to fall in the market or always the first to rise in the market. It didn't find the classical case of price leadership.[117/]

Thus, Commission counsel appears to be saying that the one meaning that the term "bellwether" might be expected to have in the current context, is the one meaning it doesn't have, an assertion that is even more puzzling in view of the fact that one of the cited supports for the Commission's finding is an earlier Commission

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116/ Other dictionary definitions of the term include: "one that takes the lead or initiative, leader" (Webster's Third New International Dictionary (1969)), and "a person or thing that takes the lead" (Random House College Dictionary (1988)).

117/ Panel Hearing Transcript, at 140.

investigation in which it found that "British Columbia mills [appear] to lead prices...."[118]

Taking Commission counsel's statement at face value, however, the Panel concludes that the Commission did not use the term "bellwether" in its dictionary sense, as a (price) leader. Nor did it actually regard SPF as a price leader, although price leadership is another of the traditional tools of finding causation in injury determinations. Rather, the Commission appears to believe that SPF is, as it in fact stated it to be, "a reference point for pricing [of domestic softwood lumber]."[119]

In so far as price leadership is concerned, the Panel notes that the Commission previously has found that "specific evidence of price leadership by imports generally is difficult to pinpoint [in a commodity market] because any lower price would likely be promptly matched by all competitors."[120] Nevertheless, the Commission in the cited case was able to find a "predominant price leader," and "aggressive pricing," to demonstrate "price declines even beyond the effect of the import volumes alone."[121]

118/ ITC Final, at 31 n.107.

119/ The Panel observes that SPF prices clearly could not be the exclusive reference point for pricing of domestic softwood lumber. SPF prices would, of necessity, be merely one of many such reference points (a great many factors go into establishing U.S. softwood lumber prices on a daily basis). The Panel would also observe that being a reference point for pricing (i.e., one of many), is a very different, and much more limited, role than being a price leader in the "classical" sense, the sense which has supported causation findings in numerous prior injury determinations.

120/ Certain Red Raspberries from Canada, Inv. No. 731-TA-196, USITC Pub. 1707, at 13 (June 1985) (Final).

121/ Id.

The specific evidence cited by the Commission in Red Raspberries from Canada was sufficient to support an unanimous affirmative determination. The circumstances of this case, however, appear to be quite different. SPF is not the lowest priced species in the market.[122/] Its volume and market share (in terms of quantity) decreased during the period of investigation.[123/] The Commission determined that both questionnaire data and publicly available materials were "not sufficient ... to make a reasoned judgment concerning under- or over- selling."[124/] In addition, lumber producers do not set their prices on the basis of SPF prices[125/] and, according to Commission counsel, SPF cannot be considered a price leader per se.[126/]

Regardless of the definition applied to the term "bellwether," the Commission must demonstrate the "significant influence" and price effects of SPF in order to support the conclusion that imports of Canadian SPF "limit" potential increases in U.S. prices. The Commission in this case purported to find the price limiting effect of SPF from its role as a "bellwether" in the market, and as a "reference point for pricing." The Commission offered as evidence a statement made in 1987 by an independent Canadian firm, which noted that "[t]he bellwether of forest industry health in North America is the price level of SPF random length 2x4 ... this product is the most widely traded commodity within Canada and the U. S.

122/ Panel Hearing Transcript, at 168.
123/ Id. at 169.
124/ ITC Final, at 30.
125/ Panel Hearing Transcript, at 169.
126/ See Panel Hearing Transcript, at 140.

and serves as an accurate measure of overall lumber prices."[127/] The Commission also cited to a finding in its 1985 Section 332 investigation of softwood lumber,[128/] as well as to the use of SPF prices by a leading commercial newsletter, Random Lengths. In addition, the Commission noted that SPF is used to fulfill deliveries of lumber purchased on the futures market.[129/]

In the Panel's view, the broad statements and conclusions contained in the ITC's 1985 Section 332 investigation and the 1987 Widman Report, even if they might support a finding that at the time SPF "appear[ed] to lead prices," are insufficient, without evidence developed in this investigation, to support the conclusion that SPF currently has a "significant influence" and price suppressing effect on the U.S. market. The 1985 Section 332 investigation obviously was based upon data from a period well before the period of investigation in this case[130/] and, moreover, was based largely on the same type of Random Lengths pricing data which the Commission found unusable for price comparison purposes in this case. Similarly, the Widman Report is based on 1986 and earlier data which may not be representative of current market conditions.

The Panel notes, for example, that in 1986 when the "bellwether" observation was made, SPF was the market share leader, making up

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127/ ITC Final, at 31 n.107 (quoting Canada's Forest Industry; Markets 87-90, at 43 (1987) (Widman Management Limited, Vancouver, B.C.)) [hereinafter "Widman Report"].
128/ Conditions Relating to the Importation of Softwood Lumber into the United States, Inv. No. 332-210, USITC Pub. 1765 (Oct. 1985).
129/ ITC Final, at 31 n.107.
130/ The 1985 Section 332 investigation utilized Random Lengths data for the period 1977-1984.

approximately 28.3 percent of apparent U.S. consumption,[131] compared with 24.8 percent for SYP. By 1991, however, SPF had dropped to approximately 27 percent of apparent consumption, while SYP had taken the lead at 29.4 percent.[132] The statements made in the Widman Report refer to different market conditions than those existing at the time of the Commission's determination in this case. The conclusions reached in that report therefore cannot support the Commission's finding without some indication of the continued validity of those conclusions in a changed marketplace.[133]

However helpful the 1987 and 1985 reports may be as evidence of SPF's "importance," they cannot make up for the lack of evidence on current market conditions demonstrating the "significant influence" and price limiting role of SPF. As the Commission itself has previously stated, it is required to make "an analysis of the current condition of the domestic industry at the time of the Commission's determination."[134] If the Commission is unable to demonstrate price effects from "current" information, it cannot substitute information from a prior period, particularly when there has been a significant change in the operation of the market (e.g., SYP/SPF market share reversal).

In addition, the Panel notes that the governing statute "does not authorize the Commission to base a material injury determination on the lingering

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131/ The Panel utilized the same methodology as that described in the ITC Final, at 31 n.108 for these calculations.

132/ ITC Final, at A24, A31, A70.

133/ See Armstrong Bros. Tool Co. v. United States, 84 Cust. Ct. 102, 115, 489 F. Supp. 269, 279 (1980), aff'd, 626 F.2d 168, 67 C.C.P.A. 94 (1980).

134/ 12 Volt Motorcycle Batteries from Taiwan, Inv. No. 731-TA-238, USITC Pub. 2213, at 11 (Aug. 1989) (Final). (Emphasis supplied).

effects of a past injury."[135/] To the extent that information relating to earlier periods was used to support the finding of SPF's role and effect on U.S. softwood lumber prices, the Commission may have been influenced improperly by the conditions existing before the period of investigation.[136/]

In the Panel's view, the remaining evidence cited by the Commission also does not support the conclusion that SPF has a current price suppressing effect, or that SPF significantly influences the U.S. softwood lumber market.

Random Lengths is the private industry publication to which "producers and importers report prices most frequently."[137/] It is cited, discussed and reproduced often throughout the record of this case. Nowhere in the record, however, has the Panel been able to discover any evidence to support the conclusion that the location of SPF prices in a portion of Random Lengths numerous price listings renders SPF a "key" price. Nor does the evidence support the Commission's claim that the "composite price for 2x4s ... is an important guide to pricing in the market."[138/] It seems somewhat incongruous that these claims, presented in a footnote, immediately follow a section where the Commission notes that: 1) Random Lengths is published "for purposes of reporting general trends and price levels for the information of producers and purchasers;" and 2) prices "are not

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135/ Chr. Bjelland Seafoods A/C v. United States, No. 91-05-00364, slip op. 92-196 at 17, 22 (Ct. Int'l Trade Oct. 23, 1992).
136/ See Mitsubishi Materials Corp. v. United States, 820 F. Supp. 608 (Ct. Int'l Trade 1993).
137/ ITC Final, at A-76.
138/ Id. at 31 n.107. The Commission notes in its brief that the composite price "for 2x4s" in fact is based on prices for "framing lumber." Commission Brief, at 89 n.201.

reported with the degree of specificity and consistency necessary to enable us to rely on them for developing price comparisons."[139/]

Similarly, the use of SPF in fulfillment of futures contracts also fails to support any conclusion as to the price effect of SPF or its "significant influence" in the U.S. market. The SPF futures market plays a limited role, with sales totaling less than 1 percent of the total market for SPF.[140/] Arguments over how delivery rules and transportation costs affect species choice do not obscure the fact that very few questionnaire respondents, even with the option listed first, indicated that futures prices have any effect on pricing considerations.[141/] There is no indication in the record beyond mere supposition to support the claimed importance of futures market prices. There also is no evidence indicating how and to what extent the futures market affects softwood lumber pricing generally. In the absence of evidence demonstrating actual price effects, the mere availability of SPF futures quotes in the Wall Street Journal[142/] does not support the contention that SPF or the SPF futures market affects lumber prices generally.

The Panel does not determine that U.S. softwood lumber prices could not be, or were not, in some way "influenced" by SPF prices during the period of investigation. Rather, the Panel finds that the "evidence" cited by the Commission does not constitute substantial evidence of the "significant influence" and price limiting role of SPF. If actual effects on U.S. prices, such as those involved in Red Raspberries from Canada, had been found, price suppression might

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139/ ITC Final, at 30.
140/ CFIC Pre. Br., Ex. 18 (Pub. Doc. 7, List 2).
141/ Canadian Complainants' Joint Brief, at IV-62.
142/ Panel Hearing Transcript, at 242.

have been adequately supported. In this case, however, the Commission failed to demonstrate the actual price suppressing effect of SPF and, therefore, failed to demonstrate significant price suppression by reason of imports of Canadian SPF.[143/] In the end, therefore, the Commission's finding appears to rest on the significant volume of Canadian SPF imports and the inference that, by virtue of SPF's "importance," imports of Canadian SPF limit price increases in the U.S. market. As noted previously by the Panel, however, causation cannot be demonstrated by the mere presence of a significant volume of imports.

b) The Cost/Price Squeeze

The Commission found that the domestic softwood lumber industry was caught, during the period of investigation, in a cost/price squeeze, noting in its final determination that the "inability of the industry to raise prices, commensurate with rapidly increasing costs, demonstrates significant price suppression."[144/] While domestic supply and demand conditions could explain that outcome, the Commission specifically noted that Canadian log costs did not increase as steeply as in the United States, and that "one obvious and relevant factor affecting Canadian log costs is the subsidy Commerce determined is received by

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143/ The Court of International Trade has rejected reliance on assumptions where no concrete evidence exists to support a finding (China Nat'l Arts and Crafts Import & Export Corp. v. United States, 15 Ct. Int'l Trade 417, 422, 771 F. Supp. 407, 411 (1991)), and has rejected findings based on theories alone. "[W]ithout a strong demonstration of linkage between the data and the chosen form, the threat exists that the administrative process can become a matter of choice between theoretical techniques which are equally defensible in the abstract, but which do not have a proper grounding in substantial evidence." Daewoo Electronic Co., Ltd. v. United States, 15 Ct. Int'l Trade, 124, 132, 760 F. Supp. 200, 207 (1991).

144/ ITC Final, at 32.

Canadian lumber producers."[145] The Commission also referred to the extremely competitive nature of the two country lumber market, where "purchasing decisions are sensitive to relatively small changes in price."[146] It then immediately moved to the conclusion that "the significant volume of subsidized Canadian lumber ... has contributed to the inability of U.S. producers to increase lumber prices in the face of increasing costs, resulting in material injury to the industry."[147]

Although the Commission may not weigh causes, and is not required to find that subsidized imports are anything more than a cause of material injury,[148] it is incumbent upon the Commission to cite substantial evidence linking its finding of significant price suppression (due to the cost/price squeeze or otherwise) to the imports of Canadian softwood lumber. An "agency must make findings that support its decision, and those findings must be supported by substantial evidence (citations omitted) .... [It must] articulate any rational connection between the facts found and the choice made."[149]

The limited discussion by the Commission of the relationship between the domestic cost/price squeeze and the Canadian imports concerned the effect of the subsidy on Canadian log costs. While it is, as noted by one Commissioner,[150] the responsibility of the Commerce Department to make

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145/ Id.
146/ Id. at 33.
147/ Id. at 33. (Emphasis supplied).
148/ Encon Industries Inc. v. United States, No. 92-01-00026, slip op. 92-164, at 4-5 (Ct. Int'l Trade Sept. 24, 1992).
149/ Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962).
150/ ITC Final, at 32 n.113. The ITC is neither required to examine, nor barred from examining, a subsidy. Copperweld Corp. v. United States, 12 Ct. Int'l Trade 148, 154, 682 F. Supp. 552, 559 (1988); Hyundai Pipe Co. v. U.S. Int'l Trade Comm'n, 11 Ct. Int'l Trade 117, 122, 670 F. Supp. 357, 359 (1987).

determinations regarding the existence of a countervailable subsidy, it is the responsibility of the Commission to determine whether the subsidized imports adversely affect U.S. prices and the domestic industry.

The Panel finds that the Commission merely inferred that, due to the existence of Canadian subsidies, imported Canadian lumber must have contributed to the significant suppression of U.S. softwood lumber prices. In the absence of demonstrated price effects linking the subject imports to significant price suppression, however, the Commission's conclusion necessarily rests solely on the significant volume of Canadian imports. As discussed above, volume alone is insufficient to prove causation.

(1) "Increases, Which Otherwise Would Have Occurred"

The Canadian Complainants specifically argue in this context that the Commission failed to provide a reasoned explanation why domestic lumber prices could be expected to increase more than they did during the period of investigation. They contend that the Commission did not consider the business cycle_the massive drop in lumber demand that occurred during the period of investigation_as required by 19 U.S.C. § 1677(7)(C)(iii). The Canadian Complainants also cite the "perfectly competitive" nature of the softwood lumber market, as well as statements in prior Commission determinations (e.g., "prices are expected to soften during a downturn in the business cycle"),[151/] for the proposition

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151/ Coated Groundwood Paper from Belgium, Finland, France, Germany, and the United Kingdom, Inv. Nos. 731-TA-487-90 and 494, USITC Pub. 2467, at 21 (Dec. 1991).

that no higher prices could be expected in this case. According to the Canadian Complainants, in a market with over 6,700 individual U.S. and Canadian sellers no participant can unilaterally establish prices.[152/]

Counsel for the Commission responds by pointing out that the conditions of the market in this case_namely the restrictions on the supply of U.S. softwood lumber, and the price inelastic demand for lumber_provide the basis for concluding that prices could be expected to increase.

In light of the significant drop in U.S. demand for softwood lumber, and the Commission's prior determinations with respect to the effect of a recession on prices, the Panel finds that the Commission has failed to make its rationale clear on the record, by explaining the basis for its conclusion that greater "price increases ... otherwise would have occurred." The Commission must provide an adequate explanation of its findings in order to permit meaningful review.[153/] Such an explanation also is desired to aid in the predictability of future agency determinations.[154/] The Panel considers an adequate explanation to be

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152/ The Commission in its final determination noted that data obtained from Commerce indicate that in 1991 there were 5,680 producers of softwood lumber in the United States. ITC Final, at 14 n.41. Canadian Government statistics indicate that in 1990 there were almost 1,100 sawmills and planing mills in Canada.

153/ New Steel Rails from Canada, USA 89-1904-07, at 15 (June 8, 1990).

154/ Certain Carbon Steel Products from Austria and Sweden, Inv. Nos. 701-TA-225, 227, 228, 230 and 231, USITC Pub. 1759, at 30 (Sept. 1985) (Final) (Views of Commissioner Eckes) ("Durable guidelines are essential if our industries and our trading partners are to plan their economic activities with a view to international principles of transparency and predictability in trade decisions. Consistency encourages confidence in the essential fairness of the decision makers."); see also FTA art. 1902(2)(d)(ii).

particularly important in this instance, as the finding that the subject imports suppressed prices "to a significant degree" is merely implied.[155/]

If, on remand, the Commission finds price suppression due to the subject imports, the Panel requests that the Commission address the issues raised in this section of the Opinion, and substantiate its finding that the subject imports suppress prices "to a significant degree," as specified in 19 U.S.C. § 1677(7)(C)(ii).

(2) Independent Evidence

The Coalition argues that the mere existence of the cost/price squeeze is independent evidence that imports of subsidized Canadian softwood lumber were responsible, at least in part, for the price suppression found by the Commission.[156/]

In the primary cost/price squeeze case cited by the Coalition, Certain Fresh Atlantic Groundfish from Canada,[157/] the Commission found that the additional source of supply provided by increased imports "acts to suppress to some degree the price increases" that otherwise would have occurred.[158/] "[D]omestic prices ... are lower than they would have been without the increase in subsidized imports."[159/] The Coalition also cites to Aspherical

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155/ See Cemex, S.A., 790 F. Supp. at 298.
156/ Panel Hearing Transcript, at 220, 222.
157/ Inv. No. 702-TA-257, USITC Pub. 1844 (May 1986) (Final).
158/ Id. at 16.
159/ Id. at 16. (Emphasis supplied). The three Commissioners casting negative votes mentioned the lack of "conclusive evidence ... presented to support, or conversely to disprove," price suppression. They also indicated that protecting market share, and keeping prices "affordable," "is not injurious, but rather desirable." Id. at 21 n.8.

Ophthalmoscopy Lenses from Japan,[160] in which the importer "drastically cut prices of its products sold in the U.S. market," thereby "increas[ing] its share of the market at the expense of" the domestic producer.[161] In Stainless Clad Steel Plate from Japan,[162] and Certain Iron Metal Castings from India,[163] there was "staggering" growth in import penetration, and import prices consistently below those of the domestic industry. In Certain Residential Doorlocks from Taiwan,[164] and Erasable Programmable Read Only Memories from Japan,[165] there was substantial underselling by the imported merchandise.

The Panel notes that in each of the cases relied on by the Coalition factors apart from any cost/price squeeze, such as increased imports, price reductions, and underselling, were present to substantiate the Commission's findings. In the judgment of the Panel, the mere fact that a domestic cost/price squeeze exists, in the absence of additional factors indicating causation, does not demonstrate that the imports are responsible for any price suppression.

160/ Inv. No. 731-TA-518, USITC Pub. 2498 (Apr. 1992) (Final).
161/ Id. at 15.
162/ Inv. No. 731-TA-50, USITC Pub. 1270 (July 1982) (Final).
163/ Inv. No. 303-TA-13, USITC Pub. 1098 (Sept. 1980) (Final).
164/ Inv. No. 731-TA-433, USITC Pub. 2198 (June 1989) (Prelim.).
165/ Inv. No. 731-TA-288, USITC Pub. 1927 (Dec. 1986) (Final).

3. Causation Summary

SPF has been demonstrated to be the major Canadian species imported into the United States. It is used to fulfill futures contracts, and reported regularly in price guides. It also may have been a "bellwether" or even a price leader in the mid-1980s. The Commission cites to no current information, however, supporting the conclusion that SPF at the time of the contested determination had a "significant influence" on U.S. softwood lumber prices, such that imports of Canadian SPF could be found to "limit" increases in U.S. softwood lumber prices.

The argument that the cost/price squeeze alone is evidence of a price effect fails because there is a plausible explanation which does not involve suppression by Canadian imports_the decline in U.S. demand for softwood lumber. Even if such suppression in fact has been caused in part by Canadian imports, that conclusion may not simply be presumed by the Commission. Substantial evidence on the record must support the Commission's finding of price suppression by reason of Canadian imports. The court has rejected a "mere possibility" standard on numerous occasions.[166/]

Price suppression in past Commission investigations has always been demonstrated by price information or trend data. In this case, the Commission's determination of price suppression by reason of imports of Canadian softwood lumber uses the likelihood that those imports have a price effect, coupled with their significant volume, to presume significant price suppression by such imports. In the absence of any demonstrated price, share, or volume changes, however, the

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166/ Chung Ling Co. v. United States, 805 F. Supp. 45, 52 (Ct. Int'l Trade 1992); China Nat'l Arts and Crafts Import & Export Corp., 15 Ct. Int'l Trade at 426, 771 F. Supp. at 415; Asociacion Colombiana de Exportadores de Flores v. United States, 13 Ct. Int'l Trade 13, 15, 704 F. Supp. 1114, 1117 (1989), aff'd, 901 F.2d 1089 (Fed. Cir. 1990), cert. denied, 111 S. Ct. 1308 (1991).

