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pursuant to the
NORTH AMERICAN FREE TRADE AGREEMENT

In the Matter of: SOFTWOOD LUMBER FROM CANADA; DETERMINATIONS; (SOFTWOOD LUMBER INJURY)	Secretariat File No. USA-CDA-2018-1904-03 PUBLIC VERSION

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SOFTWOOD LUMBER
FROM CANADA;

DETERMINATIONS;
(SOFTWOOD LUMBER INJURY)

Secretariat File No.
USA-CDA-2018-1904-03

PUBLIC VERSION

FINAL DECISION AND ORDER OF THE PANEL

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I. Introduction

In its Final Affirmative Determinations dated December 7, 2017, the Commission unanimously determined that the U.S. Softwood Lumber industry was materially injured by reason of softwood lumber imports from Canada that the U.S. Department of Commerce had found to be dumped and subsidized.[1] In its Interim Decision and Order dated September 4, 2019, this Panel, which was constituted pursuant to Article 1904.2 of the North American Free Trade Agreement ("NAFTA") to review the Agency's determinations, remanded to the Commission its findings regarding certain aspects of the business cycle, substitutability, post-petition data, volume, and price effects issues, while affirming the Commission's findings on the other challenged issues.[2] The Panel directed the Commission to: (1) "reconsider the record evidence in relation to the business cycle(s) distinctive to the U.S. lumber industry, and to apply its findings in its analysis of volume, price effects, impact, and causation,"[3] (2) "consider whether to take into account the Forest Economic Advisors ("FEA") data in its calculations of the domestic industry's capacity,"[4] (3) "reconsider its calculation of substitution elasticity, explaining how it reached its conclusion and demonstrating how that conclusion was applied in the Commission's analysis of volume, price effects, impact, and causation,"[5] (4) "demonstrate how, and to what extent, the limitations to substitutability implied in its conclusion that the goods were 'at least moderately substitutable' factored into the Commission's analysis of volume, price effects, impact, and causation,"[6] (5) "provide a reasoned determination on whether or not to reduce the weight accorded to interim 2017 data and provide a reasoned determination on whether or not to reduce the weight accorded to interim 2017 data;" "clarify whether or not it is also reducing the weight

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[1] *Softwood Lumber Products from Canada*, Inv. Nos. 701-TA-566 and 731-TA-1342, USITC Pub. 4749 (Dec. 2017) (Final) ("*Lumber V ITC Final Det.*").
[2] Interim Decision and Order of the Panel, Sec. File No. USA-CDA-2018-1904-03 (September 4, 2019) ("Panel Dec.").
[3] Panel Dec. at 49.
[4] *Id.* at 90.
[5] *Id.* at 77-78.
[6] *Id.* at 78.

accorded to third- and fourth-quarter 2017 data,"[7] and "if, upon reconsideration, the Commission decides to reduce the weight given to post-petition data, … to clarify what weight, if any, it is giving to post-petition data and the reasons for this determination,"[8] (6) "consider all record evidence to demonstrate how, and to what extent, the limitations to substitutability implied in its conclusion that the goods were 'at least moderately substitutable' factored into its conclusion that subject imports experienced significant gains in market share directly at the expense of the domestic industry," and "further consider its volume analysis as the Commission considers appropriate,"[9] (7) "reconsider its conclusion that the prices of different species closely track each other to take into consideration that price movements of one species 'affect' prices of other species, the existence of a 'great difference in price movement' of one species compared to another, and that prices for different species 'generally track' each other, as well as any other record evidence, and to determine what effect such reconsideration has on its price suppression analysis,"[10] (8) "reconsider the record evidence, its conclusion that purchasers confirmed purchasing subject imports rather than domestic product solely due to their lower prices, and to determine what effect such reconsideration has on its price suppression analysis,"[11] and (9) "reconsider its COGS and price trends analysis to take into account the Commission's finding that subject imports and domestic products are at least moderately substitutable, and determine what effect such reconsideration has on its finding that subject imports prevented price increases(,) which otherwise would have occurred(,) to a significant degree"[12] and to reconsider certain other factual findings in its price effects analysis.[13]

In its Remand Determination dated December 19, 2019,[14] the Commission again determined that an industry in the United States was materially injured by reason of

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[7] Panel Dec. at 60-61.
[8] *Id.*
[9] *Id.* at 77-78.
[10] *Id.* at 93-94.
[11] *Id.* at 102.
[12] *Id.* at 98.
[13] *Id.* at 77.
[14] *Softwood Lumber from Canada: Proprietary*, Secretariat File No. USA-CDA-2018-1904-03 (Dec. 19, 2019) ("Remand Det.").

imports of softwood lumber from Canada found by Commerce to be dumped and subsidized by the Governments of Canada. This Final Decision and Order constitutes this Panel's review of that remand determination.

On April 21, 2020, the Panel denied the April 17, 2020, Request by the Canadian Parties for Oral Hearing on Rule 73 Submissions Regarding ITC Remand Determination, and hereby affirms that decision.[15]

II. Standard of Review

Reference is made to the Panel's Interim Decision and Order for a thorough discussion of the standard of review required to be applied by a binational panel created pursuant to Chapter 19 of the North American Free Trade Agreement. This Panel must apply the standard of review in § 516A(b)(1)(B) of the *Tariff Act of 1930*, which establishes that U.S. Courts "shall hold unlawful any determination, finding, or conclusion found…(1) to be unsupported by substantial evidence on the record, or (2) otherwise not in accordance with law."[16] Additionally, U.S. Courts have held that "(t)he same standard or review applies to the review of a remand determination as to the review of the original determination."[17]

An administrative agency's determination must be supported by substantial evidence on the record considered as a whole.[18] The substantial evidence standard requires "more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," "when viewed in the light that the record in its