Panel considers the likelihood of injury to be nothing more than a likelihood. In Sulfur Dyes from China and the United Kingdom,[167] the Commission found import market shares of up to 30 percent, but nevertheless concluded that "due to the lack of significant volume or price effects of the subject imports, we do not find a sufficient impact by the [unfairly traded] imports on the industry to warrant an affirmative determination."[168]

The Commission and the Coalition have cited numerous cases indicating that affirmative determinations can properly be made when consumption is declining,[169] when imports are declining,[170] when there is no evidence of underselling or lost sales,[171] when there is no change or a reduction in import market share,[172] or when import prices are increasing.[173] In each of these determinations, however, one or more of the criteria indicating the effects of the

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167/ Inv. Nos. 731-TA-548 and 551, USITC Pub. 2602 (Feb. 1993) (Final).
168/ Id. at 30.
169/ Shop Towels from Bangladesh, Inv. No. 731-TA-514, USITC Pub. 2487 (Mar. 1992) (Final).
170/ Certain Telephone Systems and Subassemblies Thereof from Korea, Inv. No. 731-TA-427, USITC Pub. 2254 (Jan. 1990) (Final); British Steel Corp. v. United States, 8 Ct. Int'l Trade 86, 593 F. Supp. 405 (1984); Sparklers from the People's Republic of China, Inv. No. 731-TA-464, USITC Pub. 2306 (Aug. 1990) (Prelim.).
171/ Florex v. United States, 13 Ct. Int'l Trade 28, 39, 705 F. Supp. 582, 593 (1989).
172/ Fresh and Chilled Atlantic Salmon from Norway, Inv. Nos. 701-TA-302 and 731-TA-454, USITC Pub. 2371 (Apr. 1991) (Final); Certain Personal Word Processors from Japan, Inv. No. 73-TA-483, USITC Pub. 2411 (Aug. 1991) (Final).
173/ Certain Fresh Atlantic Groundfish from Canada, Inv. No. 701-TA-257, USITC Pub. 1844 (May 1986) (Final).

imports was present. No prior affirmative determinations without any of these indications have been noted.

While not required to assess price suppression in any particular manner,[174/] the Commission must still base its findings on evidence of record. As Commission counsel stated at the Panel hearing, a comment with which we emphatically agree, "it's the evidence that drives the determination ...."[175/] In this case the Panel has been unable to discover any actual evidence of injurious shifts in market share, rising import volume, decreasing prices, underselling, lost sales, or even price leadership. The mere presence of a significant volume of imports, even unfairly traded imports, is not sufficient to demonstrate injury. This per se injury rule has been rejected by the Commission, as well as the Court of International Trade.[176/]

The conclusion reached by the Commission concerning the suppression of softwood lumber prices in the United States by reason of Canadian imports is based solely on a "handful of broad statements ... [which] do not begin to satisfy the criteria that the Commission's injury determination must be supported by rationally-based findings."[177/] Inferences made by the Commission can be

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174/ Cemex S.A., 790 F. Supp. at 299.
175/ Panel Hearing Transcript, at 46.
176/ SCM Corp., 4 Ct. Int'l Trade at 13, 544 F. Supp. at 199; see also New Steel Rails from Canada, USA-89-1904-09 and USA-89-1904-10, at 59 (Aug. 13, 1990).
177/ Mitsubishi Materials Corp. v. United States, 820 F. Supp. at 622.

supported only when based on facts found in the record.[178/] A finding of material injury requires more than speculation.[179/]

D. The Cross-Sectoral Comparison

1. Background

a) The Commission's Finding and the Arguments of the Parties

The Commission in its final determination found that the evidence of price suppression demonstrates that the domestic recession and the environmentally-related reduction in timber supplies were not the only causes of material injury to the domestic industry; the domestic industry's woes also were caused in part by imports of Canadian softwood lumber.[180/] The Commission then found that "[a] comparison of the performance of U.S. producers on their softwood lumber operations and their operations producing other wood products and building materials confirms that [basic] conclusion."[181/] The Commission specifically determined that the softwood lumber operations of selected U.S. producers were

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178/ See Republic Steel Corp. v. United States, 8 Ct. Int'l Trade 29, 35, 591 F. Supp. 640, 646 (1984).
179/ Commission Brief, at 42 n.83 (citing Matsushita Elec. Indus. Co. v. United States, 6 Ct. Int'l Trade 25, 29, 569 F. Supp. 853, 857-58 (1983), rev'd, 750 F.2d 927 (1984)).
180/ ITC Final, at 33.
181/ Id. (Emphasis supplied).

performing worse than the wood products and building materials operations of those same producers.[182/]

At the hearing before the Panel, the parties considered this "cross-sectoral comparison"[183/] issue at some length, both in the context of the legal authority for such a comparison and its substantive value. Counsel for the Commission and the Coalition argued for both its value and validity. The Canadian Complainants, however, in response to questioning from the Panel, suggested that in light of the legislative history of the statute, a portion of which had been noted by

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182/ This argument was first raised at the time of the Staff Conference, when counsel for the Coalition argued that "[o]ther building products subject to the recession and supply concerns but insulated from subsidized Canadian competition have performed much better than softwood lumber during this period of recession." Pub. Doc. 32, List 1, at 11. In its final determination, the Commission stated that such a comparison of the softwood lumber industry with the "wood products and building materials" industries was relevant because:

- softwood lumber and wood products and building materials are similarly marketed and financed and are commonly manufactured by the same companies; and
- the same macroeconomic factors, particularly increased timber costs, the recession, and the downturn in housing starts, affected the softwood lumber industry and the wood products and building materials industry during the period of investigation. ITC Final, at 33.

According to the Commission, this phenomenon was explained by the fact that "[p]lywood production constitutes a significant portion of production of wood products and building materials other than softwood lumber. There is a significant tariff on imports of plywood." Id. at 33 n.115.

183/ For convenience, the Panel adopts the phrase "cross-sectoral comparison" to describe the Commission's comparison of the financial results of the wood products and building materials industries with the financial results of the softwood lumber industry or, in other contexts, to describe a generic comparison, financial or otherwise, between an industry under formal investigation by the Commission and an industry not being formally investigated in the same proceeding.

the Commission in its preliminary determination, the Commission's use of such a comparison might well be improper.[184/] The Canadian Complainants at the hearing[185/] and in their briefs[186/] also argued that a cross-sectoral comparison such as this was an "unprecedented" procedure or practice.

As to the substance of the cross-sectoral comparison, the Canadian Complainants level three main criticisms:

184/ Panel Hearing Transcript, at 55-60.

185/ In response to a question from the Panel whether the Commission had ever utilized such a cross-sectoral comparison to decide a case, counsel for the Canadian Complainants responded: "We have not been able to uncover a single case in which the Commission has used a comparison where it looked at one industry like lumber and some broad amalgam of identified other industries on the other. No. We think it's completely unprecedented." Id. at 59-60.

Counsel for the Coalition subsequently noted at the Panel hearing that the Commission's final determination in 12-Volt Motorcycle Batteries from Taiwan, USITC Pub. 2213, Inv. No. 731-TA-238 (Aug. 1989), involved a comparison of motorcycle battery (the investigated industry) performance to automobile battery (a non-investigated industry) performance. Id. at 230.

186/ Canadian Complainants' Joint Reply Brief, at page 5 states:

> Perhaps recognizing this, the Commission elsewhere in its brief suggests that the comparison between the financial performance of softwood lumber and other wood products and building materials is the fundamental, if not the sole, basis for its linkage of price suppression to imports. ITC Brief at 57-58, 105-106, 108. For the first time in the Commission's history, it suggests that the price suppression can be attributable to imports either solely or principally on the basis of such a broad cross-sectoral financial comparison. The Commission admits it has never before reached an affirmative determination in reliance on such an analysis. ITC Brief at 102. (Emphasis in original).

> While the flaws in this comparison are pervasive, there are three in particular that would have prevented any reasonable decision maker from considering it probative on the issue of causation. First, the Majority lacked the information necessary to know whether the financial comparison, in fact, isolated for the effect of Canadian imports. Second, the information the Majority did have indicated that significant differences existed between the cost and demand conditions affecting lumber and industries producing other building products. Third, the Majority failed to account for verified financial data showing comparable performance between lumber and plywood, the industry the Majority necessarily had to consider the best benchmark against which to compare lumber's performance.[187/]

The Canadian Complainants build upon each of these criticisms, arguing with respect to the first, for example, that the Commission cites no evidence to support its assumption that lumber and building products are "equally affected either by increased timber costs, the recession or the downturn in housing starts. It did not because it could not. The Commission did not collect the information necessary to enable it to know whether its assumption was valid or not."[188/]

187/ Panel Hearing Transcript, at 48-49.

188/ Id. at 49-50. On the data collection issue, the Canadian Complainants comment further:

> With respect to the effect of increased timber costs, the Commission had detailed per unit manufacturing costs, including per unit log costs for all producers responding to ITC questionnaires. The Commission thus knew [ ] precisely how these companies log costs changed each year, both absolutely and relative to total costs on both a regional and national basis.
>
> At the same time, the Commission collected detailed consumption data which, along with company and industry-wide production data and a wealth of other factors, permitted it to determine precisely to what extent the recession and the downturn in housing starts had affected both those lumber producers responding to the ITC questionnaire and the lumber industry as a whole over the period of investigation.
>
> What about the industries producing other building products? The contrast could not be more stark . . . . [T]he Commission collected no comparable data on either the cost or demand side of the equation. The Commission lacked any information on how wood raw material costs changed over the period of investigation for any of the other building products industries in the ITC sample.
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> The Commission was also completely in the dark with respect to demand. It collected no consumption data or production data for any of the other building products industries . . . .

(continued...)

b) The Preliminary and Final Investigations

Information regarding the financial performance of the wood products and building materials industries was gathered in an ad hoc manner during the course of the Commission's proceedings. Those industries were not within the scope of Commerce's investigation in this case, nor were they found by the Commission to be within the scope of its investigation.[189/] Thus, there was no

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(...continued)

> As a result, there was no basis other than speculation either for the Majority's assumption that lumber and building products should have performed comparably . . . . [S]peculation cannot substitute for substantial evidence.
>
> Id. at 50-51.

189/ Under 19 U.S.C. § 1671(a)(1), the Commerce Department determines whether a subsidy is provided with respect to the manufacture, production, or exportation of the "class or kind of merchandise" imported into the United States. This determination in effect defines the scope of Commerce's investigation. Hosiden Corp. v. United States, 810 F. Supp. 322 (Ct. Int'l Trade 1992).

Under 19 U.S.C. § 1677(4)(A), the term "industry" is defined to mean the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product. 19 U.S.C. § 1677(10) in turn defines the term "like product" to mean a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to investigation. These determinations in effect define the scope of the Commission's investigation. See Algoma Steel Corp., Ltd. v. United States, 12 Ct. Int'l Trade 518, 522-23, 688 F. Supp. 639, 644 (1988) ("In applying the statute, ITC does not look behind ITA's determination, but accepts ITA's determination as to which merchandise is in the class of merchandise sold at LTFV. ITC, on the other hand, determines what domestic industry produces products like the ones in the class defined by ITA and whether that industry is injured by the relevant imports."), and Hosiden Corp., 810 F. Supp. at 328 ("The plain language of the statute therefore limits the Commission to individual determinations of whether a domestic industry producing products like each separate class or kind of imported article is being injured by each separate class or kind of imported merchandise designated by Commerce."). Commerce and the Commission have distinct and independent roles and the cases hold that the Commission does not have power to modify a position taken by Commerce. See, for example, Torrington Co. v. United States, 14 Ct. Int'l Trade 640, 648, 747 F. Supp. 744 (1990) (The Commission "does not have authority to modify [Commerce's] finding of class or kind . . .").

direct investigation by the Commission of these non-subject industries, although certain data regarding them was accumulated by, or otherwise available to, the Commission during the course of its investigation of the softwood lumber industry.

Not surprisingly, the information provided by the Coalition and the Canadian Complainants on this point was contradictory. In the preliminary investigation, the Coalition offered a graphical comparison of the (adverse) operating profit margins for softwood lumber as compared to all other building products, backed up by financial data for a select, but small group of companies that produced both types of products.[190/] The Canadian Complainants argued that an accurate look at the most specific comparison of plywood to softwood lumber required a conclusion that the prices of the two products were "in virtual

190/ Post-Conf. Br., Pub. Doc. 37, List 1, Figure 9; Conf. Doc. 2, List 2, Table 9A.

lockstep."[191] The Canadian Complainants also offered data that showed the multifarious nature of the wood products and building materials industries.[192]

In its preliminary determination,[193] the Commission addressed the cross-sectoral comparison issue for the first time, in terms that were largely negative:

> Much of the information and argument presented on the question of whether the lumber industry is performing 'as well as could be expected' in the current economic conditions, and therefore cannot be deemed materially injured, was based on a comparison of the performance of the lumber industry with that of other construction related industries. As noted above, 19 U.S.C. § 1677(7)(C)(iii) specifies that the Commission 'shall examine all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.' [footnote omitted]. While other construction-related industrial sectors are no doubt affected by many of the same overall economic factors as the lumber industry, we do not believe these comparisons

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191/ Posthearing [Post-Conf.] Br., Pub. Doc. 38, List 1, at 15.

192/ Exhibit 8 to the CFIC brief, entitled "Annual Profitability of Wood Products & Construction Materials Industries, 1988-1990," which was based on Dun & Bradstreet, Industry Norms & Key Business Ratios, Three-Year Edition, 1990-91, indicated the broad range of building products that would have some potential relevance as a cross-sectoral comparison to softwood lumber. These included sixteen different "selected wood products" categories and twelve different "construction materials" categories. In footnote 35 to its brief, CFIC criticized the Coalition's comparison chart in part because the Coalition failed to identify the specific building products sectors used to develop the comparison.

193/ Softwood Lumber From Canada, Inv. No. 701-TA-312, USITC Pub. 2468 (Dec. 1991) (Aff. Prelim.).

clearly and convincingly demonstrate that the domestic industry is not materially injured.[194/]

In its footnote 56, the Commission focused on the legislative history to the language quoted above in 19 U.S.C. § 1677(7)(C)(iii), which had been added to Title VII by the Omnibus Trade and Competitiveness Act of 1988. That legislative history emphasized that "[a]n industry's health should be determined in the context of the impact that imports are having on that industry. Furthermore, the condition of an industry should be considered in the context of the dynamics of that particular industry sector, not in relation to other industries or manufacturers as a whole."[195/]

In its preliminary determination, therefore, the Commission appeared to go two directions at once. It expressed concern about its statutory authority to examine industries ("construction related industries") outside the industry under investigation (softwood lumber) but concluded, notwithstanding any such concern, that the comparisons that were being drawn by the parties to such non-investigated industries did not clearly and convincingly overcome the conclusion otherwise reached that there was a reasonable indication that the domestic softwood lumber industry was suffering material injury.

194/ Id. at 14. (Emphasis in original).

195/ Id. at 15 n.56. (Emphasis in original) (citing H.R. Rep. No. 40, 199th Cong., 1st Sess. 128 (1987); S. Rep. No. 71, 100th Cong., 1st Sess. 117 (1987)). The Commission noted that "[a]lthough the House and Senate committees were specifically addressing provisions in the predecessor bills to the [1988 Act] which effected the amendment, the specific proposed statutory language was the same as that actually enacted, compare section 154 of H.R. 3 and section 330 of S. 490 with 19 U.S.C. § 1677(7)(C)(iii), and that Congress adopted the legislative histories of the predecessor bills as the legislative history of the [1988 Act]." Id.

During the final investigation, the Coalition continued to argue that both questionnaire data and public data demonstrated that the softwood lumber industry was performing "more poorly" than other building products,[196] while the Canadian Complainants argued for the most part that this data was misinterpreted and incomplete.[197] At the formal Commission hearing held May 28, 1992, some discussion of the cross-sectoral comparison was entered into, particularly with Commissioner Nuzum, who inquired whether there was "any basis, legal basis or economic basis, for looking at other industries and other sectors that are also closely tied to the housing market and examining the condition of those particular industries in an effort to try and ascertain the effects of the recession on the softwood lumber industry as opposed to other effects."[198]

As had earlier staff reports, the Final Staff Report submitted to the Commission on June 19, 1992, failed to address the cross-sectoral comparison

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196/ Conf. Doc. 6, List 2, at 22-24.

197/ The Canadian Complainants' economist argued that the Coalition's exhibit comparing softwood lumber with plywood included data only from 1988 to 1990, omitting 1991 data. After including the more current data, he found that there was "virtually no difference between plywood and lumber." He also criticized the Coalition's wood products comparison, arguing that at the beginning of the period of investigation lumber enjoyed a higher return on fixed assets than wood products, and that imports could not be responsible for the subsequent reversal in that position since their share didn't change. He further criticized the Coalition's implicit argument that wood products and lumber had the same degree of "cyclical sensitivity." He believed such an assumption to be unwarranted since wood products were at the retail end of the market and would not be as cyclically sensitive as lumber, which was at the production end. Pub. Doc. 195, List 1, at 167-69.

198/ Hearing Transcript, Pub. Doc. 195, List 1, at 128-129.

issue in any manner.[199/] On this record, and despite the concerns it had expressed in the preliminary determination, the Commission used the cross-sectoral comparison to "confirm" its finding that Canadian imports in part caused the suppression of U.S. softwood lumber prices.

2. The Legal Issues

The Panel has serious concerns as to the statutory authority per se of the Commission to conduct cross-sectoral comparisons, and as to the methodology employed by the Commission to carry out this particular cross-sectoral comparison.

a) Statutory Authority

As to the question of statutory authority, the Panel has examined the specific language of the statute, the overall language and design of Title VII, and the extensive legislative history of the 1979 and 1988 trade acts, only a portion of which was cited by the Commission in its preliminary determination.[200/] In light of this, the Panel is aware that it might be argued that

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199/ Pub. Doc. 225, List 1. Neither the Preliminary Staff Report, Pub. Doc. 48, List 1, issued December 6, 1991, nor the Prehearing Staff Report, Pub. Doc. 147, List 1, issued May 11, 1992, discussed the cross-sectoral comparison issue.

200/ The Panel has already discussed the standard of review applicable to its efforts in this case, but would reiterate that agency interpretations of statutes which they are charged with administering shall be sustained if permissible, unless Congress has directly spoken to the precise question at issue, or unless the text of the statute and/or its legislative history indicates that the agency's interpretation is not one Congress would have sanctioned. In K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988), the Supreme Court, per Justice Kennedy, defined the inquiry as whether Congress had made its intentions known in the "plain meaning" of the statute, which requires an examination of "the particular statutory language at issue, as well as the language and design of the statute as a whole."

Congress intended, by virtue of its 1979 and 1988 amendments to Title VII, to delimit or confine the Commission's injury investigation to the defined domestic "industry," and that it was not Congress's intent to have the Commission engage in ad hoc examinations of one or more nonsubject industries to justify or support a determination with respect to an investigated industry.

Nevertheless, the Panel recognizes that neither the Commission nor the parties have focused significant attention on this issue; that the Commission's reliance on the cross-sectoral comparison conducted in this case was indirect (i.e., as confirmation only), and that the Commission on remand may decide not to place any reliance on such a comparison. We wish to remind the Commission and the parties, therefore, of the necessity of establishing the statutory authority for even a methodologically improved cross-sectoral comparison.

b) The Methodology Applied by the Commission

The Panel believes that the use of cross-sectoral comparisons-comparisons between investigated and non-investigated industries-is methodologically unsound absent standards and procedures, not in evidence in this case, (i) to ensure the proper selection of the industry to be compared with; (ii) to ensure a reasonably thorough examination of that industry; and (iii) to eliminate economic anomalies and other variables to the maximum extent possible so as to permit a credible "apples-to-apples" type comparison of the subject and nonsubject industries, consistent with often expressed Congressional intent.

The Panel has already noted that the statutory scheme created by Congress depends critically on careful definition of the "class or kind of merchandise" (determined by Commerce), and the "like product" and domestic "industry" (determined by the Commission).[201/] By focusing on, and remaining within, the scope of these definitions, both the Commission and the parties appearing before it are able to meet the "extremely short statutory deadlines" established by the law,[202/] and to concentrate their efforts on a thoroughgoing investigation and exploration of the specific industry in question, setting a clear basis for a careful and reasoned determination by the Commission.

In contrast, when an agency uses data, developed largely on an ad hoc basis, from a non-investigated industry to support a determination made with respect to an investigated industry, it is engaged in a process that is

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201/ The statutory definitions of these terms were introduced in the 1979 trade act. See Babcock & Wilcox Co. v. United States, 521 F. Supp. 479 (Ct. Int'l Trade 1981) ("[P]rior to the enactment of the Trade Agreements Act of 1979 the Commission had a broad grant of discretion in delineating the relevant domestic industry against which it was required to assess the effects of LTFV imports. Neither the Anti-dumping Act of 1921, nor section 303 of the Tariff Act of 1930 defined the term 'industry'. See S. Rept. No. 96-249 to accompany H.R. 4537, 96th Cong., 1st Sess. p. 82 (1979), U.S. Code Cong. & Admin. News 1978, p. 381. The Trade Agreements Act of 1979 contains specific guidelines for the determination of the relevant 'industry' or 'industries,' as the case may be."). It is, of course, noteworthy that at the same time as these precise definitions of "like product" and domestic "industry" were introduced into the law, Congress imposed much stricter time constraints on the Commission's decisions in antidumping and countervailing duty cases, time constraints which can realistically only be met if the scope of the Commission's investigation is appropriately focused and circumscribed.

202/ Saha Thai Steel Pipe Co., Ltd. v. United States, No. 91-11-00813, slip. op. 93-131, at 12 (Ct. Int'l Trade July 15, 1993).

statutorily unconfined, judicially undisciplined,[203/] and potentially susceptible to serious error. The reasons are not hard to discern.

In the first place, the agency may well have doubts about its legal authority to reach out to nonsubject industries, and proceed to do so in a less than deliberate fashion. Second, the agency may have failed to articulate appropriate standards by which the methodology is to be implemented, in terms of selecting the most appropriate other industry to be examined and the information to be sought therefrom. Third, the agency, or its staff, may fail to investigate and develop sufficient factual information with respect to the non-investigated industry to provide a reliable database, as well as fail to address the numerous economic anomalies, variables, and issues that will inevitably arise as a result of the use by the agency of that information and the comparison to be undertaken.

Importantly, the interested parties may also fail to brief, or even anticipate or address, the numerous possible cross-sectoral linkages that the agency involved may ultimately regard as important. Most significantly, as here, the parties may not even know whether the agency regarded a particular linkage as important or unimportant until the agency's final determination, when it is too late to do anything about it. If linkages to particular non-investigated industries are

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203/ As an illustration of the potential lack of judicial discipline, the Panel notes that although the U.S. Congress has set no minimum standard by which to measure the thoroughness of a Commission investigation, Atlantic Sugar, Ltd. v. United States, 744 F.2d 1550, 1561 (Fed. Cir. 1984), an agency's failure to collect pertinent data may constitute an abuse of discretion. Granges Metallverken AB v. United States, 13 Ct. Int'l Trade 471, 480, 716 F. Supp. 17, 25 (1989). Presumably, this standard applies only to industries under formal investigation by the agency as it would appear anomalous for a reviewing court to sanction an agency for failing to thoroughly investigate an industry not actually under investigation. From an administrative law standpoint, therefore, an examination by an agency of nonsubject industries in the course of its investigation of a subject industry lacks an important procedural discipline imposed by this standard.

considered by the agency as important, the parties need to know that, and the agency needs to define that, at the outset of the investigation, rather than at the ending of it.

At the hearing before the Panel, counsel for the Coalition and Commission characterized the cross-sectoral comparison in this case as a "controlled" test or experiment.[204/] The Panel believes that while the Commission had the best of intentions in the matter, particularly in this otherwise very difficult case, counsel's post hoc characterization is not accurate.[205/] This "experiment" was clearly not controlled. Its flaws were only too manifest and, indeed, quite symptomatic of the very dangers we have spoken about.

The infirmity of the process is well illustrated by the Commission's treatment and use of its producers' questionnaires. In its final determination, the Commission noted that there were some 5,680 establishments producing softwood lumber in the United States in 1991. As a key part of its investigation, the Commission sent producers' questionnaires to more than 100 producers, and of this total some 50 producers, accounting for nearly 49 percent of 1991 production of softwood lumber, responded.[206/] In addition, the Commission noted that "a great deal" of public information about the softwood lumber industry was available from various government sources and industry organizations.

204/ Panel Hearing Transcript, at 150, 231.

205/ See Chung Ling Co., Ltd. v. United States, 805 F. Supp. 45, 54 (Ct. Int'l Trade 1992) (". . . an agency's decision must stand or fall on the rationale proffered by the agency itself, not post hoc rationale of counsel."), and SCM Corp., 544 F. Supp. at 198 n.4 ("It is a fundamental principle of administrative law that the post hoc rationalizations of Government counsel may not be relied upon to uphold agency action.").

206/ ITC Final, at 14 n.41.

Clearly, the Commission's investigation of the softwood lumber industry in the United States was thorough and detailed.

The producers' questionnaires solicited information on the following subjects:

- trade, including capacity, production and inventory
- employment
- financial information, including material costs
- pricing, lost sales, lost revenues
- annual reports
- 10-K reports
- financial statements
- substitute products
- changes in demand
- changes in productivity
- technological change
- interchangeability of products
- "quality" of product
- supply difficulties
- lost sales to competition from Canada
- reduced or rolled-back prices

The information generated in response to these questionnaires, when taken together with other data and information generated by, or available to, the Commission and its staff, was eminently capable of guiding the Commission to a reasoned conclusion, based upon a full understanding of the softwood lumber industry.

However, since the wood products and building materials industries were never formally investigated by the Commission-nor indeed were these other industries ever even precisely defined by the Commission_it is obvious that they were not investigated in similar detail.[207/] Limited information on the non-lumber operations of a select number of softwood lumber producers was obtained only as a tangential matter to discern their overall financial results.[208/]

207/ Throughout this investigation, the Commission and parties have spoken generally of comparisons to various specific products, such as plywood, as well as to broad business sectors, such as "wood products," "building materials," "construction related industries," etc. In its final determination, the Commission referred to both "wood products and building materials" and to "plywood" alone. Based on Dun & Bradstreet materials in the record, the Panel understands, however, that the wood products and building materials industries may in fact involve some 28 different sub-industries or categories. Thus, even at this date, the Panel does not know whether the Commission in its final determination was drawing a financial comparison to:

- plywood alone;
- some undefined amalgam of "wood products";
- some undefined amalgam of "building materials";
- some doubly undefined amalgam of "wood products and building materials", or
- some undefined amalgam of "construction related industries".

Manifestly, there was no attempt by the Commission to further define these broader categories or to indicate clearly that it was relying on a comparison to plywood alone as opposed to one of these broader categories. Equally manifest, there was no attempt by the Commission to develop a consistent database with respect to the (unidentified) comparison. Finally, there was no attempt by the Commission to justify the (unidentified) comparison, other than the broad conclusory statements made as to the "relevance" of "wood products and building materials" and the existing tariff on plywood.

208/ Conf. Doc. 2, List 1, Table 9A.

There were no direct questions put to this limited group of producers regarding market demand for wood products and building materials, costs of materials, productivity, levels of investment, technological change, substitutability, supply difficulties, or similar matters. Moreover, producers' questionnaires were only sent to members of the industry producing softwood lumber (the industry under investigation) and not to the numerous companies that do not produce softwood lumber but do manufacture a variety of other wood products or building materials.[209/]

Thus, as the Canadian Complainants correctly point out,[210/] with respect to softwood lumber the Commission staff was able to glean from the producers' questionnaires unit manufacturing costs, including log costs per unit. When combined with the production and consumption data, staff could then determine with reasonable precision the extent to which the recession and the downturn in housing starts affected softwood lumber producers. By contrast, with respect to the wood products or building materials sectors, staff had no data as to how per unit net wood costs changed each year, either absolutely or in relation to total costs. Nor was any data collected on production quantities or apparent consumption. Consequently, the Commission simply could not measure with any degree of precision, as it plainly could for softwood lumber, the extent to which the financial performance of these other industries had been affected by increased timber costs, the recession, and the downturn in housing starts.

A further weakness in this particular cross-sectoral comparison is that it did not take into account the likelihood that increased timber costs would

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209/ It seems doubtful to the Panel that such a database has any "pretense of being representative." Chung Ling Co., Ltd., 805 F. Supp. at 49.

210/ Canadian Complainants' Joint Reply Brief, at IV-41-44.

have a disproportionately greater impact on lumber, which is made solely from logs, than on products made only partly from logs, and for which the wood raw material costs are a smaller component of total costs, such as hardboard, particle board, fiberboard, etc.[211/]

In these circumstances, it is difficult for the Panel to see how any reliable conclusions could have been drawn as to the reasons for, or even the extent of, possible differences in earnings between softwood lumber and other wood products.

The Panel also is concerned with the ad hoc nature of the examination of the issue both by the Commission staff and by the parties to the proceeding. The Commission staff was not directed to, and did not in fact, investigate the wood products and other building materials industries except in a limited, tangential way relating to the financial results of companies that produced those products along with softwood lumber. Moreover, in none of the various staff reports-the Preliminary Staff Report, the Prehearing Staff Report, and the Final Staff Report_did the Commission staff ever consider or analyze the cross-sectoral comparison issue, and these documents, of course, are the principal bases for the findings and determinations made by the Commission in the course of its investigations. The Panel also is not aware that the Commission's Office of Economics has ever independently considered the appropriateness of, and other issues relating to, such cross-sectoral comparisons.

Insofar as the parties themselves are concerned, the Coalition consistently pressed the cross-sectoral comparison issue in their briefs and at the hearings, but we note that the Canadian Complainants did not address the issue in

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211/ Canadian Complainants' Joint Reply Brief, at IV-74; Reply Brief, at 44.

the important Prehearing brief (perhaps because of the generally negative views expressed by the Commission on this issue in its preliminary determination). While the nature of the Canadian Complainants' argumentation might have been predictable, their failure to address the issue at all in what may be regarded as critically important briefs illustrates the ad hoc nature of the process when the Commission ranges far afield from the products and industry within the defined scope of investigation.

The Panel has already noted that the Commission itself changed from expressing reservations about the validity and appropriateness of cross-sectoral comparisons in the preliminary determination to embracing the concept without reservation in the final determination. While the Panel has no difficulty with the Commission changing its mind between preliminary and final determinations in the ordinary case, the matter is of concern to us in the present situation since the parties could not clearly have understood that the Commission regarded the cross-sectoral comparison as even relevant until the issuance of the final determination, when nothing further could be done.

For all of the foregoing reasons, the Panel regards the cross-sectoral comparison conducted in this case to be methodologically unsound and, therefore, not in accordance with law. Furthermore, we do not view the cross-sectoral comparison as having produced substantial evidence on the record in support of the Commission's material injury determination.

We have considered, however, whether on remand the matter could be put on a more solid basis, to the extent the Commission decides to rely on the cross-sectoral comparison. In the Panel's view, this would necessitate action by the Commission to articulate and apply standards by which this particular cross-sectoral comparison is to be made. The purpose of such standards should be to ensure that the Commission can: (a) isolate and select for examination the most

appropriate industry from among the many possible nonsubject industries (and do so early on in the proceeding); (b) develop information and data in its usual systematic way from the selected industry; and (c) seek to eliminate the anomalies, differences or other variables between the subject and nonsubject industries so that something approaching an "apples-to-apples" comparison can be drawn. In this regard, the Panel recognizes that the Commission may have to reopen the record.

As indicated previously, should the matter be returned to us for further consideration, we will at that time apply the applicable standard of review to the questions of whether (a) the Commission has statutory authority to conduct such a cross-sectoral comparison; (b) the methodology utilized by the Commission on remand is in accordance with law; and (c) the specific findings made on remand are supported by substantial evidence on the record. In carrying out that examination, the parties may anticipate that we will return to the points and concerns we have expressed above.

E. The Commission's Quebec Finding

The Gouvernement du Québec, the Quebec Lumber Manufacturers' Association, and members of the Canadian Lumbermen's Association located in Quebec (collectively, "Quebec Parties") join in the arguments raised by the other Canadian Complainants contesting the Commission's final determination. In addition, however, the Quebec Parties briefed separately issues raised by the Commission's determination that are unique to Quebec.

The Quebec Parties contest the Commission's inclusion of Quebec for purposes of the injury determination, and argue specifically that imports of the subject merchandise from Quebec are entitled to a separate injury determination. The Panel notes, however, that in light of the nature of the Commission's treatment of the Quebec issue in the final determination, the Panel is precluded from

reviewing the merits of the Commission's finding, or addressing in detail the substantive arguments raised by the parties in this regard. The Panel believes that the Commission has failed to provide an adequate explanation of this aspect of its determination so as to permit meaningful review by the Panel.

The Panel is required under the FTA to apply the standard of review that would be applied by United States courts reviewing a Commission final determination. The courts of the United States, as well as prior Panels, have held that "deference must be afforded the findings of the agency charged with making factual determinations under its statutory authority."[212/] Similarly, deference must be accorded a permissible interpretation by an agency of the statute it is charged with administering.[213/]

United States courts and prior Panels have made equally clear, however, that the deference due an agency's findings and permissible interpretations is not unbounded. An agency's determination must have a reasoned basis.[214/] There must be a rational connection between the facts found and the choice made by the agency.[215/]

212/ See, e.g., Fresh, Chilled and Frozen Pork from Canada, USA 89-1904-11 (Aug. 24, 1990) (citing Red Raspberries from Canada, USA 89-1904-01, at 18-19 (Dec. 15, 1989)).

213/ Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Udall v. Tallman, 380 U.S. 1, 16 (1965).

214/ See American Lamb Co. v. United States, 785 F.2d 994, 1004 (Fed. Cir. 1986) (citing S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 638).

215/ Bando Chem. Indus., Ltd. v. United States, 787 F. Supp. 224, 227 (Ct. Int'l Trade 1992) (citing Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285 (1974), and Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)); Avesta AB v. United States, 13 Ct. Int'l Trade 894, 724 F. Supp. 974, 978 (1989), aff'd, 914 F.2d 233 (Fed Cir. 1990), cert. denied, 111 S. Ct. 1308 (1991).

Furthermore, the agency must provide an adequate explanation for its findings, or the reasons which led to its conclusion.[216] The "[f]ailure of the decision-maker 'to provide the court with the basis of its determination precludes the court from fulfilling its statutory obligation on review.'"[217] Moreover, as recently noted by the Court of International Trade, "an agency's decision must stand or fall on the rationale proffered by the agency itself, not post hoc rationale of counsel."[218]

While the Commission "is not required to make a perfect statement as to the reasons for its determination,"[219] it nevertheless must provide an explanation sufficient to allow the Panel to discern the Commission's "path of reasoning."[220] That standard has not been satisfied in this case with respect to Quebec.

216/ See, e.g., Mitsubishi Materials Corp. v. United States, 820 F. Supp. 608 (Ct. Int'l Trade 1993); USX Corp. v. United States, 11 Ct. Int'l Trade 82, 85, 655 F. Supp. 487, 490 (1987); SCM Corp. v. United States, 487 F. Supp. 96, 108 (Cust. Ct. 1980); Maine Potato Council v. United States, 9 Ct. Int'l Trade 293, 302, 613 F. Supp. 1237, 1244-45 (1985); Bando Chem. Indus., Ltd., 787 F. Supp. at 227; see also Fresh, Chilled and Frozen Port from Canada, USA 89-1904-01, at 11 (Dec. 15, 1989); Red Raspberries from Canada, USA 89-1904-01, at 18-19 (Dec. 15, 1989).

217/ A. Hirsh, Inc. v. United States, 14 Ct. Int'l Trade 23, 25, 729 F. Supp. 1360, 1362 (1990) (quoting Industrial Fasteners Group v. United States, 2 Ct. Int'l Trade 181, 190, 525 F. Supp. 885, 893 (1981)).

218/ Chung Ling Co., Ltd. v. United States, 805 F. Supp. 45, 54 (Ct. Int'l Trade 1992).

219/ Maine Potato Council, 613 F. Supp. at 1245.

220/ See Asociacion Colombiana de Exportadores de Flores v. United States, 12 Ct. Int'l Trade 1174, 1177, 704 F. Supp. 1068, 1071 (1988).

Specifically, in concluding that imports of the subject merchandise from Quebec are not entitled to an injury determination separate from that made with respect to imports from elsewhere in Canada, the Commission offered the following rationale in a footnote:

> We note that we include imports from Quebec in our analysis. Commerce did not make a separate subsidy determination with respect to Quebec. In determining, inter alia, that Quebec is not a "country under the Agreement," Commerce rejected the very arguments Quebec raised before the Commission in requesting a separate injury determination . . . . Commerce also denied a request that the final determination be amended to exclude, inter alia, Quebec. There is no basis for a separate injury analysis with respect to imports from the Province of Quebec in this investigation.[221/]

The above constitutes the entire "explanation" proffered by the Commission in its final determination to support its finding. The conclusory nature of the Commission's finding is self-evident, and the offered rationale falls far short of the adequate explanation contemplated by the United States unfair trade laws.[222/] The Commission's explanation in fact consists of the mere recitation of action taken by another agency-the Commerce Department-and is wholly insufficient to permit the Panel to discern the "path of reasoning" employed by the Commission in making its finding. In the absence of an adequate explanation, the Panel is constrained from assessing whether the Commission's finding is supported by

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221/ ITC Final, at 26 n.90.

222/ See, e.g., 19 U.S.C. § 1671d(d), which requires the Commission in rendering a final determination to notify the parties of the "facts and conclusions of law upon which the determination is based." See also SCM Corp., 487 F. Supp. at 108.

substantial evidence, and otherwise in accordance with law. Meaningful review of the Commission's finding therefore is precluded.

In this regard, the Panel notes that it has reviewed the arguments of Commission counsel with respect to the Quebec issue. Counsel argues that the Commission is "bound" by Commerce's action, and that it has no authority to make any other determination. That position is not expressly evident in the subject footnote. Neither does the determination address whether the Commission intended to voluntarily adopt findings made by Commerce; whether it believed that deference was a "permissible interpretation"; or whether it believed that it had no authority to make a contrary decision on this issue. Nor are Commission counsel's arguments concerning the statutory requirements of the term "country under the agreement" discussed in the determination in a substantive manner.

In light of the above, the Panel finds that the Commission failed to fulfill its obligation to provide an adequate explanation for its finding that imports of the subject merchandise from Quebec are not entitled to an injury determination separate from that accorded subject products imported from elsewhere in Canada. The Panel therefore remands this aspect of the Commission's determination and instructs the Commission to articulate a satisfactory explanation of its finding with respect to the treatment of imports from Quebec.

VII. REMAND

The Panel remands the Commission's final determination and directs the Commission to make a determination about causation of material injury by reason of imports of subsidized softwood lumber from Canada not inconsistent with this Opinion. If price suppression is the basis of a new affirmative determination by the

Commission, the Commission should indicate the actual price suppressing effect of the subject

products. The Commission should also address the "to a significant degree" requirement of 19 U.S.C. § 1677(7)(C)(ii).

Should the Commission on remand decide to rely on the cross-sectoral comparison, it must explain the statutory and other bases permitting the Commission to conduct such a comparison in this case. It must also establish, define, and apply an appropriate methodology as discussed in this Opinion.

Finally, the Commission is instructed to provide an adequate explanation of the basis for its finding that imports of softwood lumber from Quebec are not entitled to a separate injury determination.

The Commission shall complete its redetermination on remand within 90 days of the date of this Opinion.

APPENDIX A

IN THE MATTER OF SOFTWOOD LUMBER FROM CANADA

USA-92-1904-02

OPINION OF THE PANEL REGARDING THE MOTION TO DISMISS FOR LACK OF JURISDICTION

This memorandum sets forth the reasons of the Panel for the Order dated March 4, 1993, denying the motion brought by the Coalition for Fair Lumber Imports ("Coalition") to dismiss this review for lack of jurisdiction.

Procedural History

On November 20, 1992, the Coalition filed with this Panel a Notice of Motion to Dismiss for Lack of Jurisdiction. The United States International Trade Commission ("Commission" or "ITC") timely filed a Response to the Notice of Motion to Dismiss, arguing in opposition to the Coalition's efforts to vacate this review. The Commission's Response expressly incorporates the Investigating Authority's ("Commerce") Response to the Coalition's Notice of Motion to Dismiss, previously filed by Commerce in opposition to a similar motion made by the Coalition in the companion Commerce Binational Panel proceeding. On December 4, 1992, the Canadian Complainants filed a Memorandum of Law in Opposition to the Motion of the Coalition to Dismiss for Lack of Jurisdiction ("Memorandum of Law"). The Canadian Complainants thereafter filed a Rule 70 submission, bringing to the attention of this Panel the decision of the Commerce Panel denying the Motion to Dismiss for Lack of Jurisdiction filed by the Coalition in that proceeding.

On March 4, 1993, this Panel denied the Coalition's motion.

Issues Raised in the Motion to Dismiss

In the Motion to Dismiss for Lack of Jurisdiction, the Coalition requested the Panel to determine that it did not have the requisite jurisdiction to review the Commission's Softwood Lumber decision. The Coalition argued that Article 2009 of the United States-Canada Free Trade Agreement ("FTA") mandates such a conclusion.