[15] Opinion and Order of the Panel on Request for Oral Hearing on Rule 73 Submissions Regarding ITC Propr. Remand Det. at 2 (Apr. 21, 2020).
[16] 19 U.S.C. § 1516a(b)(1)(B)(i); *see also* NAFTA Annex 1911 "standard of review" (b). Interim Dec. at 17.
[17] *See Bethlehem Steel Corp. v. United States*, 223 F. Supp. 1372, 1375 (Ct. Int'l Trade 2002) (citing *Laclede Steel Co. v. United States*, 125 F. Supp. 2d 525, 530 (Ct. Int'l Trade 2000)).
[18] *See UPI Semiconductors v. Int'l Trade Comm'n*, 767 F.3d 1372, 1377 (Fed Cir. 2014) (quoting *Spanson Inc. v. Int'l Trade Comm'n*, 629 F.3d 1331, 1344 (Fed. Cir. 2010)).

entirety furnishes, including the body of evidence opposed to the (agency's) view."[19] Thus, the Panel must consider the Commission's reasons for its conclusions and determine whether there is a rational connection between the facts found on the record and the determination made by the Agency.[20]

However, courts or binational panels are not thereby enabled to "reweigh" the evidence or substitute their judgment for that of the original finder of fact.[21] That a party "can point to evidence of record which detracts from the evidence which supports the Commission's decision and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive," and does not provide this Panel with a valid basis for remand.[22]

Moreover, the Panel may not, "even as to matters not requiring expertise ... displace the (agency's) choice between two fairly conflicting views, even though the (Panel) would justifiably have made a different choice had the matter been before it *de novo*."[23] According to the Federal Circuit,"(i)t is the Commission's task to evaluate the evidence it collects during its investigation" and "(c)ertain decisions, such as the weight to be assigned a particular piece of evidence, lie at the core of that evaluative process."[24] The Panel's role is only to review those decisions for reasonableness.[25]

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[19] *Universal Camera v. NLRB*, 340 U.S. 474, 477 (1951); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).
[20] *Bando Chem. Indus. v. United States*, 16 Ct. Int'l Trade 133, 136-37 (787 F. Supp. 224, 227 (1992) (citing *Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974)).
[21] *Universal Camera, supra* note 19 at 488.
[22] *Matsushita*, *supra* note 19 at 936 (Fed. Cir. 1984); Propr. Rule 73(2) Brief of ITC at 3-4.
[23] *Universal Camera*, *supra* note 19 at 488; *accord, Grupo Indus. Camesa v. United States*, 85 F.3d 1577, 1582 (Fed. Cir. 1996). Even if one or more subsidiary findings of the Commission are unsupported by substantial evidence, the Court must still assess whether the remaining evidence cited by the Commission provides substantial evidence for the Commission's determinations. See *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996).
[24] *U.S. Steel, supra* note 23; *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350 (Fed. Cir. 2006) (quoting *U.S. Steel*, *supra* note 23).
[25] *Nippon Steel, supra* note 24 at 1359 ("Congress has allocated to the Commission the task of making these complex determinations," the Federal Circuit has explained, and "(o)urs is only to review those decisions for

As previously explained by the Panel, the Agency enjoys broad discretion to select the correct methodology and to interpret the statute under which it operates. This discretion is not unfettered; the Agency must engage in reasoned decision-making as to all material facts and issues and must not leave the reviewing body to guess as to the Agency's findings and reasons.[26] "(T)he Commission need not address every piece of evidence presented by the parties; absent a showing to the contrary, the court presumes that the Commission has considered all of the record evidence."[27] Rather, the Federal Circuit further clarifies that "issues material to the agency's determination (must) be discussed so that the 'path of the agency may reasonably be discerned.'"[28]

Although this presumption may be overcome if the opposing party can demonstrate that the Commission's determination is not supported by substantial evidence or is otherwise not in accordance with law,[29] the Federal Circuit has explained that a Party challenging an agency's findings of fact "has chosen a course with a high barrier to reversal."[30] With respect to interpretations of the statutes under which it operates, the U.S. Supreme Court has established that, in the absence of a clear intent of Congress, federal courts must defer to the reasonable interpretation made by the agency charged with administration of a statute.[31] Challengers "must satisfy a high burden in order to

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reasonableness."); *U.S. Steel*, *supra* note 23; *Dastech Int'l Inc. v. U.S. Int'l Trade Comm'n,* 963 F. Supp. 1220, 1222-23 (Ct. Int'l Trade 1997) ("The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia.").

[26] *Greater Boston Television Corp. v. Fed. Comm'ns Comm'n*, 444 F.2d 841, 851 (D.C. Cir. 1970); Interim Dec. at 17.

[27] *Siemens Energy, Inc. v. United States*, 992 F. Supp. 2d 1315, 1324 (Ct. Int'l Trade 2014), *aff'd* 806 F.3d 1367 (Fed. Cir. 2015); Interim Dec. at 18. The SAA is found at H.R. Doc. No. 103-316, Vol. I (1994). It is "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round Agreements, both for purposes of U.S. international obligations and domestic law." SAA at 656.

[28] SAA, *supra* note 27 at 892 (quoting *Ceramica Regiomontana*, *S.A.* v. *United States*, 636 F. Supp, 961, 1139 (Ct. Int'l Trade 1986)).

[29] Propr. 73(2) Brief of ITC at 3-4; 28 U.S.C. § 2639(a)(1).

[30] Propr. 73(2) Brief of ITC at 3-4; *Nippon Steel, supra* note 24 at 1358. (quoting *Mitsubishi Heavy Indus., Ltd. v. United States*, 275 F.3d 1056, 1060 (Fed. Cir. 2001)).