Article 2009 of the FTA states in pertinent part:

> The Parties agree that this Agreement does not impair or prejudice the exercise of any rights or enforcement measures arising out of the Memorandum of Understanding on Softwood Lumber ("MOU") of December 30, 1986.

The Coalition makes the claim that the self-initiation of the countervailing duty ("CVD") investigation of the subject merchandise was an enforcement measure arising out of the MOU. According to the Coalition, the Panel's review of the Commission's injury determination necessarily would impair the exercise of that enforcement measure, and the Commission's determination therefore is exempt from consideration by the Panel. The Coalition further argues that the Panel's inquiry impairs the United States industry's right to judicial review, which review would be available in the absence of Panel jurisdiction.

FTA Chapter 19 Grants the Panel Exclusive Jurisdiction

After due consideration of the issues raised by the Coalition, and the responses submitted by the Commission and the Canadian Complainants, the Panel

finds that Chapter 19 of the FTA grants the Panel exclusive jurisdiction to examine the Commission's final determination in Softwood Lumber from Canada.

Chapter 19 of the FTA details the conditions under which a Binational Panel review supplants judicial review. Article 1901 requires Commerce to determine that the merchandise under investigation is of Canadian origin.[223/] Article 1904 mandates that an interested party, which was a party to the underlying proceeding, timely file a request for Binational Panel review.[224/] It is undisputed that all of these elements, prerequisites to exclusive jurisdiction, are present in this case. Furthermore, none of the exceptions provided for in the FTA and in the Tariff Act of 1930 may be invoked to support the Coalition's argument for dismissal.

In particular, Article 1904 delineates three circumstances in which a Binational Panel may not maintain jurisdiction:

> 1) where neither party seeks panel review of a final determination;
>
> 2) where a revised final determination is issued as a direct result of judicial review of the original final determination by a court of the importing Party, in cases where neither Party sought panel review of that original final determination; or
>
> 3) where a final determination is issued as a direct result of judicial review that was commenced in a court of the importing Party before the entry into force of the FTA.[225/]

The Tariff Act of 1930, as amended by the Customs and Trade Act of 1990, provides for Court of International Trade review where a Panel has decided that it

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223/ FTA art. 1901; 19 U.S.C. § 1516a(g)(1).
224/ FTA art. 1904(2), (4), (5), (11).
225/ FTA art. 1904, para. 12.

does not have the requisite authority to examine an agency's determination.[226/] However, none of the existing exemptions which might strip this Panel of its authority to consider the Commission's Softwood Lumber determination is relevant to this case.

Given that Chapter 19 of the FTA provides for Panel review of the Commission's determination; the fact that the enumerated exceptions are not applicable; and the language of Chapter 19, which does not expressly place softwood lumber beyond the purview of Binational Panel review; this Panel concludes that it has the authority to review the contested Commission determination.

FTA Article 2009 Does Not Preclude Jurisdiction

Although the Panel need not take a position with respect to the argument raised by the Commission (through the incorporated Commerce brief), that Chapter 19 FTA Panels lack the requisite authority to interpret provisions falling outside Chapter 19, we nevertheless find convincing the argument raised by the Commission and the Canadian Complainants that Article 2009 would not change the Panel's conclusion.

Article 2009 is not a jurisdictional provision. In contrast to other sections of the FTA,[227/] that Article does not expressly grant or remove jurisdiction. In addition to its plain language, the legislative history of Article 2009 provides no support for the notion that it prohibits Panel jurisdiction. None of the contemporaneous legislative material cited by the Coalition speaks to the issue of

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226/ 19 U.S.C. §§ 1516a(g)(3)(A)(iv), 1516a(g)(2)(A), 1516a(a)(2)(A)(B), 1516a(d).
227/ See, for example, Article 2005 regarding cultural industries.

Chapter 19 Panel authority with respect to softwood lumber. As Commerce and the Canadian Complainants explain in detail, the purpose behind the inclusion of Article 2009 was to ensure the coexistence of the MOU and the FTA.[228/]

The Panel further notes that the CVD order issued against imports of Canadian softwood lumber is not an enforcement measure arising out of the MOU. As the Canadian Complainants rightly point out, an enforcement measure is:

> an act which coerces another party to fulfill existing obligations . . . [while] a countervailing duty investigation is intended to be an objective proceeding to determine whether an injurious subsidy exists and, if so, to impose prospective relief on future trade.[229/]

Thus, it would be inconsistent with United States CVD law to interpret the order as an enforcement measure.

There is also no merit to the Coalition's claim that Article 2009 is invoked because the Panel's review impairs the rights of the United States industry. The FTA and the MOU are agreements between the Governments of the United States and Canada. The "rights" referred to in Article 2009 are the rights of the governmental signatories to that Agreement. There are no private rights arising out of the MOU upon which the Panel's inquiry could infringe.

* * *

228/ Investigating Authority Response, at 24-27; Memorandum of Law, at 18-20.
229/ Memorandum of Law, at 32.

Conclusion

For the reasons discussed above, the Panel denied the Coalition's motion to dismiss this review for lack of jurisdiction.

ARTICLE 1904
BINATIONAL PANEL REVIEW UNDER
THE UNITED STATES-CANADA FREE TRADE AGREEMENT

In the Matter of: **SOFTWOOD LUMBER FROM CANADA**	**USA-92-1904-02**

ORDER

For the reasons stated in the Opinion, the Panel affirms in part and remands in part the United States International Trade Commission's final determination in Softwood Lumber From Canada (Investigation No. 701-TA-312), for further consideration consistent with the Opinion.

The results of the remand shall be provided to the Panel by the International Trade Commission within 90 days of the date of the Opinion.
SIGNED IN THE ORIGINAL BY:

July 26, 1993
Date

Joseph F. Dennin, Chairman
Joseph F. Dennin,
Chairman

July 26, 1993
Date

Steven W. Baker
Steven W. Baker

July 26, 1993
Date

Harry B. Endsley
Harry B. Endsley

July 26, 1993
Date

James F. Grandy
James F. Grandy

July 26, 1993
Date

Donald M. McRae
Donald M. McRae

ARTICLE 1904
BINATIONAL PANEL REVIEW UNDER
THE UNITED STATES-CANADA FREE TRADE AGREEMENT

In the Matter of:

SOFTWOOD LUMBER
FROM CANADA

USA-92-1904-02

DECISION OF THE PANEL

ON REVIEW OF THE REMAND DETERMINATION OF

THE U.S. INTERNATIONAL TRADE COMMISSION

January 28, 1994

Before: Joseph F. Dennin (Chair)
Steven W. Baker
Harry B. Endsley
James F. Grandy
Donald M. McRae

Appearances:

John A. Ragosta and Harry L. Clark on behalf of the Coalition for Fair Lumber Imports. With them on brief were Robert H. Griffen, William A. Noellert, Susan B. Hester, Gregory I. Hume, David R. Goldberg and Evan Y. Chuck.

James A. Toupin and Judith M. Czako on behalf of the U.S. International Trade Commission. With them on brief was Lyn M. Schlitt.

M. Jean Anderson on behalf of the Government of Canada. With her on brief were Bruce H. Turnbull, David W. Oliver, and Deborah E. Siegel.

W. George Grandison and Mark A. Moran on behalf of the Canadian Forest Industries Council and affiliated companies. With them on brief were Gracia M. Berg and Robert J. Sokota.

Spencer S. Griffith on behalf of the Gouvernement du Québec. Submitting briefs were Elliot J. Feldman, Michael A. Hertzberg, Matthew J. Clark, and Jonathan D. Cahn on behalf of the Gouvernement du Québec; and Randolph J. Stayin on behalf of the Quebec Lumber Manufacturers' Association and members of the Canadian Lumbermen's Association located in Quebec.

Joining in the arguments of the Government of Canada, and the Canadian Forest Industries Council and affiliated companies were: Lawrence A. Schneider, Claire E. Reade, Michael T. Shor, and Matthew Frumin on behalf of the Government of the Province of Alberta; Homer E. Moyer, Stuart E. Benson and Paul Maguffee on behalf of the Government of British Columbia; and Mark S. McConnell, Lynn G. Kamarck, Deanna Tanner Okun, Leslie A. Delagran on behalf of the Government of Ontario.

TABLE OF CONTENTS

OPINION AND ORDER OF THE PANEL

INTRODUCTION

This Binational Panel was convened pursuant to Article 1904(2) of the United States-Canada Free Trade Agreement ("FTA"), and Title IV of the United States-Canada Free Trade Agreement Implementation Act.[1/] The Panel was constituted in response to a request for review of the final affirmative injury determination of the United States International Trade Commission ("Commission" or "ITC") in the matter of Softwood Lumber From Canada.[2/] Details on the trade dispute leading to the Panel's review of the Commission's determination, as well as the procedural history before the Panel, are provided in the Panel's opinion of July 26, 1993.[3/] The Panel in that opinion affirmed certain aspects of the Commission's determination, and remanded for a new determination the Commission's finding with respect to causation. The Panel also remanded for additional explanation the Commission's finding that imports of softwood lumber from Quebec are not entitled to a separate injury determination.

Pursuant to the Panel's instructions, the Commission on October 25, 1993, issued its determination on remand. In that determination a majority of the Commission again found

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1/ 19 U.S.C. § 1516a(g)(2). With regard to the passage of the North American Free Trade Agreement ("NAFTA") and the potential implications for this Panel's review, the Panel notes that effective January 1, 1994 the governments of the United States and Canada agreed not to suspend application of Chapter 19 of the FTA with respect to all on-going proceedings under that Chapter. Provision for transitional arrangements are authorized in the NAFTA implementing legislation and envisioned in the accompanying Statement of Administrative Action.

2/ Softwood Lumber From Canada, 57 Fed. Reg. 31,389 (July 15, 1992) (Aff. Final); Softwood Lumber From Canada, Inv. No. 701-TA-312, USITC Pub. 2530 (July 1992) (Aff. Final) [hereinafter ITC Final].

3/ Softwood Lumber from Canada, USA-92-1904-02, at 2-11 (July 26, 1993) [hereinafter Panel Opinion].

material injury by reason of imports of softwood lumber from Canada.[4/] This Opinion, and the Panel's second review, are concerned with that determination.[5/]

Briefs in opposition to the Remand Determination were filed on November 22, 1993 on behalf of the Government of Canada, the Governments of Alberta, British Columbia and Ontario, the Gouvernement du Québec, the Canadian Forest Industries Council and affiliated companies, the Quebec Lumber Manufacturers' Association, and members of the Canadian Lumbermen's Association located in Quebec (collectively, "Canadian Complainants" or "Complainants").[6/] In response to these briefs, and in support of the Commission's decision on remand, briefs were filed on December 12, 1993 by the Commission and by the Coalition for Fair Lumber Imports ("Coalition").

4/ Softwood Lumber from Canada, Inv. No. 701-TA-312 (Remand), USITC Pub. 2689 (Oct. 1993) [hereinafter Remand Determination]. Chairman Newquist, Vice Chairman Watson, and Commissioner Rohr together issued an affirmative determination on remand. Commissioner Crawford, writing separately, also found the evidence to support an affirmative remand determination. Commissioners Brunsdale and Nuzum issued negative remand determinations.

Unless the context otherwise requires, the term "Commission" as used in this Opinion refers to the views of Chairman Newquist, Vice Chairman Watson, and Commissioner Rohr.

5/ The Commerce Department's final determination and determination on remand in the softwood lumber case have been reviewed by a separate Binational Panel. That Panel's first opinion was issued on May 6, 1993, and its opinion on review of Commerce's remand determination was issued on December 17, 1993. On January 6, 1994, the Commerce Department issued its Final Results of Redetermination Pursuant to Binational Panel Remand, in which it found the subsidy rates in the softwood lumber case to be zero percent ad valorem.

6/ The Gouvernement du Québec, the Quebec Lumber Manufacturers' Association and members of the Canadian Lumbermen's Association located in Quebec, while joining in the arguments made by the other Canadian Complainants, also filed a separate brief challenging the Commission's decision on remand with respect to imports of softwood lumber from Quebec.

By Order dated December 30, 1993, the Panel established January 10, 1994 as the date for oral argument on the direct evidence relied on by the Commission to support its finding of causation. Pursuant to that Order, a hearing was convened in Washington, D.C. on January 10, 1994. Arguments were made on behalf of the Canadian Complainants, the Commission, and the Coalition. Oral argument addressing aspects of the Commission's remand determination unique to Quebec was made on behalf of the Gouvernement du Québec, the Quebec Lumber Manufacturers' Association, and members of the Canadian Lumbermen's Association located in Quebec.

STANDARD OF REVIEW

This Panel is obligated under Article 1904(3) of the FTA to apply the standard of review and general legal principles that a U.S. court would apply in reviewing a Commission determination. The Panel in this second review and opinion has applied that standard, which is set forth on pages 11 through 17 of the Panel's first opinion and incorporated in this Opinion by reference.

In addition, the Panel has considered the effect of decisions issued by the Commission's reviewing courts subsequent to the Panel's initial opinion.[7/] The Panel has applied the teachings

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7/ See, e.g., Daewoo Electronics Co., Ltd. v. United States, 6 F.3d 1511 (Fed. Cir. 1993); Wheatland Tube Corp. v. United States, Slip Op. 93-220 (Ct. Int'l Trade 1993). The Panel also has reviewed and considered the concerns raised by the Commission and the Coalition with respect to the Panel's prior discussion of "concrete" evidence. (Remand Determination, at 30-31; Coalition Brief in Support of the International Trade Commission's Determination on Remand, December 13, 1993, at 18-19 [hereinafter Coalition Remand Brief]). While the holding in Republic Steel regarding Commission preliminary determinations was reversed, as noted in the Panel's first opinion, the Panel nevertheless

(continued...)

of these decisions in its second review, including the principles that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," and that "considerable deference" is due agencies charged with interpreting the trade laws.[8/] In this light, the Panel recognizes the authority of the Commission to use new or different methodologies in performing its functions. It also recognizes the possibility that the particular circumstances of individual cases may require "non-traditional" analysis by the Commission.

Fundamentally, however, the standard of review to be applied by the Panel has not changed. Regardless of the analysis undertaken, the methodologies used, or the type of evidence offered by the Commission, the Panel is obligated under the applicable standard of review to ensure that the Commission's determination is the result of reasoned decision-making based on substantial evidence in the record, and that it is otherwise in accordance with law.

THE COMMISSION'S QUEBEC FINDING

The Commission in its final determination found that imports of subject merchandise from Quebec are not entitled to an injury determination separate from that accorded subject products from elsewhere in Canada. The Panel remanded that aspect of the Commission's determination,

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(...continued)
continues to be instructed by the CIT's discussion of "concrete" evidence. (8 Ct. Int'l Trade 29, 591 F. Supp. 640, 646 (1984)). See also China Nat'l Arts and Crafts Import & Export Corp. v. United States, 15 Ct. Int'l Trade 417, 422 (1991). Cf. USX Corp. v. United States, 11 Ct. Int'l Trade 82, 655 F. Supp. 487, 490, n.9. (on issues not addressed by the Court of Appeals, "Republic Steel continues to be valid precedent.").

8/ In both Daewoo and Wheatland Tube the reviewing court found the statutory interpretations and methodologies chosen by the Commerce Department to be reasonable, not in contravention of the statute, and therefore sufficient to support Commerce's determinations.

finding that the Commission had failed to articulate an adequate explanation for its decision. The Commission has now satisfied that obligation. Based on its explanation and the arguments of the Parties, the Panel finds that the Commission's remand determination with respect to imports from Quebec is supported by substantial evidence and is otherwise in accordance with law.

The Gouvernement du Québec, the Quebec Lumber Manufacturers' Association, and members of the Canadian Lumbermen's Association located in Quebec (the "Quebec Parties"), argue that imports of softwood lumber from Quebec are entitled to a separate injury determination. Citing applicable statutory provisions, the Quebec Parties allege that Commerce determined that imports from Quebec are not subsidized; that Quebec is a "country" for purposes of U.S. countervailing duty law; and that, accordingly, the Commission was required to conduct a separate injury investigation for Quebec imports.

In response, the Commission argues that it is precluded from varying the scope of Commerce's affirmative determination for purposes of rendering an injury determination. The Commission specifically cites to 19 U.S.C. § 1671d(b)(1) as evidence of its obligation to consider for injury purposes all imports with respect to which Commerce has made an affirmative determination.

It is uncontested that the pertinent statutory provision requires the Commission to determine whether an industry in the United States is materially injured "by reason of imports ... of the merchandise with respect to which the administering authority [Commerce] has made an affirmative determination."[9/] While Commerce did, as noted by the Quebec Parties, investigate subsidies at the provincial level, it nevertheless rendered a determination with respect to subject

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9/ 19 U.S.C. § 1671d(b)(1) (emphasis supplied).

imports from all parts of Canada, as defined in its scope of investigation. Thus, Commerce did not expressly exclude imports from Quebec in issuing its affirmative final determination.

In the absence of clear and convincing evidence indicating a contrary intent, the plain language of the statute must control the resolution of this issue. The statute does not indicate that the Commission has either express or implied authority to vary the scope of the products with respect to which Commerce has made an affirmative determination for purposes of making an injury determination. Commerce's "country-wide" subsidy finding clearly included imports of softwood lumber from Quebec. In light of the plain language of the statute, the Panel finds that the Commission did not unreasonably interpret the statute as precluding it from rendering a determination other than with respect to the merchandise found by Commerce to be subsidized. The Commission's conclusion, moreover, finds support in the decisions of the Commission's reviewing courts.[10/]

The Quebec Parties further allege, however, that Quebec must be considered a "country" for purposes of U.S. countervailing duty law, and that as such the Commission must accord imports from Quebec a separate injury determination. Although the term "country" is defined in the applicable statute as including political subdivisions of a foreign country,[11/] such as the province of Quebec, that provision is not, in the Panel's view, jurisdictional in nature, and does not expressly authorize the Commission to modify Commerce's determination as to the imports

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10/ See, e.g., Algoma Steel Corp. v. United States, 688 F. Supp. 639, 644 (Ct. Int'l Trade 1988) ("In applying this statute, the ITC does not look behind [Commerce's] determination, but accepts [Commerce's] determination as to which merchandise is in the class of merchandise sold at [less than fair value]." See also Sony Corp. of America v. United States, 712 F. Supp. 978, 984 (Ct. Int'l Trade 1989).

11/ 19 U.S.C. § 1677(3).

found to be subsidized. The broad obligations attributed to the term "country" by the Quebec Parties do not find support in the text of the applicable statute.

Furthermore, nothing in the legislative history suggests that the Commission do anything other than accept Commerce's definition of the country under investigation. In fact, the legislative history expressly indicates otherwise. "The administering authority [Commerce] will determine, on the basis of the facts in each case, what entity or entities will be considered the country."[12/]

The Commerce Department determined that softwood lumber from "Canada," including Quebec, was subsidized. Under these circumstances, the Commission cannot be faulted for accepting Commerce's finding of imports determined to be subsidized. Nor can it be faulted for accepting Commerce's determination of the country whose products are subject to investigation.[13/]

The Panel finds the Commission's interpretation of the statute with respect to the Quebec issue to be reasonable, supported by substantial evidence, and otherwise in accordance with law. Accordingly, the Panel affirms the Commission's finding with respect to the treatment of subject products imported from Quebec.

EVIDENCEOF SIGNIFICANT PRICE SUPPRESSION BY REASON OF SUBJECT IMPORTS

12/ H.R. Doc. No. 153, Part II, Statement of Administrative Action, 96th Cong., 1st Sess. 431 (1979) (emphasis supplied). In this connection, the Panel notes that the broad scope of the "country" provision apparently was intended merely to ensure that all countervailable subsidies, whether provided at the local, provincial, federal or supranational level, are encompassed by the countervailing duty law.

13/ See Republic Steel Corp. v. United States, 544 F. Supp. 901, 904 (Ct. Int'l Trade 1982).

In its Remand Determination the Commission bifurcated the issues of significant price suppression and material injury by reason of Canadian imports. In deference to that approach, the Panel separately reviews the evidence and analysis offered by the Commission in its Remand Determination to support those findings.

A. Price Suppression

The Commission concluded that rising costs for domestic producers necessarily should have led to an increase in prices greater than that which in fact occurred (i.e., price suppression). The Commission's finding of price suppression was based on an analysis of the supply and demand in the market for softwood lumber over the period of investigation. The Commission in its final determination characterized the market for softwood lumber as highly competitive, and subject to inelastic demand. No party challenges this basic description.[14/] In such circumstances, the log cost increases experienced by the softwood lumber industry, all else being equal, should cause an inward shift in the industry's supply curve, and an increase in the equilibrium price of softwood lumber. In a market characterized by inelastic demand the effect of such a shift should be to cause the equilibrium price to rise relatively substantially. Based upon the normal operation of supply and demand curves having those characteristics, the Commission determined that

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14/ The Panel notes that the Complainants take the view that demand is not perfectly inelastic, but only "fairly inelastic." (Canadian Complainants' Joint Brief in Opposition to the Determination on Remand, November 22, 1993, at 25, n.24 [hereinafter Complainants' Remand Brief], citing Office of Economics Memorandum, EC-P-039, at 21 ("elasticity of demand for softwood lumber [is] fairly inelastic and in a range from -0.3 to -0.9.")). This appears to the Panel to be a fairly wide range of elasticities "in which the true value may fall." Cf. Certain Acetylsalicylic Acid (Aspirin) from Turkey, Inv. No. 731-TA-364 (Final), USITC Pub. 2001, at 9, n.22 (Aug. 1987). The Panel does not understand the Commission to be asserting that demand is perfectly inelastic or that it otherwise falls outside this range.

domestic producers should have been able to "pass cost increases along to customers almost dollar for dollar."[15/] In the Commission's view, the failure of prices to keep up with cost increases indicates price suppression.

Supply and demand curves depend on ceteris paribus conditions, however, and the Commission acknowledged that all things were not equal during the period of investigation. Due to the recession there was a significant reduction in demand for softwood lumber contemporaneously with the decline in supply. Such a decline in demand should have had an effect on the price in the opposite direction. The Commission determined, however, that despite declining demand, on balance the increased costs of producing lumber during the period of investigation should have resulted in overall price increases.[16/] The Commission reached this conclusion by finding that the shifts in supply and demand were about equivalent, and that the upward price effect from the shift in supply was more significant than the downward price effect from the decline in demand, since domestic supply of lumber is more elastic than demand.[17/] Under these circumstances, relatively equivalent shifts in demand and supply would, again ceteris

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15/ Remand Determination, at 11.

16/ Id. at 10-11, 13-14. Overall, prices apparently did increase. In its final determination, the Commission found that "prices of softwood lumber, both imported and domestic, generally increased during the period under investigation." ITC Final, at 31. In its Remand Determination the Commission stated that "[p]rices for most products showed the largest increases between the fourth quarter of 1991 and the first quarter of 1992," but refused to give much weight to the latter increases because they were "reportedly due, at least in part, to the initiation of this investigation and Commerce's imposition of preliminary countervailing duties." Remand Determination, at 14, n.36.

17/ Id. at 13.

paribus, result in an equilibrium price point higher than the original equilibrium price point.[18/] In the judgment of the Commission, however, the price increases which actually occurred in the marketplace were less than those expected given the operation of the posited supply and demand curves. Although this method of analysis appears to call for a fairly precise quantification of the supply and demand shifts involved, the Commission stated, nevertheless, that it was not attempting to undertake a "precise quantification of the shifts in supply and demand," nor was it attempting to "predict a specific equilibrium market price."[19/]

An initial and obvious difficulty with the Commission's supply-demand model is that, as the Complainants point out,[20/] and as the Commission recognizes, it depends on "all else being equal." Although the Panel does not consider that the Commission has in fact established that the circumstances of the lumber market were such that the supply-demand model would operate as the Commission has posited, the Panel decides that it need not pursue this issue in view of its conclusion, set out below, that the Commission has not met the substantial evidence standard in

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18/ It is well recognized that if both supply and demand decrease (i.e., shift to the left), the quantity will definitely fall, but the price may go either way, depending on which curve shifts more. In this case, because demand was in an estimated range that was relatively more inelastic than the estimated elasticity range for supply, if the shifts are about equivalent the normal operation of such supply and demand curves would indeed put the new equilibrium price point at least somewhat higher than the original equilibrium price point. The Complainants argue, however, that the shifts were not equivalent. Complainants' Remand Brief, at 27.

19/ Remand Determination, at 13, n.35.

20/ Complainants' Remand Brief, at 26.

support of its conclusion that significant price suppression was caused by Canadian imports of softwood lumber.[21/]

The Panel also need not pursue the remaining evidence offered by the Commission to support its finding of significant price suppression. On remand the Commission inferred that by-product prices increased over the period because revenues from the sale of by-products increased 9 percent, while by-product production declined.[22/] The Commission further noted that plywood prices increased at a faster rate than lumber prices, despite the fact that softwood log costs are a less significant portion of plywood costs than lumber costs, and so increased log costs exerted less upward pressure on plywood prices.[23/]

Both of these references raise the question of whether the Commission is relying to some extent on a "cross-sectoral" analysis, without responding to the Panel's previously expressed concerns on that issue. Nevertheless, since the references are meant to be supportive only, and in view of the Panel's conclusion on the issue of causation, the Panel declines at this time to pursue the matter further.[24/]

21/ The Panel, accordingly, also does not pursue the question of whether injury or causation can, as a matter of law, be proven by a showing that actual results in the market are at variance with the results anticipated by a set of self-selected supply and demand curves. Cf. Daewoo Electronics Co., Ltd. v. United States, 15 Ct. Int'l Trade 124, 130, 760 F. Supp. 200, 206 (1991), rev'd in part on other grounds, Daewoo Electronics Co., Ltd. v. United States, 6 F.3d 1511 (Fed. Cir. 1993) (disapproving determinations "ordained by selection of the demand curve rather than arising from, and being based on, the data in the record.").

22/ Remand Determination, at 14.

23/ Id. at 15.

24/ Such declination should not be construed as an implicit approval by the Panel of cross-sectoral comparisons generally, or as conducted by the Commission in this case. Although the Panel has not found it necessary to rule on the cross-sectoral issue, either with respect to the

(continued...)

B. Causation

On remand the Commission concluded that price increases for U.S. softwood lumber over the period of investigation were less than they otherwise would have been, and that this price suppression was caused, in part, by Canadian imports to a significant degree.[25/] To support the latter conclusion the Commission relied on three specific evidentiary findings:

1. Canadian prices tended to rise more slowly and fall more rapidly than domestic prices;

2. the price of subsidized Canadian imports, particularly Spruce-Pine-Fir (SPF), has a dominant impact on lumber prices in the U.S. market; and

3. the weighted average composite U.S. price in the Northern market, where Canadian import penetration is highest, is lower than that price in the Southern market, where import penetration is lower.[26/]

(...continued)
original final determination or this remand determination, the Panel continues to regard cross-sectoral comparisons as highly suspect under the applicable statutes and the extensive legislative history interpreting those statutes. Assuming it is legally permissible to place significant reliance on such comparisons, however, the Panel continues to believe that a proper methodology must be used by the Commission in carrying them out_a matter which the Panel addressed at some length in its previous opinion.

25/ Remand Determination, at 7.

26/ Id. at 16. The Commission also appeared to rely heavily on the volumes of Canadian softwood lumber imports in the U.S. market as probative of the key elements of the statute (i.e., an effect on the U.S. industry, an effect on domestic prices, and causation). 19 U.S.C. § 1677(7)(B). Insofar as the effect on the domestic industry is concerned, the Commission stated that "the large volume of imports of subsidized lumber perforce has had a significant impact on the domestic industry." Id. at 5. As for the effect on domestic prices, the Commission stated that "it is inconceivable as a matter of economic logic that prices would not have been higher were it not for the significant volume of subsidized imports." Id. at 6. Finally, as for causation the Commission stated, first, that "the significant volume of subsidized Canadian imports had significant price suppressing effects" and, second, that "[t]he
(continued...)

With respect to the first evidentiary basis, the Panel accepts that a fully developed and rational price trends analysis may be a useful tool in assessing causation and, with appropriate factual support and applying an appropriate methodology, could demonstrate the sufficiency of information in the record. At this time, however, the Panel finds that the price trends data and analysis as presented by the Commission do not constitute substantial evidence of causation and are otherwise not in accordance with law. The Panel therefore remands this issue to the Commission for further consideration.

As to the remaining bases for the Commission's affirmative remand determination, the Panel holds that the Commission's findings with respect to the dominant impact of Canadian SPF on U.S. softwood lumber, and the comparison of regional prices and import penetration, are not supported by substantial evidence on the record or are otherwise not in accordance with law.

1. Reliance on Price Trend Data

The first evidentiary basis used by the Commission to support its finding of causation, as set out in its Remand Determination, is that "comparing trends in composite price indices for U.S. and Canadian lumber indicates that during the period of investigation, prices for imported subsidized Canadian lumber increased more slowly, and declined more rapidly, than did

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(...continued)
effects of the significant volume of subsidized imports of Canadian lumber on prices in part explain the price suppression suffered by the domestic industry." Id. at 7. The Panel addressed the seemingly well established rule that causation cannot be proven by volumes alone at pages 32-34 of the Panel Opinion.

U.S. lumber prices."[27/] A few sentences later the Commission adds the further conclusion that "specific comparisons of SPF price trends and price trends for other species also show that, during the period of investigation, SPF prices fell more rapidly or increased more slowly than did prices for other species."[28/]

The question for the Panel is whether the above conclusory statements are supported by substantial evidence on the record and are otherwise in accordance with law. The difficulty facing the Panel in providing an answer to this question is that the Commission provides little information on how these conclusions are reached. Still, it is incumbent on the reviewing authority to satisfy itself that conclusions are supported by substantial evidence, and that there is a "rational connection between the facts found and the choice made."[29/]

Proof that the failure of domestic prices to rise in accordance with increased costs was due to the prices of Canadian softwood lumber rising more slowly and falling more quickly than domestic prices, was offered in the form of a series of indexed graphs purporting to show a variety of price comparisons for Canadian and U.S. lumber.[30/] These comparisons relied on Producer Price Indices ("PPIs"), SPF price trends in relation to the price trends of other species,

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27/ Id. at 16.

28/ Id. at 17.

29/ Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962).

30/ The Panel notes that the only specific reference by the Commission to reductions in Canadian and domestic softwood lumber prices is set forth in footnote 67 of the Remand Determination. The figures presented, however, are from Office of Investigations Memorandum INV-Q-174, October 14, 1993, and are based on the revised 11.54 percent subsidy rate found by the Commerce Department in its remand determination, not the 6.51 percent rate originally considered by the Commission. The Panel also notes that the Commerce Department subsequently revised the rate to zero percent. See footnote 5, supra.

and trends based on information derived from responses to questionnaires sent out by the Commission on remand.[31/]

The Panel notes at the outset its concern regarding the use of PPIs as a specific proof of causation. The Panel has found no Commission precedent utilizing PPIs for the specific and precise purpose of establishing price underselling, price depression, or price suppression, three elements of the statute which are clearly probative of causation. Nor has it found any court decision which has accepted such use as substantial evidence of such a finding. Product-specific PPIs normally have a much broader purpose and use as, for example, building blocks for more comprehensive indices, which are often used as indicators of inflation in the country involved, as "deflators" of other economic series, and as factors for escalating various forms of long-term contracts. However, putting two different countries' PPIs side-by-side and drawing conclusions therefrom-particularly the kind of precise conclusions that are involved in a price suppression analysis-seems highly unusual, even assuming that the exact same product series is involved for both countries.

In the typical injury case, price underselling, price depression or price suppression would be proved by reference to data in the record on actual prices. The difficulty in the instant case, of course, is that the information in the record was not, in the Commission's view, reliable for that purpose. The question therefore is whether resort to a tool that is far more general in nature and does not even purport to show prices-only price changes-is an acceptable alternative.

31/ The price trends graphs, which were presented to the Panel by the Coalition, are found in Appendix A to the Coalition's Remand Brief. A number of them first appeared in the Coalition Pre-Hearing Brief, Pub. Doc. 168. None was discussed by the Commission prior to its Remand Determination.

The Panel emphasizes in this connection that PPIs do not measure prices at all, they measure the average change in prices.[32/]

Without more, the Panel at this time is not convinced that the indexed rates of price changes of a basket of softwood lumber species in Canada, calculated in one manner by Statistics Canada with respect to the conditions existing in the Canadian economy, when compared to the indexed rates of price changes of a basket of different softwood lumber species in the United States, calculated in perhaps a somewhat different manner by the Bureau of Labor Statistics[33/] with respect to the conditions existing in the U.S. economy, says much at all about whether the basket of Canadian softwood lumber species had a price suppressive effect on the basket of U.S. softwood lumber species. In the absence of adequate information on the question of comparability

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32/ "[P]roducer price indexes are designed to measure only the change in prices received for the output of domestic industries." Bureau of Labor Statistics, "Technical Notes," at 1. Their purpose, therefore, is not to measure the level of prices but rather their rate of change. Figure 1 of the Coalition's Brief on Price Effects of Subsidized Canadian Lumber, List No. 2R, Doc. No. 36, was entitled "Comparison of Softwood Lumber Prices" and subtitled "U.S. PPI vs. Canadian PPI." That figure, which normalized the then divergent absolute price levels of Canadian and U.S. softwood lumber at the beginning of 1988, and which has a dramatic visual impact, of course cannot show prices at all because PPIs measure only the rate of change of prices. Even the Commission, at page 16 of its Remand Determination, stated that "comparison of price indices shows that Canadian prices tended to rise more slowly and fall more rapidly than domestic prices." (emphasis added). As noted, the Panel believes that a comparison of price indices can in fact show only that the relative rates of increase or decrease in the prices of the Canadian PPI series and the U.S. PPI series were disparate, not that the prices of the products being indexed thereby were necessarily so.

33/ At the remand hearing, Commission counsel indicated that the Commission did not attempt to compare the analytical approaches taken by Statistics Canada and the Bureau of Labor Statistics in the compilation of their respective PPI series. Of course, numerous differences could arise in their respective approaches, such as whether constant dollar output is involved; whether the data are seasonally adjusted or unadjusted; whether the Laspeyres or Paasche (or other) formula is utilized; whether the data measure shipment or order prices; whether true transaction prices are being measured (including discounts); whether the prices are delivered or F.O.B.; etc.

of the PPI series and, most importantly, without a convincing argument that a PPI comparison conducted in this manner truly has causative implications, the Panel is inclined to the view that the PPI evidence is not probative.

Furthermore, the Panel finds that a price index is only as good as the price information on which it is based. In this instance a number of the graphs were based on questionnaire data that the Commission had declared "accurate and reflective of trends," but nevertheless unsuitable for "reasoned judgment concerning under- or over-selling."[34/] Accordingly, this raises a question in the minds of the Panelists whether the data are robust enough for their present use. Certain other graphs were based on data published by Random Lengths, data which the Commission had also found unsuitable for comparing price levels, particularly in light of the different bases used for quoting prices by Canadian and U.S. producers.[35/]

Even assuming, however, that the data deficiencies mentioned above can be overcome, the Commission still does not demonstrate how the conclusions it draws follow from the price trends analysis. Apparently relying on the graphs developed by the Coalition, the Commission simply treats the conclusion that prices of imported Canadian lumber rose more slowly and fell more quickly than domestic prices as self-evident. But the Commission must support its conclusions by reasoned analysis, not by revelation. In the Panel's view, the conclusion drawn by the Commission is not self-evident. Without more, the Coalition's graphs cannot be considered to prove the Commission's hypothesis.

34/ ITC Final, at 30.

35/ ITC Final, at 30. See also Complainants' Remand Brief, at 70-71.

First, the price trends data have been "normalized" by reference to a specific base date. The selection of that base date is critical because the figures show the relationship of Canadian and U.S. prices in the light of the price difference that existed between them as at that base date. What is not indicated is whether that differential was typical of the price relationship throughout the period of investigation. Nor is there any indication of the point at which any change in that differential has an impact on sales.[36/]

In fact, the conclusions drawn by the Commission about price movements are based on an apparent assumption that any downward movement of import prices that neither followed nor was equal to a downward movement of domestic prices, or any upward movement of import prices that was not equal to or in advance of domestic price increases, was price suppressive.[37/] Such an assumption does not amount to substantial evidence in support of an essential element in the Commission's conclusion.

Second, even in light of adequate information about the base date selection, and verification that any change in the differential between domestic and imported lumber would be insignificant, it is not self-evident that on average Canadian prices fell more quickly and rose more slowly than domestic prices throughout the period of investigation. A cursory glance at the slopes on the graphs relied on by the Commission might suggest that prices of imported lumber fell more quickly and rose more slowly about half of the time, and rose more quickly and fell more slowly the other half of the time. Further information and a more precise analysis clearly is needed.

36/ See Complainants' Remand Brief, at 67.

37/ In its final determination, the Commission noted that "[v]ariations in the price differential among species will cause purchasers to switch," and that "sales are sensitive to relatively small price movements." ITC Final, at 28, 29.

Mere affirmation that the graphs prove the points for which they are offered does not substitute for proof, and cannot constitute substantial evidence.

Third, there is one thing that the price trends analysis lacks_one key element that would establish it as reliable and change what is no more than a theory into solid evidence. If the market had functioned as the Commission asserts, then Canadian market share would have increased. If all price changes did have an impact on sales, as the Commission apparently assumes, then the effect of Canadian prices, whether higher or lower, of always lagging domestic prices as they rose or fell, would have resulted in a larger Canadian share of the lumber market.[38/] But this did not occur, and in fact over the period of investigation the Canadian market share declined slightly.

The Commission's response to this, contained in a footnote to its written response brief, is the Coalition's argument that domestic producers chose to compete on the basis of price, rather than lose market share.[39/] The Coalition also argues, however, that market share of Canadian imports did increase in value, while declining in volume,[40/] and that if SYP is excluded, Canadian market share in fact increased in volume.[41/]

38/ This would also be the implication of the Commission's statement in its final determination that "sales are sensitive to relatively small price movements." ITC Final, at 29.

39/ The Coalition has advanced this argument from the outset. See comment of Michael H. Stein, Esq., counsel for the Coalition, at the Commission's staff conference in the preliminary investigation, at 49. ("The industry can attempt to maintain prices and cede market share, or it can attempt to fight on the basis of price, keep market share ....").

40/ Coalition Remand Brief, at 62-63.

41/ Remand Hearing Transcript, at 119.

These arguments do not remedy the fundamental defect in the Commission's analysis. No evidence appears on the record that the domestic softwood lumber industry ever made a concerted decision to fight on price during the period of investigation. Moreover, the notion of always fighting on price rather than conceding market share, when taken at an individual company level, appears inconsistent with the Commission's finding that "individual producers in a competitive industry are price takers."[42/] The argument that there was an increase in the value of imported softwood lumber does not meet the objection raised, and the proposal to measure market share after excluding SYP flies in the face of the conclusion of the Commission in its final determination that "[o]n the whole, lumber is a commodity product with a significant proportion of all lumber, both domestic and imported, competing head-to-head on the basis of price."[43/]

Accordingly, the Panel finds that the price trends data and analysis put forward in the Remand Determination do not yet rise to the level of substantial evidence and are otherwise not in accordance with law. Should the Commission on remand rely on price trend information to support an affirmative determination, the Commission is instructed to provide a full analysis and explanation of the underlying data and the methodology employed in the creation and presentation of the price trends analysis.

2. The Role of Spruce-Pine-Fir in the U.S. Market

42/ Remand Determination, at 11, n.27. While there is some evidence in support of the "compete on price" argument, it is difficult for the Panel to understand how the "industry" could have successfully stood its ground and fought on price if no single member of the industry was able or in a position to do so.

43/ ITC Final, at 28; see also 6-7, n.14.

The second evidentiary basis offered by the Commission to support its finding of causation relates to its original conclusion that prices of Canadian SPF have a significant influence on U.S. softwood lumber prices. Citing various facts in support of its position, the Commission in its final determination found that "[p]rices for spruce-pine-fir (SPF) are a bellwether in the market, serving as a reference point for pricing."[44/] The Commission then utilized this finding as a principal basis for reaching its conclusion on causation: "The major species group represented in Canadian import volumes, SPF, has a significant influence on price movements in the U.S. market."[45/] In effect, the Commission found that the substantial volume of Canadian SPF, because of SPF's characteristic as a "bellwether" or "reference point for pricing," had a price suppressive effect within the meaning of the applicable statute,[46/] not only on U.S.-produced SPF but on other domestically produced species as well.

Following its consideration of the Panel's remand order, the Commission in its Remand Determination abandoned the "bellwether" terminology but readopted the substance of its earlier finding, determining that "the price of subsidized Canadian imports, particularly SPF, has a dominant impact on lumber prices in the U.S. market."[47/] Citing this time to responses to a series of questionnaires submitted to various industry participants during the remand period,[48/]

44/ ITC Final, at 31. The Commission cited as support for this finding the information contained in footnote 107 to the final determination. The Panel addressed this finding and its supporting information at pages 37 through 45 of the Panel Opinion.