[31] *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

rebut the presumption that agency officials have adequately considered the issues in making a final decision, including their reading and understanding of the record evidence."[32] The court needs solely to determine whether the agency's determination is based on a permissible construction of the statute.[33] The Court does not act on whether it believes the Commission's determination to be correct, but rather whether the determination is unfounded or legally defective.[34] The Federal Circuit has acknowledged that "in the hierarchy of the four most common standard of reviews, substantial evidence is the second and most deferential, and can be translated roughly to mean 'is (the determination) unreasonable.'"[35]

Accordingly in this matter, the Panel must uphold the determination of the Investigating Authority if it is supported by substantial evidence on the record and is not contrary to law, even if the Panel would have made a different determination had it been the initial trier of fact or interpreter of the statute.

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[32] *Taiwan Semiconductor Industry Ass'n v. United States,* 105 F. Supp. 1363, 1367 (Ct. Int'l Trade 2000) (the presumption holds "in the absence of clear evidence to the contrary.").
[33] *Id. See also Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992) (the panel may not substitute its own judgment for that of the agency when there are two legitimate alternative views); *National R.R. Passenger Corp. v. Boston & Marine Corp*., 503 U.S. 407, 417 (1992) (when considering whether or not a decision is "in accordance with law," the panel must defer "to reasonable interpretations by an agency of a statute that it administers..."); *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-620 (1966) ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.").
[34] *Dastech, supra* note 25 at 1222; see also *Ceramica Regiomontana*, *supra* note 28 at 966.
[35] *Nippon Steel*, *supra* note 24 at 1351 (citing *SSIH Equipment SA v. United States ITC*, 718 F. 2d 365, 381 (Fed. Cir. 1983)).

III. Analysis

A. Whether the Commission's Remand Determination Accounted for the U.S. Softwood Lumber Industry's Performance in the Context of the Business Cycle and the Conditions of Competition Distinctive to the Industry

1. Background

i. Panel Remand

In its injury analysis, the Commission is required to consider the relevant economic factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."[36] During their challenge before this body to the original Agency determinations, the Canadian Parties argued that the Commission's examination of the financial performance of the lumber industry using economic data solely from the three-year POI (2014 to 2016 and part of 2017) was faulty and in violation of its statutory obligation to consider the economic factors "within the context of the business cycle."[37] They claimed that the lumber market responds to the "lengthy multi-year" "boom-and-bust cycles of the housing market" and therefore, the ITC's "failure to understand why a 2014 to 2016 analysis was faulty all comes back to this question of the business cycle."[38]

The Panel observed that the Commission indeed was "silent on what constitutes a business cycle or how the Commission's understanding of the business cycle in relation to the POI might have affected its determinations on the impact of subject imports."[39] Despite acknowledging through its counsel at the Panel hearing that there existed "this larger macro . . . economic cycle," "as well as the shorter annual business cycle,"[40] the

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[36] 19 U.S.C. § 1677(7)(C)(iii).

[37] Transcript of Panel Hearing at 90, 93-94, USA-CDA-2018-1904-03 (May 7, 2019) ("Hearing Transcript").

[38] *Id.* at 90, 93-94.

[39] Panel Dec. at 44.

[40] Hearing Transcript at 200.

Agency's actual determinations eschewed further consideration of the U.S. lumber industry's distinctive cycles to create the context for its examination of the economic injury factors.[41]

The Panel found that the Commission thereby erred with respect to its obligation to consider the relevant economic injury factors within the context of the lumber industry's distinctive business cycle and the conditions of competition with subject imports. The Agency's "analysis did not adequately establish the *context* required for its later injury analysis."[42] The Panel remanded for the Commission to reconsider the record evidence in relation to the business cycle and conditions of competition data and to apply its revised findings in this respect "in its analysis of volume, price effects, impact, and causation."[43]

ii. ITC Remand Determination

In reconsidering how the domestic lumber industry's financial performance relates to, and is affected by, the business cycle and conditions of competition, the Commission finds explicitly that the lumber industry is subject both to an annual business cycle "reflecting the seasonality of the housing and remodeling markets" and to "a larger macro-economic cycle" that it notes the Parties describe as the "multi-year boom-and-bust cycles of the housing market."[44] Regarding the latter, the Agency finds that "it began when total housing starts decreased substantially during the 2008-2009 recession and continued through 2017 as housing starts increased steadily after the recession."[45] It identified 2015 as a significant year because total housing starts surpassed the pre-recession highs of 2008.[46] The Remand Determination explains that the 3-year POI thus covered a period "when there was an uptick in demand and

[41] 57(2) Rebuttal Brief of ITC at 108.
[42] Panel Dec. at 48 (emphasis supplied).
[43] *Id.* at 49.
[44] Remand Det. at 6-7.
[45] *Id.* at 6.
[46] *Id.* at 5.

growth,"[47] noting that the "vast majority" of participants in the market "corroborate that U.S. demand for softwood lumber increased since January 1, 2014 and that this increase was principally due to the continued recovery of the housing and repair/remodeling markets."[48]

The Commission's Remand Determination described the supply and demand considerations of which it took account in defining the lumber industry's business cycles, noting that the Parties agreed that "the primary indicator" of demand was U.S. housing starts,[49] and that this end-use demand was affected by such conditions of competition as "the general strength of the overall economy, cyclical trends in the housing market, and seasonality of housing and remodeling starts."[50] The ITC further found that the demand driven by housing starts "had decreased substantially as a result of the recession of 2008-2009, but then slowly and erratically improved from 2010 to 2012, and then steadily increased overall during the POI, with total units after 2015 surpassing the prior highs of the cycle in the 2008 levels."[51]

On the supply side of the equation, the Canadian Parties had challenged the Agency's finding in the original determinations, that domestic industry capacity was relatively flat from 2014 to 2016.[52] Their concern was that the Commission had not used the most recent FEA data to determine such capacity,[53] and that doing so would have shown a substantial increase in domestic capacity from 2014 to 2015.[54] In remanding this issue, we instructed the ITC to "consider whether to take the more recent FEA data into account in its domestic capacity analysis, explain its decision, and, if it decides to take

[47] *Id.* at 6.
[48] *Id.* at 7.
[49] Specifically, the Agency refers to "residential construction activity for new home construction and repairs and renovations on existing homes, nonresidential construction, and non-construction uses." Remand Det. at 5.
[50] *Id.*
[51] *Id.*
[52] 57(1) Brief of Can. Parties at 79; Original Views of the Commission at 41 (CD 582).
[53] 57(1) Brief of Can. Parties at 80-81.
[54] *Id.*

the updated FEA data into account, reconsider its price effects analysis as it determines is appropriate."[55]

Continuing to rely on West Wood Products Association (hereafter "WWPA") data because of its "universal acceptance," the Commission unpacks the information and formula it had originally used, looking in some detail at the underlying FEA data inputs. It found that the tables used by the Canadian Parties to show FEA data were a "different dataset" than the up to date FEA information utilized by the WWPA.[56]

2. *Arguments of the Parties*

i. Canadian Parties

The Canadian Parties contend that the Commission's "superficial description of the business cycle,"[57] while now agreeing with the Parties that the business cycle "is defined by demand and supply, with each factor affecting the other within the broader cycle,"[58] "focuses entirely" on the issue of the domestic industry's capacity from 2014 to 2015, "when composite lumber prices fell."[59] According to the Canadian Parties, the ITC then posits that once demand started increasing, anything other than a persistent upward trajectory—in prices and accompanying industry performance--signalled material injury to the industry caused by imports.[60]

Instead, the Canadian Parties describe the relationship between supply, demand, and prices as more complex; explaining that "(w)hile demand drives and largely defines the business cycle, it does not alone dictate market prices . . . ."[61]

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[55] Panel Dec. at 8 and 90.
[56] Remand Det. at 12.
[57] 73(2)(b) Brief of Can. Parties at 12.
[58] *Id.* at 13.
[59] *Id.*
[60] *Id.*
[61] *Id.*

> Supply and the factors that influence supply, such as capacity expansions, also affect prices. The evidence about the broader business cycle contradicts the Commission's assumption that prices and industry performance necessarily increase in perfect concert with demand.[62]

In support, the Canadian Parties refer to data from past business cycles, showing "that composite lumber prices, and in turn industry profits, do not follow demand in lock step."[63] Instead, "prices fluctuated,"[64] because the *supply* response to the increase in demand "was erratic, resulting in price movements that did not perfectly track the increase in demand."[65] The Canadian Parties cite to another example, in late 2014, of this lack of lock step movement of prices with demand—"FEA Lumber Advisor reported, 'there is a significant volume of new production that is scheduled to come on line in the U.S. South in the first quarter. This increased production will hold down prices.' "[66]

Based on these examples, the Canadian Parties argue that

> (i)t would have been unprecedented and unrealistic, however, for the rates of price increases during the early years of the recovery from the Great Recession to have persisted throughout the business cycle.
>
> The Commission saw rising demand over the three-year POI, increasing Canadian market share, and lower prices in 2016 than in 2014, and drew the conclusion that subject imports caused material injury to the domestic industry without considering any broader context.[67].

The Canadian Parties contend that "the Commission's simplistic and flawed 'demand was up' analysis fails to account for relevant arguments of the parties and other significant, conflicting evidence that there is no causal link between subject imports and allegedly material injury."[68]

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[62] 73(2)(b) Brief of Can. Parties at 13.
[63] *Id.*
[64] *Id.* at 14.
[65] *Id.* at 15.
[66] *Id.* at 15-16.
[67] *Id.* at 19.
[68] *Id.*

ii. ITC Rebuttal

In response to the Panel's Interim Decision and Order, the Commission located the POI at about 10 years after the start of a lumber industry business cycle that began with the exceptionally low prices at the start of the Great Recession in 2008-2009.[69] The Agency noted that housing starts "increased steadily after the recession," by 2015 surpassing the high pre-Recession 2008 levels, so that the POI "thus covered a period during which there was an uptick in demand and growth."[70]

As to the demand and supply drivers of prices, the Commission finds that demand "derives primarily" from new housing starts and home remodeling/repairs, and supply is driven by domestic industry capacity, which it finds to have been "relatively flat" during the POI.[71] The ITC "finds (no) merit" to the contention by the Canadian Parties that the Agency's findings as to industry capacity, utilize non-current data, which led to the "relatively flat" finding on capacity rather than the capacity increase from 2014 to 2015 urged by the Canadian Parties and Resolute (hereafter "Joint Respondents").[72]

The Panel had instructed the Commission to consider what the Canadian Parties claimed was "the more recent FEA data" [73] in its industry capacity calculations. The Commission explained that, as permitted by the Courts,[74] it relies both on the primary data furnished by producer questionnaire responses and the secondary information from published industry sources. It notes that both the COALITION and Joint

[69] Remand Det. at 7.
[70] *Id.* at 7,note 17 (which similarly describes the POI as "a time period of economic recovery").
[71] *Id.* at 6-8.
[72] Remand Det. at 7-12.
[73] Panel Dec. at 90.
[74] Remand Det. at 9 (citing *Ranchers-Cattlemen Action Legal Found. v. United States,* 74 F. Supp.2d 1353 (1999)).