45/ ITC Final, at 34.

46/ 19 U.S.C. § 1677(7)(C)(ii).

47/ Remand Determination, at 16.

48/ The Remand Determination does not make clear the total number of questionnaires (continued...)

the Commission determined that the information contained in such responses "supports the conclusion that SPF prices, which are predominantly import prices, have a significant effect on lumber prices overall."[49/] Utilizing this new evidence, the Commission on remand again found that Canadian SPF had a price suppressive effect on domestically produced softwood lumber, whether SPF or other species.

The remand questionnaire prepared by Commission staff was sent to three categories of participants in the softwood lumber market (producers, importers and purchasers). Each questionnaire was identical in purpose and followed, mutatis mutandis, the same format.[50/] Each information request was focused not on the national softwood lumber market as a whole, but

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(...continued)
dispatched to industry participants in the remand investigation (i.e., the size of the intended sample), nor does it make clear the percentage of the intended sample, either in absolute terms or as a percentage of industry production, that responded to the questionnaires. However, the Office of Investigations Memorandum INV-Q-174, October 14, 1993, indicates that 33 producers, 28 importers and 26 purchasers did respond to the questionnaire requests, and the results of those responses were summarized in that Memorandum. The Panel notes that in the original investigation, "the Commission [had] sent questionnaires to more than 100 producers who accounted for more than 75 percent of U.S. production in 1991. Fifty producers, accounting for nearly 49 percent of 1991 production responded to the Commission's questionnaires." ITC Final, at 14, n.41.

49/ Remand Determination, at 17.

50/ Separate questionnaire forms were issued to producers, importers and purchasers but, with necessary changes in detail, the same information was solicited in each case.

on seven large submarkets,[51/] and asked with respect to each of those submarkets several broad questions.

The first question or information request (Question 1) was to "rank [specified factors] as critical, very important, somewhat important, or not important when establishing transaction prices for (sales to U.S. customers) or (purchases from U.S. or Canadian suppliers) of softwood lumber." The factors identified by the Commission included:

- Futures market quotes
- Overall availability of lumber
- Weather conditions
- Competing quotes from other suppliers in your market areas
- The size of an order
- Random Lengths or other trade publications
- Lead times between order and delivery
- Other factors[52/]

51/ Atlanta, Georgia; Baltimore, Maryland; Boston, Massachusetts; Chicago, Illinois; Dallas, Texas; Los Angeles, California; and Seattle, Washington. For purposes of tabulating the responses to the questionnaires, each producer, importer or purchaser response within one of these seven submarkets was considered to be a single response. Office of Investigations Memorandum INV-Q-174 (October 14, 1993), Attachment A at 1, 3 and 8. For example, if a producer participated in each of the seven submarkets, its single questionnaire response as a producer would actually be tabulated or summarized as seven different responses. If that producer also occupied the role of an importer and answered the importer questionnaire in the same manner as the producer questionnaire, the aggregate responses would be doubled for composite summary purposes. The same approach also was taken with respect to tabulating the responses to the importer and purchaser questionnaires.

52/ A summary of the responses to this question prepared by the Coalition indicates that respondents listed the following items as "other factors": customers' needs and preferences;

(continued...)

In addition, the Commission asked three principal questions of each respondent, namely:

> 2a) Are there any particular mills, warehouses, distributors, retailers, or other organizations in either Canada or the United States that tend to lead softwood lumber prices up or down, or that have a significant impact on prices in the market areas in which your firm (sells) or (purchases) softwood lumber?
>
> 2c) Does your firm use price quotes by any of these organizations as a reference when establishing prices for (sales to customers) or (purchasers from suppliers) in your market areas?
>
> 3a) Are there any species of softwood lumber from Canada or the United States that are used as a reference to establish transaction prices for other species of softwood lumber in your market areas?

At the January 10, 1994 hearing, counsel for the Canadian Complainants presented a table summarizing the responses to these three inquiries.

a) SPF as a Reference Point for Pricing

The Commission's finding on remand that "[SPF] has a dominant impact on lumber prices in the U.S. market" continues to rely, in part, on the "reference point for pricing" characteristic of SPF as its causation link to price suppression of U.S. softwood lumber. This

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demand factors; tally; Canadian prices; time of year; cost of manufacturing; housing starts and activity; quality of product and service; and grade and availability of softwood lumber from Canada. See Table 1, Brief on Price Effects of Subsidized Canadian Lumber of the Coalition for Fair Lumber Imports, List No. 2R, Doc. No. 36. These nine factors plus the seven factors specifically identified by the Commission in the questionnaire thus total sixteen items or factors considered by the industry to be relevant to the establishment of transaction prices for the purchase or sale of softwood lumber. The availability of a particular lumber species (e.g., SPF) as such a factor was not identified in the question nor, apparently, in the responses. Based upon the record, changes in seasonal demand, exchange rates, and U.S. government policies (e.g., reduction in logging permits) also appear to affect prices but were not specifically noted in the two lists.

time, however, the Commission relies on the results of the remand questionnaires as support for the "reference point"/price suppression finding.

The Panel is presented with two questions: first, is the "reference point for pricing" finding supported by substantial evidence on the record; and second, even if adequately supported by substantial evidence on the record, is it otherwise in accordance with law for the Commission to establish causation on the basis of the fact that prices of an import species serve as "a reference point" for the prices of largely different, domestic species. The Panel finds in the negative on both issues.

As a preliminary matter, the Panel in its earlier opinion specifically noted that an important distinction had to be drawn between price leadership and the Commission's "reference point for pricing" finding. In effect, the Panel concluded that being "a reference point for pricing" was a lesser order of beast than being a price leader, which has been a recognized tool for assessing causation in previous cases.[53/] In particular, the Panel observed that:

53/ The appropriateness of price leadership as a tool for establishing causation has been recognized in numerous Court of International Trade decisions. See Metallverken Nederland B.V. v. United States, 728 F. Supp. 730, 739 (Ct. Int'l Trade 1989); Maverick Tube Corp. v. United States, 687 F. Supp. 1569, 1578 (Ct. Int'l Trade 1988); Copperweld Corp. v. United States, 682 F. Supp. 552, 565 (Ct. Int'l Trade 1988); and Gifford-Hill Cement Co. v. United States, 615 F. Supp. 577, 588 (Ct. Int'l Trade 1985). In addition to the cases giving rise to the foregoing judicial reviews, the Commission has examined or relied on price leadership in numerous other cases, such as Certain Red Raspberries from Canada, Inv. No. 731-TA-196 (Final), USITC Pub. 1707, at 13 (June 1985); Coated Groundwood Paper from Belgium, Finland, France, Germany, and the United Kingdom, Inv. Nos. 731-TA-487-490 & 494 (Final), USITC Pub. 2467, at 22, n.77 (December 1991); Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from Brazil, France, Germany, and the United Kingdom, Inv. Nos.
701-TA-314-317 (Final); Inv. No. 731-TA-552-555 (Final), USITC Pub. 2611, at 41 (March 1993); and Certain Flat-Rolled Carbon Steel Products from Argentina, Inv. Nos.
701-TA-319-332, 334, 336-342, 344, and 347-353 (Final); Inv. Nos. 731-TA-573-579, 581-592, 594-597, 599-69, and 612-619 (Final), USITC Pub. 2664, at 49-50 (August 1993).
(continued...)

> SPF prices clearly could not be the exclusive reference point for pricing of domestic softwood lumber. SPF prices would, of necessity, be merely one of many such reference points (a great many factors go into establishing U.S. softwood lumber prices on a daily basis). The Panel would also observe that being a reference point for pricing (i.e., one of many) is a very different, and much more limited, role than being a price leader in the 'classical' sense, the sense which has supported causation findings in numerous prior injury determinations.[54/] (emphasis in original).

In both the original and remand determinations, the Commission clearly did not find, on the record at hand, that Canadian SPF was a price leader for purposes of assessing its impact on the prices of competing products in the U.S. market. At best, with the data available to it the Commission could find only that SPF, most of which is Canadian, was "a reference point for pricing." As suggested above, the question for the Panel is whether even this finding is adequately supported by substantial evidence on the record and, if it is, whether such a characteristic has the same legal significance as would a finding of price leadership.

Insofar as factual support for the finding is concerned, the Panel notes that 31 out of 32 (97%) of the purchaser responses held that one species of softwood lumber is not used as a reference point for pricing of other species; 60 out of 81 (74%) of the importer responses held similarly; while 80 out of 134 (60%) of the producer responses held that one species of softwood

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In light of such substantial and convincing authority, the Panel would always be prepared to accept a substantiated case of price leadership as an appropriate tool for establishing causation in a Commission injury determination. However, research has disclosed no case in which the Commission has relied on the "reference point for pricing" analysis as support for a causation finding. Language of this kind usually appears in the information section of Commission determinations where Commission staff comments on whether list prices serve as points of departure or reference points for the negotiation of actual transaction prices. See, e.g., Certain Flat-Rolled Carbon Steel Products from Argentina, Volume II, at I-151.

54/ Panel Opinion, at 39, n.119.

lumber could be a reference point for the pricing of another species. Thus, the most disinterested group of respondents (purchasers)[55/] was virtually unanimous in rejecting the notion that one species of softwood lumber could be a reference point for pricing of another species. The Panel notes that almost three-quarters of the importing group took the similar view while only a relatively small majority of the U.S. producers took the contrary view.

Expressed another way, two out of the three groups examined overwhelmingly rejected the assertion put forward by the Commission, while only one group (the domestic producers) supported it. On an overall composite basis, 59% of all responses were against the Commission position while only 41% supported it. The Commission offers no explanation in the Remand Determination why it rejected the "majority" view, including the virtually unanimous view of the purchaser sector, in favor of the view contra. Nor did Commission counsel at the remand hearing offer any explanation of this aspect of the Commission's decision.

55/ Research suggests that the Commission and its staff appear most frequently to turn to purchaser questionnaires to resolve issues of price leadership. See Certain Flat-Rolled Carbon Steel Products from Argentina, supra, at 49-50; Professional Electric Cutting and Sanding/Grinding Tools from Japan, Inv. No. 731-TA-571 (Final), USITC Pub. 2658, at I-37, n.28; Certain Special Quality Carbon and Alloy Hot-Rolled Steel Bars and Rods and Semifinished Products from Brazil, Inv. No. 731-TA-572 (Final), USITC Pub. 2662 (July 1993), at I-86 and n.160; and Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from Brazil, France, Germany, and the United Kingdom, supra, at 41-42. Because of their relatively more disinterested standing, this approach appears to the Panel to be highly appropriate, although the Panel would stress that soliciting the same or similar data from producer and importer groups can in no way be considered inappropriate. Rather, purchaser responses on this issue would appear to be inherently more convincing to a reasonable mind than the views expressed by parties that are more directly involved in the proceeding and/or interested in its outcome.

The Panel is quite cognizant of its obligation under the substantial evidence standard not to reweigh the evidence or to substitute its judgment for that of the Commission.[56/] However, the Panel also notes that an agency's determination must have a reasoned basis and that there must be a rational connection between the facts found and the choice made by the agency.[57/] The Commission "is obligated to weigh all the pertinent evidence gathered in an investigation in reaching a determination."[58/] The Commission may "not rely upon isolated tidbits of data which suggest a result contrary to the clear weight of the evidence,"[59/] must not engage in "unexplained or inadequately supported selectivity [of evidence],"[60/] and "must have some justification, supported by substantial evidence in the record" for selecting certain data over other data.[61/]

With this standard of review in mind, the Panel concludes that the "reference point for pricing" finding is not supported by substantial evidence on the record. The virtually unanimous rejection of that notion by the purchasers, who typically form the most disinterested group of questionnaire respondents, the seconding of that rejection by the importer group, and the relatively small majority contra among the producers-when taken into conjunction with the

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56/ See the Panel's extensive review of the substantial evidence standard set forth at pages 12-17 of its original opinion.

57/ Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962).

58/ Roses, Inc. v. United States, 720 F. Supp. 180, 183 (Ct. Int'l Trade 1989).

59/ USX Corp. v. United States, 655 F. Supp. 487, 489 (Ct. Int'l Trade 1987).

60/ Armstrong Rubber Co. v. United States, 685 F. Supp. 252, 256 (Ct. Int'l Trade 1988), vacated mem. by agreement of the parties, 887 F.2d 1094 (Fed. Cir. 1988).

61/ Timken Co. v United States, 894 F.2d 385, 388 (Fed. Cir. 1990).

complete failure of the Commission to explain why it accepts the view of the latter against the former-has rendered it impossible for the Panel to sustain this finding.

As to its legal sufficiency, the Panel reiterates that it has carefully reflected upon the appropriateness of not foreclosing the Commission from developing new tools by which to analyze cases. Nevertheless, the Panel believes that being "a reference point for pricing" is indeed very different from being a price leader, which is an established concept in law and in Commission practice with obviously probative causative implications. In the Panel's view, the fact that SPF prices are or may be included on a list of factors that a member of the domestic softwood lumber industry might refer to for purposes of establishing his own transaction prices is legally insufficient, without more, to sustain a finding that Canadian SPF has caused price suppression, to a significant degree, of domestic softwood lumber prices.

The fact that SPF is a "reference point for pricing" appears to mean little more than that SPF prices could be expected to be included among a list of items that a producer, importer or purchaser might (or might not) refer to when focusing on a particular purchase or sale of SPF, or some other species of softwood lumber. The responses to the Commission's remand questionnaire indicate that at least sixteen (and very likely more) items are involved in the pricing of softwood lumber.[62/] Without unfairly minimizing the appropriate weight to be given SPF as one such factor, assuming that it does have weight for this purpose, the Panel simply is not convinced that the special identification of one of those items by the Commission is adequate to establish causation in this case. In the Panel's view it is not adequate to convince "a reasonable mind" of such causation.

62/ Interestingly, SPF prices were not identified by respondents in their replies to the "all others" question, nor were they broken out by the Commission in the seven identified factors.

Accordingly, the Panel holds that the Commission's "reference point for pricing" finding is unsupported by substantial evidence on the record and is otherwise not in accordance with law.

b) Competitive Price Quotations

In its Remand Determination, the Commission also found that "[p]roducers, importers, and purchasers consistently indicated that competing quotes were important in establishing transaction prices."[63/] The remand questionnaire solicited this information both through Question 1 and Question 2c.[64/] Question 1 is very broad and appears to do little more than restate the accepted conclusion that the softwood lumber industry is a competitive one and that competing quotes are or can be important in establishing transaction prices for softwood lumber, although in an economic sense individual competitors are thought to be "price takers."[65/] Neither Question 1 itself nor the responses thereto specifically identify SPF, and thus such responses cannot themselves be taken as substantial evidence in support of the Commission's causation finding.

Question 2c is somewhat more focused for this purpose, inquiring whether the respondent utilizes price quotations from U.S. or Canadian firms identified in its response to Question 2a as "a reference" in establishing its own softwood lumber transaction prices. All three groups of respondents rejected this notion, with the purchasers again being virtually unanimous

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63/ Remand Determination, at 17-18.

64/ Respondents were asked in Question 1 to rank the importance of "[c]ompeting quotes from other suppliers in your market areas."

65/ Remand Determination, at 11, n.27.

on the point. Twenty nine out of thirty one (94%) purchaser responses were negative (or not applicable); 65 out of 86 (76%) importer responses were negative; and 76 out of 133 (57%) producer responses were negative.

The specific language adopted by the Commission in its Remand Determination does not suggest, clearly at least, that the Commission relied on the minority responses to Question 2c in support of its causation finding. Nevertheless, as the preceding discussion might suggest, the Panel does not believe that the responses to Question 2c, whether taken in conjunction with Question 1 or standing alone, can be considered substantial evidence in support of such a finding. Moreover, and as noted above, the Panel does not believe that the fact that some identified factor may be "a reference" or "a reference point" for establishing domestic softwood lumber prices is legally sufficient to establish causation under the circumstances of this case.

c) Canadian Mills as Price Leaders

The Commission in its Remand Determination also stated that "[s]everal Canadian producers and U.S. importers and wholesalers distributing imported Canadian lumber, i.e., primarily SPF, were identified as tending to lead prices or having a significant impact on prices in the U.S. market."[66/] The data underlying this finding were developed in response to Question 2a of the remand questionnaire, which inquired whether particular mills or other Canadian or U.S. organizations tended to lead prices up or down or otherwise significantly impact prices.

Twenty-four out of twenty-nine (83%) of the purchaser responses were negative as to the proposition that either Canadian or U.S. mills tend to lead prices or have a significant

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66/ Remand Determination, at 18. The Commission did not quantify the word "several."

impact on prices; 57 out of 85 (67%) of the importer responses were similarly negative; while 73 out of 129 (57%) producer responses were positive. Once again, the Commission rejected without explanation the purchaser responses (which were overwhelmingly negative), as well as the importer responses (also negative), in favor of the producer responses (positive). The Commission further failed to note in its determination that some of the responses to this question identified U.S. mills as likely to lead prices or have a significant impact on U.S. prices.

In the opinion of the Panel, and particularly in light of its previous findings regarding the factual and legal sufficiency of the remand evidence as well as the fact that the Commission did not find price leadership in this case, this evidence is simply too inadequate to support the Commission's dominant impact finding, and the Commission's finding is otherwise not in accordance with law.

3. Regional Comparison

The final evidentiary basis advanced by the Commission to support its finding of causation on remand relies on data collected early in the investigation for the purpose of comparing the health of Western U.S. softwood lumber producers with the remainder of the country. The Commission used this information to develop a regional analysis, conducted by comparing weighted average composite prices in different regions of the United States, and correlating resulting price differences with import penetration in the same regions. The Commission found the average composite price "significantly higher" in the Southern region as compared to the Northern region, and a larger import penetration in the North.[67/]

67/ Remand Determination, at 11. Notably, the Commission did not provide information (continued...)

Complainants point out that the data used to construct the composite prices are the same data which, although "accurate and reflect[ing] pricing trends in the market," were rejected by the Commission in its final determination for purposes of making price comparisons. The Commission discussed the "day-to-day" volatility of the market, daily and even hourly price changes, and problems in obtaining specific information in explaining why the collected data were unsuitable for use in conducting such price comparisons.[68/]

The Commission Remand Determination sets forth its regional price comparison material in a single paragraph, with two footnotes. One footnote includes the statement that: "Comparing composite prices in regional markets minimizes differences in the baskets of species used to calculate those prices."[69/] No other explanation is set forth as to why the data previously rejected for comparing prices can now be used for that purpose.

This Panel has emphasized the need for the Commission to "provide an adequate explanation of its findings in order to permit meaningful review."[70/] While the evaluation of data, including their reliability, is committed to the expert determination of the Commission,[71/] and the reviewing authority must not substitute its judgment for that of the Commission,[72/] the

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(...continued)
as to how it derived its weighted averages.

68/ ITC Final, at 30.

69/ Remand Determination, at 11, n.68 and 69.

70/ Panel Opinion, at 48.

71/ Matsushita Electric Industrial Co., Ltd. v. United States, 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984).

72/ Alberta Pork Producers Marketing Board v. United States, 11 Ct. Int'l Trade 563, 582, (continued...)

Commission nevertheless must demonstrate that the evidence is sufficient to allow a reasonable person to reach the same conclusion.[73] It must also provide a "rational connection between the facts found and the choice made by the agency."[74]

The Panel does not believe that the Commission has met this standard with regard to the use of the previously rejected data for price comparison purposes. No explanation is set forth of why the use of average composite prices changes the previously stated position of the Commission on such use. No discussion is presented of why such comparisons are valid despite the marked differences in regional markets. No information is provided on why species differences can be discounted, apart from the non-explanatory footnote previously quoted. Further, even if that footnote can be read to show the Commission's path of reasoning on the "baskets of species" issue, this reasoning remains at odds with the view expressed in the final determination, without any reasoned explanation.

The Complainants also challenge the regional analysis on the basis that the price differential determined by the Commission, a $7.92 difference between $262.48 and $270.40, was statistically insignificant. Complainants cite "elementary statistical analysis" demonstrating that the price differential was much less than the $33 or $42 price differentials necessary for statistical significance at the 95% confidence level_the confidence level often required by statisticians.[75]

(...continued)
669 F. Supp. 445, 449 (1987).

73/ See Matsushita, at 51.

74/ Panel Opinion, at 16.

75/ Complainants' Remand Brief, at 43-44.