Respondents agree that WWPA publications are the most reliable sources of industry production, capacity utilization, and capacity.[75]

Noting that WWPA uses FEA data in its calculation of industry capacity utilization,[76] the Commission notes that the table which Joint Respondents point to as showing updated FEA capacity, production, and capacity utilization data, in fact shows only capacity data, which is "a different dataset than the FEA 'capacity utilization' information used by WWPA."[77] In any event, the Agency continues, "the FEA excerpts cited by the Joint Respondents do not demonstrate that the WWPA data used by the Commission were outdated."[78]

iii. COALITION Rebuttal

The COALITION contends that "the Commission properly took into account the relationship between the business cycle of the U.S. lumber industry and trends within the U.S. housing market,"[79] citing the evidence used by the ITC. The COALITION situates the POI "at the high point" of the then-current business cycle,[80] as contrasted with the Agency's description of the period as one of an "upward tick in demand and growth."

With respect to the currency of WWPA data, the COALITION argues that "the Canadian Parties have provided no basis for the Panel to overturn the Commission's reliance on WWPA capacity data, which all parties agree is based on FEA data."[81] The COALITION's brief notes that "the Commission's findings regarding domestic capacity

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[75] *Id.* at 10-11. No Party challenges the Agency's calculation of industry capacity "by dividing reported U.S. softwood lumber production by reported capacity utilization," as WWPA does not publish capacity data directly. *Id.*
[76] *Id.* at 10.
[77] *Id.* at 12.
[78] *Id.*
[79] 73(2)(c) Brief of COALITION at 136.
[80] Petitioner's Pre-Hearing Brief at 80.
[81] 73(2)(c) Brief of COALITION at 122.

are based on Table III-4 from the Final Staff Report,"[82] and that production and capacity utilization data for that Table "were taken directly from final data published by the WWPA."[83] The brief continues with the conclusion "that, as a factual matter, there is no need for the Commission to consider 'updated' FEA data because such data has already been incorporated into the WWPA's *Lumber Tracks* for Table III-4."[84]

3. Opinion of the Panel

The Commission's Remand Determination unambiguously defines both an annual and a "macro-economic" business cycle,[85] with the former reacting to "the seasonality of the housing market" and the latter responding to "the multi-year boom-and-bust cycles of the housing market."[86] The Agency pinpoints the current multi-year cycle as beginning with the substantial decrease in housing starts "during the 2008-2009 recession and continuing through 2017 as housing starts increased steadily after the recession."[87]

Having identified the business cycle particular to this investigation, the Commission concludes that the three years of the POI from 2015 to mid-2017 "covered a period during which there was an uptick in demand and growth,"[88] which the ITC's Rule 73(2)(c) Brief describes as finding that ". . . the POI for the investigations covered a period of growth and increased demand that fell within a broader, macro-economic, multi-year period of growth."[89] The Canadian Parties have no quarrel with the Commission's definition of the multi-year business cycle that is distinctive to the lumber industry.[90]

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[82] *Id.* at 123.
[83] *Id.* at 136 (emphasis in original).
[84] *Id.* at 124. *Lumber Track* is a WWPA publication of U.S. industry production and shipment data. *Id.* at 122, note 443.
[85] Remand Det. at 7.
[86] *Id.* The ITC does not further define or defend this annual business cycle, which was not challenged by any of the Parties.
[87] *Id.*
[88] *Id.*
[89] 73(2) Brief of ITC at 6.
[90] 73(2)(b) Brief of Can. Parties 12.

With regard to the Panel's remand for the ITC to reconsider the evidence in light of the lumber industry's distinctive business cycles, the Agency's analysis continues with a discussion of the supply and demand drivers of the cycle and the effect on demand of the conditions of competition, "such as the general strength of the overall economy, cyclical trends in the housing market and seasonality of housing and remodeling starts."[91] As noted, the Remand Determination situates the POI close to the 10-year mark of the business cycle that began during the 2008-2009 recession, which marked a low in lumber prices "when total housing starts decreased substantially."[92] The determination continues to explain that demand "increased steadily after the recession, with total (housing starts) in 2015 surpassing 2008 levels."[93]

As noted earlier,[94] the Remand Determination thus finds that the three years of the POI "covered a period during which there was an uptick in demand and growth" as a result of "the continued recovery of the housing and repair/remodeling markets."[95] As the ITC's Rule 73(2) Brief describes it,

> . . . the Commission concluded that the POI for the investigations covered a period of growth and increased demand that fell within a broader, macro-economic, multi-year period of growth.[96]

The ITC observed that, even as the domestic industry was experiencing this general increase in both demand and financial growth, "the volume of subject imports rose at a faster rate than apparent U.S. consumption," with the result that "the domestic industry's performance, particularly from 2014 to 2015, was not commensurate with apparent U.S. consumption." The ITC's determination on remand also noted that improvements to the

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[91] Remand Det. at 5.
[92] *Id.* at 7.
[93] *Id.* at 7, (citing Figure II-1 of the Confidential Record at II-16-17 (CD564)). The Agency notes that "the vast majority" of the U.S. industry agrees that demand for lumber increased beginning the first of January 2014 "principally due to the continued recovery of the housing and repair/remodeling markets," (citing the Confidential Record at Table II-5 (CD564)).
[94] Section I(A)(2), text at note 11.
[95] Remand Det., text at 7 & note 7.
[96] 73(2) Brief of ITC at 7-8.

industry's economic improvement "during 2016 did not return the industry's performance to levels experienced during 2014 when the softwood lumber agreement was in effect."[97]

The Canadian Parties maintain that this analysis overlooks historical data that show prices deviated from demand during several periods in the nearly 40 years since 1983. Figure 1 of their Rule 73 Brief indicates, for example, that during 1997-1999 and 2002-2005 demand was steadily increasing, while prices fluctuated. Prices did not "simply track demand on a steady upward climb," which the Canadian Parties maintain was the Commission's assumption.[98] The Canadian Parties contend that the Agency should have considered the erratic supply responses to the increasing demand during and before the POI. The Agency's explanation,

> [t]hat the Canadian Parties can point to two instances – 1997 to 1999 and 2002-2005 – across a 34-year time frame in which prices purportedly did not track with rising demand is of no import concerning the instant investigations,

is convincing to the Panel. Even taking account of the two instances relied upon by the Canadian Parties in which prices deviated from demand, their Figure 1 effectively proves the close relationship between prices and demand propounded by the Commission, especially when we note that the two instances of deviation do not correspond to the POI.[99] As the ITC implies, the exceptions in this case prove the rule.