The 95% degree of certainty has been referred to by Judge Restani as "often what statisticians require in order to find a significant correlation."[76/] She further indicated that "the Commission is not required to accept data which in the course of ordinary scientific research could properly be rejected."[77/] Commission counsel at the remand hearing indicated that the Commission is not subject to any specific requirements, such as standard deviations, concerning the statistical significance of the data it reviews.[78/] This position was also stated by the CIT in Alberta Pork Producers Marketing Board. Referencing Judge Restani's statements above, the Court stated that "nothing in the statute requires that the Commission reassess data collected and accepted in its determination in order to verify its consistency with some ambiguous level of scientific reliability."[79/]

The Panel believes that the determination which must be made here is whether the data can be considered sufficiently reliable that a reasonable mind could rely on the information to support its determination. The Commission is often required to make determinations despite "short statutory deadlines in an injury investigation and the difficulties facing the Commission in obtaining information."[80/] The reviewing authority must respect these limitations, but cannot

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76/ Maine Potato Council v. United States, 9 Ct. Int'l Trade 460, 462, 617 F. Supp. 1088 (1985); see also Hazelwood School District v. United States, 433 U.S. 299, 97 S.Ct. 2736, 53 L. Ed.2d 768 (1977), at n.17.

77/ Id.

78/ Remand Hearing Transcript, at 74.

79/ Alberta Pork Producers Marketing Board v. United States, 11 Ct. Int'l Trade 563, 585, 669 F. Supp. 445, 463 (1987).

80/ Hannibal Industries, Inc. v. United States, 13 Ct. Int'l Trade 202, 208, 710 F. Supp. 332 (1989), citing Atlantic Sugar Ltd. v. United States, 2 Fed. Cir. (T) 130, 133-34, 744 F.2d

(continued...)

allow the difficulty of obtaining data to relieve the Commission of the obligation to act only on the basis of substantial evidence on the record. While data limitations and inconsistencies may require the Commission to make judgments in situations involving less than 95% certainty, this does not give the Commission leave to rely on data which are potentially, indeed quite probably, in error.[81/]

The statistical analysis performed by the Complainants demonstrates that the variance between the prices relied on by the Commission is less than one quarter to one third of the standard deviations involved. In these circumstances, the likelihood that the actual figures taken from the ranged sample are accurate is quite small.

In Copperweld Corp. v. United States, the Court stated:

> [I]n a final investigation, the ITC is directed to determine whether an industry in the U.S. *is* materially injured by reason of the imports of merchandise at less than fair value. 19 U.S.C. § 1673d(b)(1)(A)(i) (1982). This standard is more exacting than that which is applicable in a preliminary determination. In a final investigation, the ITC must determine whether or not material injury actually exists; a 'reasonable indication' of injury is never enough.[82/]

The Panel believes that the quality of the evidence produced by an analysis with a relatively low degree of statistical certainty, using data previously rejected and now used without adequate explanation for price comparison purposes, is at most no better than a "reasonable

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(...continued)
1556, 1560 (1984).

81/ Alberta Pork Producers Marking Board, at 587: "Having found a potential error in the data specifically relied on by the Commission in reaching its determination regarding the depressing price effect of increased Canadian imports, the Court remands this action."

82/ Copperweld Corp. v. United States, 12 Ct. Int'l Trade 148, 169, 682 F. Supp. 552, 571 (1988) (emphasis in original).

indication," and therefore insufficient for a final determination. It does not provide the substantial evidence required to support a finding of price suppression due to the subject imports. The Panel therefore finds that the regional analysis conducted by the Commission is insufficient to support its affirmative determination.

CONCLUSION

Having reviewed the Commission's determination on remand, and the arguments of the Parties, the Panel affirms the Commission's remand determination with regard to imports from Quebec.

With respect to the Commission's causation determination, the Panel finds that the information and analysis regarding the role of SPF in the U.S. softwood lumber market, and the regional price and import penetration comparisons, do not constitute substantial evidence of price suppression by reason of imports of softwood lumber from Canada or are otherwise not in accordance with law.

As to the Commission's price trends analysis, the Panel finds that the analysis, in its present form, does not constitute substantial evidence and is otherwise not in accordance with law. Should the Commission on remand rely on price trend data to support an affirmative determination, the Commission shall provide a full analysis and explanation of the underlying data and the methodology employed in the creation and presentation of the price trends analysis.

Accordingly, the Panel remands the Commission's October 25, 1993 determination. The Commission shall complete its redetermination on remand within 45 days of the date of this Opinion.

ARTICLE 1904
BINATIONAL PANEL REVIEW UNDER
THE UNITED STATES-CANADA FREE TRADE AGREEMENT

In the Matter of: **SOFTWOOD LUMBER** **FROM CANADA**	**USA-92-1904-02**

ORDER

Pursuant to the United States-Canada Free Trade Agreement, and for the reasons stated in the Opinion, the Panel affirms in part and remands in part the United States International Trade Commission's Remand Determination, for further consideration consistent with this Opinion.

The results of the remand shall be provided to the Panel by the International Trade Commission within 45 days of the date of this Order.

January 28, 1994
Date

Joseph F. Dennin,
Chair

January 28, 1994
Date

Steven W. Baker

January 28, 1994
Date

Harry B. Endsley

January 28, 1994
Date

James F. Grandy

January 28, 1994
Date

Donald M. McRae

ARTICLE 1904
BINATIONAL PANEL REVIEW UNDER
THE UNITED STATES-CANADA FREE TRADE AGREEMENT

In the Matter of:		
SOFTWOOD LUMBER FROM CANADA	92-1904-02	USA-

DECISION OF THE PANEL

ON REVIEW OF THE U.S. INTERNATIONAL TRADE COMMISSION'S SECOND REMAND DETERMINATION

July 6, 1994

Before: Joseph F. Dennin (Chair)
Steven W. Baker
Harry B. Endsley
James F. Grandy
Donald M. McRae

Appearances:

John A. Ragosta and Harry L. Clark on behalf of the Coalition for Fair Lumber Imports. With them on brief was William A. Noellert.

Judith M. Czako on behalf of the U.S. International Trade Commission. With her on brief were Lyn M. Schlitt and James A. Toupin.

M. Jean Anderson on behalf of the Government of Canada. With her on brief were Bruce H. Turnbull, Ronald W. Kleinman, and David W. Oliver.

W. George Grandison and Mark A. Moran on behalf of the Canadian Forest Industries Council and affiliated companies. With them on brief was Gracia M. Berg.

Joining in the arguments of the Government of Canada, and the Canadian Forest Industries Council and affiliated companies were: Patrick F.J. Macrory, Spencer S. Griffith, Shannon S.S. Herzfeld, and Margaret L.H. Png on behalf of the Gouvernement du Québec; Randolph J. Stayin on behalf of the Quebec Lumber Manufacturers' Association and members of the Canadian Lumbermen's Association located in Quebec; Lawrence A. Schneider, Claire E. Reade, Michael T. Shor, and Matthew Frumin on behalf of the Government of the Province of Alberta; Homer E. Moyer, Stuart E. Benson and Paul Maguffee on behalf of the Government of British Columbia; and Mark S. McConnell, Lynn G. Kamarck, Paul Minorini and Leslie A. Delagran on behalf of the Government of Ontario.

TABLE OF CONTENTS

OPINION AND ORDER OF THE PANEL

I. INTRODUCTION

This Binational Panel was convened pursuant to Article 1904(2) of the United States-Canada Free Trade Agreement ("FTA"), and Title IV of the United States-Canada Free Trade Agreement Implementation Act.[1/] The Panel was constituted in response to a request for review of the final affirmative injury determination of the United States International Trade Commission ("Commission" or "ITC") in the matter of Softwood Lumber from Canada.[2/] Since its inception the Panel has issued two opinions, in which the Panel made certain findings and remanded to the Commission for further consideration specified issues as noted therein.[3/]

1/ 19 U.S.C. § 1516a(g)(2).

2/ Softwood Lumber from Canada, 57 Fed. Reg. 31,389 (July 15, 1992) (Aff. Final); Softwood Lumber from Canada, Inv. No. 701-TA-312, USITC Pub. 2530 (July 1992) (Aff. Final) [hereinafter ITC Final].

3/ Details of the trade dispute leading to the Panel's review of the Commission's determinations, as well as the procedural history pertinent to the Panel's review, are provided in the Panel's first and second opinions. The Panel's first opinion was issued on July 26, 1993. (Softwood Lumber from Canada, USA-92-1904-02 [hereinafter First Panel Opinion]). The Panel's second opinion was issued on January 28, 1994. (Softwood Lumber from Canada, USA-92-1904-02 [hereinafter Second Panel Opinion]).

In this third Opinion the Panel reviews the Commission's Second Remand Determination, issued on March 14, 1994.[4/] The Commission in that determination found that an industry in the United States was being materially injured by reason of imports of subsidized softwood lumber from Canada. Chairman Newquist and Commissioner Rohr together issued an affirmative determination. Commissioner Crawford reaffirmed her earlier, separate affirmative determination, which was issued as part of the Commission's First Remand Determination.[5/] Writing separately, Vice Chairman Watson concluded that, based on his interpretation of the Panel's opinions and his review of the record evidence, the U.S. softwood lumber industry was neither materially injured, nor threatened with material injury, by reason of subsidized softwood lumber imported from Canada. Commissioner Nuzum reaffirmed her original negative determinations on injury and threat of injury reached in the original ITC Final.

On March 24, 1994, the Commission filed a Notice of Motion to Stay Proceedings. Argument in opposition to that Motion was filed

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4/ Softwood Lumber from Canada, Inv. No. 701-TA-312 (Remand), USITC Pub. 2753 (Mar. 1994) (Aff. Final) [hereinafter ITC Second Remand].

5/ Softwood Lumber from Canada, Inv. 701-TA-312 (Remand), USITC Pub. 2689 (Oct. 1993) (Aff. Final) [hereinafter ITC First Remand]. In that remand determination Chairman Newquist, Vice Chairman Watson and Commissioner Rohr issued a single affirmative decision. Consequently, Commissioner Crawford's views were not necessary to the Commission's affirmative determination and, therefore, the Panel did not render an opinion with respect to Commissioner Crawford's decision. That decision, reaffirmed by Commissioner Crawford on remand, now constitutes an integral component of the Commission's affirmative determination and is reviewed by the Panel in this opinion.

on March 30, 1994 by counsel for the Government of Canada, the Governments of Alberta, British Columbia and Ontario, the Gouvernement du Québec, the Canadian Forest Industries Council and affiliated companies, the Quebec Lumber Manufacturers' Association, and members of the Canadian Lumbermen's Association located in Quebec (collectively, "Canadian Complainants" or "Complainants"). The Canadian Complainants on that day also filed a joint brief in opposition to the Commission's Second Remand Determination.[6/] Briefs in support of the Commission's Second Remand Determination were filed by the Commission and counsel for the Coalition for Fair Lumber Imports ("Coalition") on April 25, 1994.[7/]

On April 12, 1994 the Panel issued an Order denying the Commission's Motion to Stay Proceedings, and indicated its intent to consider whether a hearing would be necessary with regard to the Commission's Second Remand Determination. By Order dated May 9, 1994, and upon the request of counsel for the Coalition, the Panel established May 13, 1994 as the date for oral argument on Commissioner Crawford's decision, and the affirmative determination of Chairman Newquist and Commissioner Rohr. Arguments were presented at the hearing on behalf of the Canadian Complainants, the Commission, and the Coalition.

6/ Canadian Complainants' Joint Brief in Opposition to the Second Remand Determination, March 30, 1994 [hereinafter Canadian Complainants' Brief].

7/ Response of the Investigating Authority to the Canadian Complainants' Joint Brief in Opposition to the Second Remand Determination of the U.S. International Trade Commission, April 25, 1994 [hereinafter ITC Response Brief]; Brief in Support of the International Trade Commission's Second Determination on Remand, April 25, 1994, submitted on behalf of the Coalition for Fair Lumber Imports [hereinafter Coalition Response Brief].

II. STANDARD OF REVIEW

This Panel is required under Article 1904(3) of the FTA and U.S. law to apply the standard of review and general legal principles that a U.S. court would apply in reviewing a Commission determination. That standard of review, as stated in the Panel's Second Opinion, obligates the Panel "to ensure that the Commission's determination is the result of reasoned decision-making based on substantial evidence in the record, and that it is otherwise in accordance with law."[8/]

This standard, discussed in detail in the Panel's prior opinions and incorporated by reference here,[9/] requires more than a mere recitation of the underlying principles and court decisions delineating the contours of the review standard. Rather, it mandates conscientious application of the standard by the reviewing authority.[10/]

The Panel is fully aware of its obligations under the applicable standard of review, as well as the limits placed on the Panel's review by virtue of that standard. The Panel believes that it has conscientiously applied the standard of review required by the FTA and U.S. law in its deliberations and in each of its opinions. While the Coalition in its Response Brief has once again highlighted the recent Daewoo decision issued by the Court of

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8/ Second Panel Opinion, at 4.
9/ First Panel Opinion, at 11-17; Second Panel Opinion, at 3-4.
10/ Live Swine From Canada, ECC-93-1903-01 USA (April 8, 1993), at 11.

Appeals for the Federal Circuit,[11/] as discussed in the Panel's Second Opinion that decision does not fundamentally alter the standard of review to be applied by the Panel. Nor for that matter do the "intervening" court decisions cited by the Coalition.[12/] Indeed, the recent Daewoo decision simply reaffirms the standard of review as understood and applied by the Panel.

The Panel also recognizes, as pointed out by Commission counsel, that its review must be based on the grounds invoked by the agency.[13/] The Panel is not empowered to draw its own conclusions from the record. While it must presume that the Commissioners have considered all of the evidence presented, evidence not fairly encompassed in the discernible "path of reasoning" is not properly before the Panel for review.

III. THE COMMISSION'S AFFIRMATIVE REMAND DETERMINATION

A. Introduction

In its Second Opinion, the Panel addressed the evidence of significant price suppression by reason of the subject imports

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11/ Daewoo Electronics Co. v. International Union of Electrical, Technical, Salaried and Machine Workers, 6 F.3d 1511 (Fed. Cir. 1993), reversing in part Daewoo Electronics Co. v. United States, 760 F. Supp. 200 (Ct. Int'l Trade 1991). The Panel of course appreciates the fact that decisions of the Court of Appeals of the Federal Circuit, and the Supreme Court, are binding on Article 1904 Binational Panels and are thus of special relevance to its deliberations. FTA, Art. 1904(2).

12/ See Coalition Response Brief, at App. B, citing ABF Freight System, Inc. v. NLRB, 127 L.Ed.2d 152 (1994); Avesta Sheffield Inc. v. United States, No. 93-01-00062, Slip Op. 94-53 (Ct. Int'l Trade Mar. 31, 1994); Royal Thai Government v. United States, No. 92-03-00174, Slip Op. 94-59 (Ct. Int'l Trade Apr. 7, 1994).

13/ ITC First Remand Brief, at 14; ITC Second Remand Brief, at 17-18.

cited by the Majority in its First Remand Determination. In that opinion, the Panel focused on three pieces of evidence cited by the Majority which directly implicated the question of causation:

1. that Canadian prices tended to rise more slowly and fall more rapidly than domestic prices;

2. that the price of subsidized Canadian imports, particularly Spruce-Pine-Fir (SPF), had a dominant impact on lumber prices in the U.S. market; and

3. that the weighted average composite U.S. price in the Northern market, where Canadian import penetration is highest, is lower than that price in the Southern market, where import penetration is lower.

Following detailed analysis, the Panel concluded that the second and third evidentiary bases cited by the Commission in support of its causation finding were not "substantial evidence" within the meaning of the statute or were otherwise not in accordance with law.[14/] The Panel did not invite further analysis by the Commission on these findings.

As to the first evidentiary basis, however, the Panel agreed "that a fully developed and rational price trends analysis may be a useful tool in assessing causation and, with appropriate factual

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14/ Second Panel Opinion, at 13.

support and applying an appropriate methodology, could demonstrate the sufficiency of information in the record."[15/] The Panel stated in summary, however, that "[a]t this time" (i.e., as presented by the Majority in their First Remand Determination),[16/] the Commission's price trends analysis did not constitute substantial evidence of causation and was not in accordance with law. The Panel remanded this issue to the Commission "for further consideration"[17/] requesting it, in the forthcoming remand determination, "to provide a full analysis and explanation of the underlying data and the methodology employed in the creation and presentation of the price trends analysis."[18/]

Based on the foregoing, it was both explicit and clear that the Panel held itself open to be convinced by an appropriate price trends analysis and that the Commission was free to re-work its existing price trends analysis to attempt to make it appropriate and sustainable from the Panel's perspective.

In its Second Remand Determination, however, the Plurality took the position that "the panel's second decision *requires* us to conclude that the information we have collected on the issue of the effects of the price of imports on prices in the U.S. softwood lumber market does not demonstrate whether subsidized Canadian imports are having any injurious effects on U.S. lumber prices."[19/] In effect, the Plurality took the position that the Panel had

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15/ Id.
16/ Id.
17/ Id.
18/ Id. at 20-21.
19/ ITC Second Remand, at 1 (emphasis in original). Vice Chairman Watson in his separate determination expressed a similar view.

precluded any price trends analysis by the Commission.

As suggested above, the Panel strongly disagrees. The Panel made repeated references to the fact that the Commission's price effects findings did not, as presented, and as explained by the Commission, rise to the level of substantial evidence at that time. The Panel made clear its desire for additional information, and for an explanation of why the price trends evidence relied on by the Commission adequately supported its affirmative determination.

Accordingly, if the Plurality regarded themselves as being precluded from relying on price effects because there was not adequate support in the record for their interpretation of price trends, that was a conclusion they were perfectly entitled to reach. If, on the other hand, the Plurality proceeded on the assumption that the Panel had precluded them from reviewing price effects at all, or price trends in particular, they were simply mistaken. However, the Panel has no choice but to render a decision on the Plurality's affirmative determination as currently presented, which by its express terms no longer places any reliance on "price effects" in support thereof.[20/]

B. The Plurality Determination

20/ The Panel understands that its review of the Commission's Second Remand Determination is to be conducted as a full review of a new determination by the Commission, with decisions made and opinions stated by the Panel in connection with the original Determination and the First Remand Determination not necessarily controlling. On the other hand, the Panel also notes the requirement that remand determinations be made in accordance with the decisions of the Panel, and that the prior Panel decisions reflect the Panel's understanding of the law and its relationship to the specific facts involved in this investigation.

As noted above, before making the specific findings on which they relied for purposes of their affirmative Second Remand Determination, the Plurality specifically found that the language of 19 U.S.C. § 1677(7)(E)(ii) is "very explicit that a finding that the price of imports is itself injurious is *not* an absolute requirement" in reaching an affirmative decision.[21/] In effect, the Plurality determined that so long as the issue of price effects is considered, a specific finding of a price effect was, and is, not a precondition to the reaching of an affirmative determination.

For their part, the Canadian Complainants appear not to contest this interpretation, arguing instead that the Panel has already ruled on the issues connected with the Plurality's remaining findings. The Commission and the Coalition respond that the Canadian Complainants misconstrue both the Second Remand Determination and the Panel's prior opinions. They further assert that abundant evidence supports the Plurality's affirmative determination.

The Panel agrees with the Plurality that a specific finding of price effects is not a precondition to the reaching of an affirmative determination, although the absence of such effects may weaken the ability of the Commission to reach such an affirmative determination, as well as the ability of a court or Binational Panel to sustain such an affirmative determination.[22/] Section

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21/ ITC Second Remand, at 4 (emphasis in original).

22/ 19 U.S.C. § 1677(7)(B)(i) requires the Commission to consider three factors in addressing whether the domestic industry has been materially injured by subsidized imports: (a) the volume of the imported products subject to investigation; (b) the effect of such (continued...)

1677(7)(E)(ii) of the statute expressly states that the presence or absence of any factor required to be considered "shall not necessarily give decisive guidance with respect to the determination of the Commission." The plain wording of that provision clearly supports the Plurality's interpretation. As to this precise finding, therefore, the Panel concludes that it is "in accordance with law."[23/]

Following the above discussion, the Plurality set out six specific "findings and judgments" in support of their affirmative Second Remand Determination. It is these six "findings and judgments" that are the subject of the Panel's review in this opinion.

Finding #1

(...continued)
imports on prices of the like products in the United States; and (c) the impact of such imports on domestic producers of like products. Under 19 U.S.C. § 1677(7)(b)(ii), the Commission may consider "other economic factors" as well. The Panel notes that the Commission has made affirmative decisions despite being unable to find detrimental price effects. See Certain High Information Content Flat Panel Displays and Display Glass Therefore from Japan, Inv. No. 731-TA-469, Views on Remand, USITC Pub. 2610 (1993), at I-17-18; Defrost Timers from Japan, Inv. No. 731-TA-643 (Final), USITC Pub. 2740 (1994), at I-12. In those instances, however, the causation finding was supported by significant increases in volume and/or market share. In this case, of course, the record establishes that imports declined in quantity terms and that market share remained essentially stable during the period of investigation.

23/ It should be observed, however, that the Plurality's interpretation that price effects are not mandatory to support an affirmative determination does not obviate the requirement that Commission determinations be based on substantial evidence and be otherwise in accordance with law.

1. The domestic industry is currently experiencing material injury.

The Panel notes that the Majority in the original Determination had adduced evidence in support of this conclusion.[24/] On the basis of those citations, the Panel concludes that finding #1 is supported by substantial evidence on the record and is otherwise in accordance with law.

Finding #2

2. The market for lumber is a commodity market supplied almost exclusively by U.S. and Canadian producers, with thousands of transactions each day, rapid dissemination of information about these transactions to buyers and sellers, and volatile prices.

The Panel concludes this finding is supported by substantial evidence on the record and is otherwise in accordance with law.

In so stating, the Panel specifically recognizes that the conditions of competition in this industry are important factors which can, in combination with probative evidence of causation, support an affirmative determination.

The Panel feels constrained to point out, however, that the Plurality's "commodity market" findings appear to be largely a recharacterization of the "analytical framework" applied by the

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24/ See ITC Final, at 14-22.

Majority in the original affirmative determination.[25] As stated by the Majority at that time, a point with which the Panel agrees, the analytical framework merely posits a "greater likelihood" of injury by reason of imports. The Plurality admit as much with respect to finding #2, stating that "[i]n such a market, the effects of the volume of imports are likely to be far more significant . . . ."[26] In any event, on this point the Panel reiterates its position that neither the analytical framework nor a general finding about conditions of competition, in and of itself, is adequate in law to support an affirmative causation finding.[27]

Moreover, as the Panel stated in its first opinion, "likelihood" in a final (as opposed to a preliminary) determination[28] and "volumes alone" are, either alone or together, insufficient to support an affirmative determination.[29]

25/ ITC Final, at 27-28.
26/ ITC Second Remand, at 4 (emphasis supplied). See also ITC Response Brief, at 15 ("[T]he Commission, as it had in its first two determinations, merely observed that the conditions of competition made injury more likely in this case.").
27/ See First Panel Opinion, at 28 ("[T]he analytical framework, its conditions having been satisfied, does not in and of itself constitute substantial evidence of material injury by reason of Canadian imports .... In the Panel's view, the analytical framework does not, and cannot, preordain a finding of causation.").
28/ First Panel Opinion, at 29.
29/ First Panel Opinion, at 32, and 33 n.97; see also Coated Ground Paper From Belgium, Finland, France, Germany, and the United Kingdom, Inv. Nos. 731-TA-487, 488, 489, 490, and 494 (Final), USITC Pub. 2467 (Dec. 1991), Views of Commissioner Lodwick, Commissioner Rohr, and Commissioner Newquist, at 17 n.57, and Additional Views of Commissioner Newquist, at 53.

Finding #3

3. Subsidized Canadian imports account for over one quarter of the United States softwood lumber market, and have even larger shares in some local markets.

The Panel concludes that finding #3 is supported by substantial evidence on the record and is otherwise in accordance with law.

Finding #4

4. The volume of Canadian imports was "significant."

By way of supporting explanation, the Plurality went on to say that this "significance" finding also amounts to a finding that the subsidized Canadian imports were causally linked to the material injury being suffered by the domestic softwood lumber industry.[30/] The Plurality stated as follows:

> The finding that the volume of imports is significant is a finding under the Commission's statute that the volume of imports is causally

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30/ The general views of Chairman Newquist, Vice Chairman Watson, and Commissioners Rohr and Crawford on causation were set forth in footnotes 85-86 of the ITC Final. Chairman Newquist and Commissioner Rohr therein state their view that the Commission need only determine that subsidized imports are "a cause" of injury, citing Granges Metallverken AB v. United States, 716 F. Supp. 17, 25 (Ct. Int'l Trade 1989). See also footnote 5 of the ITC First Remand.

linked under the conditions in the market to the condition of the domestic industry.

Not only did the Plurality place this unusual interpretation[31/] on the literal and usual meaning of a finding that volumes are "significant", it also went on to aver that by failing to remand the Majority's earlier "significance" finding, the Panel had somehow approved by default this causation finding.

The Panel does not accept this conclusion. There was nothing in the Majority's First Remand Determination that suggested they were placing the Plurality's current reading on the word "significant."[32/] The Panel merely recognized in its Second Opinion

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31/ From a substantive standpoint, the Panel finds the Plurality's supporting statement is ambiguous and open to several interpretations.

It could be an essentially legal finding that in all cases, whenever the Commission determines that the volume of unfair imports is "significant," such imports are ipso facto to be considered causally linked to any injury otherwise determined to be suffered by the domestic industry;

It could be a joint legal and factual finding that in all commodity market cases (cases in which the analytical framework can be said to apply), whenever the Commission determines that the volume of unfair imports is "significant," causation is thereby proved as well; or

It could be a more strictly factual finding that in this case, a finding that the Canadian import volumes are "significant," when combined with the conditions of competition existing in the softwood lumber industry, should be taken as proof of causation.

32/ Indeed the Majority's First Remand Determination appears to make a clear distinction between the significance of the volume of Canadian imports and the evidence of price effects (i.e., evidence of causation.) As the Majority stated, "it is inconceivable as a matter of economic logic that prices would not have been higher were it not for the significant volume of subsidized imports. We do not, however, rely solely on this basic analysis for our affirmative determination. Subsidized Canadian lumber imports have demonstrable price effects, as discussed below." ITC First Remand, at 6.

that imports at a market share level of 28% during the period of investigation are significant volumes of imports; imports at that volume cannot in any reasonable manner be regarded as insignificant.

As to the substance of the Plurality's finding, the Panel recognizes that a finding that subject imports are "significant" may, as indicated by the Plurality, "support" a determination of a causal connection between the material injury suffered by the domestic industry and the unfairly traded imports. In the instant case, the large (though generally stable) market share of imports in the competitive market represents an important factor that may assist in reaching an affirmative determination, provided that there is other probative evidence bearing more directly on causation.

However, the Panel finds nothing in the language of Title VII, its implementing regulations, its legislative history, in the decisions of the Commission,[33/] or the decisions of any court, that

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33/ The Panel observes that the Commission itself has indicated that "significant" volume does not automatically indicate causation, even where an industry is experiencing material injury. In Certain Calcium Aluminum Cement and Cement Clinker from France, Inv. No. 731-TA-645 (Final), ITC Pub. 2772 (May 1994), a unanimous (one Commissioner not participating) Commission, including both Chairman Newquist and Commissioner Rohr, stated (at I-16):

> While the volume of LTFV imports and the market share held by CA cement produced from those LTFV imports is significant, the level of imports and market share is consistent with historical levels. For the reasons discussed above, we also find that any increase in the volume of the imports or market share were not significant, and that the decline in [the domestic producers'] market share was not by reason of the subject imports.

(continued...)

supports the Plurality's conclusions that a causation finding can be presumed by, or subsumed under, the Commission's significance finding. To the extent, therefore, that the Plurality has made such a finding, the Panel holds that such finding is not in accordance with law. To the extent that the Plurality has purported to make a finding that in the circumstances of this case a finding of "significance" should be taken as proof of causation, the Panel holds that such a finding is not supported by substantial evidence on the record and is inconsistent with previous rulings of the Panel.

Finding #5

5. The effect, if any of the price of the subsidized Canadian imports on the price of softwood lumber in the United States cannot be determined on the basis of the information on the record.

The Panel concludes that this finding is supported by substantial evidence on the record and is otherwise in accordance with law.

(...continued)

Finding #6

6. No other causes fully explain the injury being experienced by the industry.

The Plurality also noted that the Panel had not remanded the Majority's conclusion that the decline in lumber demand and the restrictions on timber supply did not fully explain the industry's injury.

Although the Plurality does not specifically cite the evidence supporting this finding, the Majority's prior affirmative determinations have indicated that the finding was: (1) demonstrated by the evidence of price suppression caused by the subject imports; and (2) corroborated by a comparison of the softwood lumber operations of U.S. producers to their operations producing other wood products and building materials (i.e., the cross-sectoral comparison).

In the absence of evidence demonstrating price suppression by reason of imports, the Plurality's finding may rest on a cross-sectoral comparison.[34/] If so, that comparison, which previously was used by the Commission merely to confirm the conclusion that the decline in demand and constraints on timber supply were not the only causes of the domestic industry's injury, would now appear to constitute a substantive basis for the Plurality's determination. The Panel believes that, to the extent the Plurality's finding relies on such a cross-sectoral comparison and is necessary to

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34/ Hearing Transcript, at 71-73.

their affirmative determination, the Plurality has not adequately responded to the Panel's concerns regarding the statutory validity of such a comparison, and the methodology employed by the Commission in reaching its conclusion.

Therefore, the Panel remands this finding for an articulation by the Commission as to the bases, whether one or several, underlying this finding, and reminds the Commission for this purpose that the Panel's position regarding cross-sectoral comparisons stated in its previous opinions has not changed.[35/] If the Commission desires to place significant reliance on one or another cross-sectoral comparisons, it must confirm that it has statutory authority to do so and such comparison(s) must be conducted in a methodologically sound manner.

As the Panel indicated, the Plurality has demonstrated the "likelihood" of injury by reason of imports -- but "likelihood" created by the conditions of competition (analytical framework) and the "significant" but decreasing volume and generally stable market share are not, alone, enough to support an affirmative determination. These factors may indicate that, depending on its probative value, not very much additional evidence may be necessary to sustain an affirmative determination. However, it is for the Commission to meet the substantial evidence standard by providing the additional support that the Panel has indicated is required.

The Panel remands the Plurality's determination for a decision not inconsistent with this Opinion.

35/ First Panel Opinion, at 54-73; Second Panel Opinion, at n.21 and accompanying text.

C. Commissioner Crawford's Determination

Commissioner Crawford joined the Commission Majority in the original affirmative injury determination. Following the Panel's remand, Commissioner Crawford issued a separate affirmative determination, in which she relied on an "analytical framework" different from that employed by the Commission Majority.[36/] That determination was reaffirmed by Commissioner Crawford in the Commission's Second Remand Determination.[37/]

In applying her analytical framework, Commissioner Crawford evaluates the volume and price effects of the subsidy at issue in the context of the market characteristics unique to the industry under investigation. Those characteristics are determined in part through an evaluation of the elasticities of demand, substitution, and domestic supply, estimates of which were produced by the Commission staff. Based on her review of the evidence and the staff's calculations, Commissioner Crawford determined that demand for lumber is price inelastic, that Canadian and domestic lumber are highly substitutable, such that purchasing decisions are based primarily on price, and that the elasticity of domestic supply is low, but not inelastic. She also found that the high substitutability of the products, the rapid dissemination of information in the lumber market, and the large number of individual buyers and sellers, indicated that the domestic market is "perfectly competitive." In that context, Commissioner Crawford considered the factors required by the Commission's governing

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36/ ITC First Remand, at 25.
37/ ITC Second Remand, at 9.

statute, namely, the volume of imports, their price effects, and their impact on the domestic industry. The Commissioner was aided in that endeavor by an economic model developed by the Commission staff, which predicts high, medium, and low ranges of price, output and revenue effects of the subsidized imports depending on selected input parameters.[38/]

All of the parties recognize that an economic analysis of the type performed by Commissioner Crawford has been used by the Commission in the past, and decisions based on such an analysis have been upheld by the Court of International Trade with respect to antidumping cases.[39/] The Canadian Complainants, while noting that this case represents the first use of the model in the context of a subsidy proceeding, did not object in principle to its use.

38/ In the First Remand Determination opinion issued by Commissioner Crawford, after making a full analysis based on the initial 6.51% subsidy margin determined by the Commerce Department, Commissioner Crawford also addressed the revised subsidy determination by the Commerce Department following Binational Panel review, which increased the rate to 11.54%. Commissioner Crawford noted that because her analysis involved evaluation of the effects of the subsidy, higher subsidy rates magnified the effects of the subsidized imports, and the impact on the domestic industry. (ITC First Remand, at 30).

The Panel recognizes that this analysis using the higher subsidy rate is a separate, alternative determination which does not affect the prior determination based on the 6.51% rate. Even though the Commerce Department subsequently, at the direction of another Binational Panel, found a zero percent subsidy (Commerce Department Notice (January 6, 1994)), this Panel does not find it necessary to review either Commissioner Crawford's determination using the 11.54% rate, or to request the futile act of making a determination using a zero percent subsidy rate. The Panel's review of Commissioner Crawford's determination is limited to Part III of her opinion on remand discussing material injury by reason of the subsidized imports. (ITC First Remand, at 26-30).

39/ See Trent Tube Div., Crucible Materials Corp. v. United States, 741 F. Supp. 921, 927-29 (Ct. Int'l Trade 1990); USX Corp. v. United States, 682 F. Supp. 60, 69 (Ct. Int'l Trade 1988).

They focused their challenge to Commissioner Crawford's determination on the choice of input parameters used in the model and apparently relied on by the Commissioner, and her alleged mechanistic application of those parameters and the results predicted by the model.[40/]

Specifically, Canadian Complainants point out that based on Tables 1 and 2 of the staff's model, contained in Memorandum EC-P-039,[41/] Commissioner Crawford in her analysis appears to have relied on an artificial U.S. market share for Canadian imports, which assumed that the Memorandum of Understanding no longer was in effect. In addition, Complainants argue that the model incorrectly assumes that 100 percent of Canadian production is exported to the United States; utilizes a parameter for elasticity of domestic supply which differs from that found appropriate by Commissioner Crawford; and does not consider net back adjustments for freight. Finally, Canadian Complainants assert that Commissioner Crawford's analysis does not adequately account for the amount, if any, of Canadian subsidies passed through to the U.S. market.

In response, Commission counsel argues that none of the tables presented in EC-P-039 corresponds exactly with Commissioner Crawford's decision. Rather, Commissioner Crawford evaluated the detrimental effects predicted by the staff's model, and determined that those results were reasonable. The Commissioner then considered the significance of those results in the context of her

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40/ Brief of the Canadian Complainants, Nov. 23, 1993, at 95 et seq.
41/ List 1, Doc. 254.

findings regarding the characteristics of the softwood lumber market, and concluded that the domestic industry was materially injured by reason of subsidized lumber imported from Canada. In addition, counsel for the Commission points out that Table 4 of EC-P-039 directly contradicts the Complainants' assertions regarding the alleged use of improper inputs regarding Canadian lumber's share of the U.S. market, and the proportion of Canadian lumber production exported to the United States. With respect to the pass-through issue, Commission counsel contends that as noted in a separate staff Memorandum,[42/] the model was designed to evaluate the pass-through of subsidies.

The Coalition also contested Complainants' assertions, arguing that Commissioner Crawford relied on ranges for the parametric inputs to the model, and that in view of the Commissioner's other findings she did not mechanistically select or apply the highest parameters used in the model, or the upper bounds of the economic effects produced by the model. The Coalition further asserts that, even if all of the adjustments suggested by Complainants are made, the economic effects determined by the model are only slightly reduced.

The Panel on numerous occasions has indicated its recognition that the Commission is afforded wide discretion in selecting and applying methodologies to carry out its statutory mandate.[43/] In

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42/ See Economic Memorandum EC-P-038, attached to memorandum EC-P-039.

43/ See, e.g., First Panel Opinion, at 14; Second Panel Opinion, at 4. The Panel has repeatedly indicated its recognition that the Commission is free to use any suitable methodology permitted by
(continued...)

the Panel's view, the model developed by the Commission staff is an acceptable tool for informing the Commission of the possible effects of subsidized imports.[44/] It is noteworthy that the model is specifically designed to measure the effect only of the subsidized imports, thereby avoiding the danger of weighing alternate causes of injury to the domestic industry.[45/]

The Panel also considers that the substantial evidence standard could be satisfied where the Commission's model is used in conjunction with other probative evidence on the record, and the model's results and other record evidence are subjected to the judgment of the reviewing Commissioner(s). It is clear in this case that Commissioner Crawford conducted a thorough review of the

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(...continued)
law, so long as the analysis produced in that methodology is based on substantial evidence in the record. (First Panel Opinion, at 14; Second Panel Opinion, at 4). What the Panel has called "traditional" methodologies or forms of evidence are those which have been the basis of numerous Commission determinations, and received approval by the reviewing courts.

The use of a new type of methodology, or evidence in support of a methodology, should, this Panel believes, be subject to special scrutiny. This is not because new methodologies are not permissible, or even in appropriate circumstances desirable; this is because these methodologies have not stood the test of time, repeated argument and analysis, and consideration by reviewing courts. Such scrutiny is not a higher standard of review; it is merely recognition that new methodologies must be adequately explained. As Judge Restani stated in USX, 682 F. Supp. at 70, discussing the use of an economic model, "until such equations are accepted as the everyday subject of antidumping decisions, however, they must be explained for the benefit of the parties and the court." Because this Panel is required to apply the same standard of judicial review as the CIT would apply, it is important for it to be confident that an approach or methodology would be found appropriate by the Commission's reviewing courts, before it endorses its use in a specific case.

44/ The Commission's Office of Economics has described this tool as one "for use in conjunction with other evidence on the record." Economic Memorandum EC-P-038, at 1, n.4.

45/ Id. at 3.

record, made certain findings regarding the characteristics of the domestic industry and the domestic market, and applied her judgment to the evidence of record and the results produced by the model in considering the factors enumerated in the Commission's statute.

The Panel notes, however, that it is unclear from Commissioner Crawford's determination whether in relying on the economic model her analysis takes into account evidence of the actual conditions of the market, namely, Canadian lumber's actual share of the U.S. market; the actual proportion of Canadian production exported to the United States; the parameter for elasticity of domestic supply found to be reasonable by the Commissioner; and net back adjustments for freight.[46/] In addition, Commissioner Crawford's determination fails to make clear, or explain, the basis for her position on the pass-through issues raised by the Canadian Complainants. Specifically, there is no discussion of whether the model itself fully accounts for all pass-through issues, or whether an additional evaluation by a Commissioner using the results is required.[47/]

46/ The only net back analysis conducted appears to be the one included in INV-Q-174, which uses the 11.54% subsidy rate.

47/ The Panel notes that while Economic Memorandum EC-P-038 states that the model is intended to take these factors into account, at 5-6, 10, the equations contained in the Technical Appendix do not appear to account for any portion of the subsidy being absorbed in Canada (e.g., by the mill as profit or by its employees as increased compensation).

The Complainant's discussion of pass through points out the significant difference between an antidumping margin, which represents the actual difference in prices determined by the Commerce Department; and a countervailing duty margin, which represents an amount or benefit received by the foreign producer, which may or may not be reflected -- or reflected fully -- in the price at which the goods are sold.

(continued...)

The Panel recognizes that clarification of the above factors may not affect the results of the model or the decision of Commissioner Crawford. However, the Panel believes that where reliance is placed on an economic model that is predictive in nature, particularly where such a model is being used for the first time in a subsidy case, it is essential that such matters be clarified. The Panel is unable to affirm a determination that is based in part on the use of such an economic model until the concerns raised here are satisfied. Finally, it is incumbent on Commissioner Crawford to decide whether, after taking into account the factors raised by the Panel, her determination would be negative or affirmative. The Panel therefore remands Commissioner Crawford's determination for clarification as to whether her reliance on the economic model takes into account these factors. To the extent Commissioner Crawford's analysis of the model's results did not consider the listed factors, the Commissioner is instructed to do so and provide the Panel with a new determination.

(...continued)
See Commissioner Brunsdale's comments in her dissent to the original ITC Final, at 41-43.

ARTICLE 1904
BINATIONAL PANEL REVIEW UNDER
THE UNITED STATES-CANADA FREE TRADE AGREEMENT

In the Matter of: **SOFTWOOD LUMBER FROM CANADA**	**USA-92-1904-02**

ORDER

Pursuant to the United States-Canada Free Trade Agreement, and for the reasons stated in the Opinion, the Panel affirms in part and remands in part the United States International Trade Commission's Second Determination on Remand, for further consideration consistent with this Opinion.

The results of the remand shall be provided to the Panel by the International Trade Commission within 30 days of the date of this Order.

DECISION AND ORDER ISSUED JULY 6, 1994

SIGNED IN THE ORIGINAL BY:

July 6, 1994
Date

Joseph F. Dennin
Joseph F. Dennin,
Chair

July 6, 1994
Date

Steven W. Baker
Steven W. Baker

July 6, 1994
Date

Harry B. Endsley
Harry B. Endsley

July 6, 1994
Date

James F. Grandy
James F. Grandy

July 6, 1994
Date

Donald M. McRae
Donald M. McRae