We asked the Commission "to consider whether to take the more recent FEA data into account in its domestic capacity analysis ... ."[100] As the Agency explained, the record contained no evidence that the FEA data were outdated; the ITC also explained that it used the WWPA data to determine industry

[97] Remand Det. at 7-8, note 17.
[98] 73(2)(b) Brief of Can. Parties at 14.
[99] *Id.* at 14, Figure 1.
[100] Panel Dec. at 8, 90.

production and capacity utilization to maintain consistency with its use of the same WWPA dataset to determine industry capacity, as urged by the Parties.[101]

We faulted the Commission in our Interim Decision for "not adequately establish(ing) the context required for its later injury analysis under 19 U.S.C. § 1677(7)(c)(iii) to consider the relevant economic factors 'within the context of the business cycle and conditions of competition that are distinctive to the affected industry.'"[102] The Agency's remand determination does not suffer from this defect. Its definition and discussion of the industry's business cycle and where within this cycle the POI falls, sufficiently sets out the context required for its succeeding analysis of volume, price effects, impact, and causation.

The remand determination, unlike the Commission's Original Views, takes account in some detail of the extent in time of this industry's distinctive business cycle. It specifically situates the POI within this cycle. Its consideration of this cycle includes analyzing the changes in the market that occurred over the cycle's long course, from the bottoming out of lumber prices during the Great Recession as a result of the housing market crash, to the steady increase in prices through 2017 as housing starts phased up after the 2008-2009 lows. The ITC also noted that 2015 was significant because lumber prices in that year equaled the 2008 highs, as housing starts exceeded the peak before the Recession.[103] As the Parties had urged, the remand determination expressly adopts the multi-year boom-and-bust description of the lumber business cycle.

Although the Canadian Parties have continued to argue whether the Commission's analysis of the business cycle looks to information outside the POI, the Panel will not further address that argument here because we did not remand that issue to the Agency and the issue was therefore included in our finding that the Commission's holdings with respect to such issues are affirmed.[104]

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[101] Remand Det. at 12.
[102] Panel Dec. at 48.
[103] Remand Det. at 7.
[104] Panel Dec. at 115.

The Remand Determination clarifies why the ITC used the market data from FEA and WWPA, including an extensive analysis why the Canadian Parties were incorrect in describing this information as out-of-date and why they had misunderstood the calculation that led to the Agency's finding that domestic industry capacity was relatively flat from 2014 to 2015.[105] The determination adequately explains why the "updated FEA" data in the Rule 73 Brief of the Canadian Parties are in fact "a different dataset than the FEA 'capacity utilization' information used" in the WWPA calculations.[106]

We find no evidence that, as claimed by the Canadian Parties, the ITC presumed that "once demand started increasing, anything other than a persistent upward trajectory in prices and accompanying industry performance signalled material injury to the domestic industry caused by imports." Nor do we find evidence of the ITC's belief that "composite lumber prices, and in turn industry profits, (follow) demand in lock step."[107]

We find, therefore, that the business cycle and conditions of competition aspects of the Agency's remand determination is supported by substantial evidence and consistent with law.

B. Whether the Commission's Post-Petition Data Remand Determination Was Supported by Substantial Evidence and in Accordance with Law

1. *Background*

i. Panel Remand

In its original determination, the Commission found that higher prices in 2017 were a result of the pendency of the investigation. As a result the Commission reduced the weight accorded to the volume, price effects, and impact of subject imports for interim

[105] Remand Det. at 8-11.
[106] *Id*. at 12.
[107] 73(2)(b) Brief of Can. Parties at 13.

2017, pursuant to 19 U.S.C. § 1677(7)(1).[108] On remand, the Panel found that the Commission had failed to provide a reasoned basis for its determination to discount interim 2017 data and that, accordingly, the Commission's determination was unsupported by substantial evidence and otherwise not in accordance with law.[109] The Panel raised four concerns with the Commission's stated reason for its decision: (i) the failure to discuss conflicting evidence; (ii) the failure to clarify whether it was invoking a presumption that the changes were related to the pendency of the investigation; (iii) the failure to discuss what weight, if any, should be given to post-petition data; and (iv) the failure to address the treatment of third- and fourth-quarter 2017 data.[110]

The Panel remanded the Commission's decision to reduce the weight it accorded to interim 2017 data and directed the Commission to provide a reasoned determination on whether or not to reduce the weight given to the interim 2017 data.[111] With respect to third- and fourth-quarter 2017 data, the Panel accepted the Canadian Parties' submission that this data was properly in the record and found that the Commission had failed to make a clear determination with respect this data.[112] The Panel directed the Commission to clarify whether or not it is also reducing the weight accorded to third- and fourth-quarter 2017 data. Further, if, upon reconsideration, the Commission were to decide to reduce the weight given to post-petition data, the Panel further directed the Commission to clarify what weight, if any, it is giving to post-petition data and the reasons for this determination.

ii. ITC Remand Determination

The Commission's Remand Determination finds that there was a significant change in prices after the filing of the petitions and presumes that this change was related to the

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[108] Remand Det. at 55 note 203, referenced again at 57 note 209 with respect to the impact of increased prices on industry revenues.
[109] Panel Dec. at 57.
[110] *Id.* at 58-60.
[111] *Id.* at 60.
[112] Panel Dec. at 61.

pendency of the investigations.[113] The Commission found that prices in 2015 and 2016 were below prices in January 2014 (the beginning of the period of investigation) and that, in contrast, prices in 2017, including interim 2017 and third and fourth quarter 2017 were higher than prices at the beginning of the period of investigation.[114]

With respect to the Joint Respondents' arguments that price increases in 2017 were linked to other market forces, the Commission finds there is substantial evidence on the record that supports the presumption that the increase in prices was related to the pendency of the investigations.[115] With respect to the Joint Respondents' arguments that higher prices coincided with the CVD gap period, the Commission finds that the removal of provisional CVD duties did not eliminate the restraining effect of provisional antidumping duties in place and the pendency of investigations on softwood lumber imports.[116]

In conclusion, the Commission found that the significant post-petition change in subject import prices in 2017 was related to the pendency of investigations. The Commission therefore reduced the weight accorded to post-petition data on volume, price effects, and impact and gave "controlling weight" to the 2014-2016 data in its material injury analysis.[117]

2. Arguments of the Parties

i. Canadian Parties

The Canadian Parties claim that the Commission's Remand Determination is unlawful and unsupported by substantial evidence. According to the Canadian Parties, the Commission's comparison of January 2014 prices to post-petition prices is not a legal or

[113] Remand Det. at 21.
[114] *Id*. at 21-22.
[115] *Id*. at 22.
[116] *Id*. at 23-24.
[117] *Id*. at 24.

coherent basis for concluding that there was a significant change in prices as a result of the filing of the petition.[118] According to the Canadian Parties, when assessing whether there has been a significant change in data subsequent to the filing of the petition, the Commission must look for differences between the period after the filing of the petition and the period immediately before the filing of the petition. In this case, there was no discernible difference between prices in October 2016 (the month before the petition was filed) and prices in December 2017 (the month immediately after the petition was filed).[119]

The Canadian Parties contend that, even if the Commission may presume changes were caused by the pendency of the investigation, the evidence rebuts the Commission's presumption. In particular, the Commission failed to address evidence that post-petition softwood lumber prices closely tracked prices of non-subject building materials, which have trended upward both before and after the petition. They argue that the Commission failed to address the legally relevant issue, whether the Commission's presumption is rebutted by evidence of price tracking between softwood lumber and non-subject building materials.[120]

The Canadian Parties next argue that the Commission's decision to give controlling weight to the 2014-2016 data means that it gives no weight to 2017 data and that this finding is in tension with instances in which the Commission invokes 2017 data to support its findings.[121]

With respect to the third and fourth quarter data, the Canadian Parties argue that the increase in prices during the CVD gap period refutes the conclusion that strong lumber prices and positive industry performance were due to the investigation and preliminary duties, as a removal of CVD provisional duties resulted in an abatement of 75% of the

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[118] 73(2)(b) Brief of Can. Parties at 21.
[119] *Id*. at 22-23.
[120] *Id*.at 24-25.
[121] *Id*. at 25-26.

duties on subject imports.[122] Further, during the CVD gap period, COALITION members posted impressive returns and species-specific pricing data rebuts any presumption of petition-related effects.[123]

In conclusion, the Canadian Parties submit that the Panel should remand the Commission's redetermination with instructions to render a determination that gives full weight to the most current data.[124]

ii. Resolute

Resolute argues that the Commission's reference point for determining whether to discount post-petition data should have been November 2016 (when the petition was filed), instead of the finding being based on analysis comparing post-petition prices to 2014. According to Resolute, any analysis of the impact of the petition has to compare prices directly before and immediately after the filing of the petition.[125] Resolute argues that the filing of the petition did not change or interrupt the trajectory of price increases; the established pricing trend continued and there was no substantial change after the petition was filed.[126] Resolute concludes that there is no evidentiary basis for according the post-petition data no weight.[127]

iii. ITC Rebuttal

The Commission argues that the Joint Respondents provide no basis for disturbing the Commission's consideration and treatment of post-petition data. The Commission contends that there is no support in the statutory language, the Statement of Administrative Authority (SAA), or caselaw for the proposition that the Commission's

[122] *Id*. at 26-28.
[123] *Id*. at 28-30.
[124] *Id*. at 31.
[125] 73(2) Brief of Resolute at 6.
[126] *Id*. at 7.
[127] *Id*. at 8.

evaluation of post-petition effects is confined to a comparison of the period "immediately before" the filing of the petitions.[128] The Commission lawfully presumed that significant changes in prices were related to the pendency of the investigation and the Joint Respondents failed to overcome this presumption by meeting the SAA requirement to demonstrate "sufficient evidence rebutting that presumption and establishing that such change is related to factors other than the pendency of the investigation."[129] Although the Joint Respondents argued that market forces and the CVD gap period contributed to increasing price trends, any such evidence does not detract from other substantial evidence demonstrating that price changes during interim 2017 were directly due to the pendency of the investigations.[130] The Canadian Parties and Resolute overlook the fact that the statute contemplates that the pendency of the investigation in and of itself can have an effect on the subject import behavior, before provisional duties are imposed.[131] Further, the Commission argues that species-specific pricing data does not detract from the significance of the overall price increases since the filing of the petition.[132] In conclusion, regardless of the evidence discussed in the submissions, the Commission did not find evidence sufficient to rebut the presumption that price increases were related to the pendency of the investigation.

The Commission expressly stated it was giving less weight to post-petition data and the natural corollary of giving "controlling weight" to 2014-2016 data is that a non-controlling weight is given to post-petition data.[133] Further, references to 2017 interim data in the redetermination do not create "tension" with the Commission's findings; the Commission's remand determination's three references to evidence in 2017 are explained by the context.

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[128] 73(2) Brief of ITC at 32.
[129] *Id*. at 33 (citing to SAA, *supra* note 27 at 854).
[130] *Id*. at 34.
[131] *Id*. at 36.
[132] *Id*. at 37.
[133] *Id*. at 38.

iv. COALITION

The COALITION argues that the Commission did not err in its finding that there is substantial evidence on the record that the filing of the petition had a significant impact on the volume and prices of subject imports.[134] In its submission, the COALITION points to evidence on the record that links the filing of the petition to changes in prices and volumes.[135] The Commission has broad discretion to consider whether changes are related to the pendency of the investigation and this discretion and the Commission's treatment of post-petition data should be reaffirmed.

3. Opinion of the Panel

The Panel remanded the Commission's decision to reduce the weight it accorded to interim 2017 data and directed the Commission to provide a reasoned determination on whether or not to reduce the weight given to the interim 2017 data. The Commission's remand determination found that significant post-petition change in subject import prices in 2017 was related to the pendency of investigations. The Commission reduced the weight accorded to post-petition data on volume, price effects, and impact and gave "controlling weight" to the 2014-2016 data in its material injury analysis.[136]

In our Interim Decision, we noted that the U.S. Court of International Trade has confirmed in *LG Elecs., Inc. v. U.S. Int'l Trade Comm'n* that the "(t)he language of the statute grants broad discretion to the Commission to consider whether ''any change'' is ''related to the pendency of the investigation."[137] We noted further that in exercising this discretion the Commission must base its determination on substantial evidence and reasoned analysis.[138]

[134] 73(2)(c) Brief of COALITION at 126.
[135] *Id*. 126-134.
[136] Remand Det. at 24.
[137] *LG Elecs., Inc. v. U.S. Int'l Trade Comm'n*, 26 F. Supp. 3d 1338, 1353 (Ct. Int'l Trade 2014).
[138] *Bando Chem.*, *supra* note 20 at 227 (citing *Bowman Transportation, supra* note 20).

We find that the Commission has complied with the Panel's directions in our Interim Decision and that the remand determination on post-petition data is in accordance with law and supported by substantial evidence.

The Joint Respondents argue that the reference point for determining whether to discount post-petition data should have been November 2016 (when the petition was filed) rather than 2014. Although this may well be a sensible and logical approach, the issue is whether that approach is legally mandated. We agree with the Commission that the law does not require that the Commission adopt a specific methodology or approach when assessing, in the words of the SAA, whether there has been a significant change in data "subsequent to the filing of the petition."

Under 19 U.S.C. § 1677(7)(I), the Commission exercises a broad statutory discretion to decide whether or not to reduce the weight accorded to post-petition information:

> **Consideration of post-petition information.** The Commission shall consider whether any change in the volume, price effects, or impact of imports of the subject merchandise since the filing of the petition in an investigation under part I or II of this subtitle is related to the pendency of the investigation and, if so, the Commission may reduce the weight accorded to the data for the period after the filing of the petition in making its determination of material injury …

Neither the statutory language nor the SAA mandates any specific type of methodology of comparison between the pre-petition and post-petition periods in assessing whether there has been "any change." As we affirm in Section II (Standard of Review), an agency enjoys broad discretion to select the correct methodology and to interpret the statute under which it operates.

Further, the cases cited by the Canadian Parties do not support the proposition that a specific methodology is mandated. Although the Canadian Parties argue that in *LG*

Elecs., Inc. v. U.S. Int'l Trade Comm'n[139] *and Gold E. Paper (Jiangsu) Co. v. United States*,[140] there was a finding of significant change based on a comparison of the period subsequent to the petition and the period immediately before, nothing in those cases suggests that the statute or SAA required such an approach. Rather, both cases simply affirm that the Commission reasonably exercised the discretion afforded to it by Congress to discount the value of post-petition data.[141]

As discussed above, the Commission's remand determination finds that there was a significant change in prices after the filing of the petitions and presumes that this change was related to the pendency of the investigations. Further, the Commission finds that there is substantial evidence on the record to support the presumption and is not persuaded that other market forces or the CVD gap period explain the price changes. The Joint Respondents contend that, even if the Commission may presume changes were caused by the pendency of the investigation, the evidence rebuts the Commission's presumption.

The Panel recalls that its role is not to reweigh evidence or to substitute its judgment for that of the original finder of fact. The fact that the Joint Respondents can point to other evidence and can hypothesize a reasonable basis for a contrary determination does not provide a valid basis for remand.[142] The Panel cannot remand the Commission's redetermination simply because there is evidence that other market factors and the CVD gap period may have affected prices and volumes or there is species-specific data

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[139] *LG Elecs., supra* note 137 at 1355.

[140] *Gold E. Paper (Jiangsu) Co. v. United States*, 896 F. Supp. 2d 1242 (Ct. Int'l Trade 2012).

[141] *LG Elecs., supra* note 137 at 1355 ("To argue that the Commission could not have weighed the evidence because had it done so it would have reached a different conclusion is simply an invitation to the court once again to reweigh the evidence for the Commission. The court will not do this. The Commission reasonably exercised the discretion afforded to it by Congress to discount the value of post-petition data."); *Gold E. Paper,* supra note 140 at 1242 ("As a result of the pending investigations, the Commission made a reasonable decision— well within its discretion, and, indeed, expressly contemplated by statute—to accord less weight to data for 2010.").

[142] *See* Part II ("Standard of Review").

pointing to differences in price movements. To go into the thicket of considering all of these issues and the evidence would invariably lead the Panel to reweighing the evidence, which is something we cannot do. As stated in *LG Elecs., Inc. v. U.S. Int'l Trade Comm'n*:

> To argue that the Commission could not have weighed the evidence because had it done so it would have reached a different conclusion is simply an invitation to the court once again to reweigh the evidence for the Commission. The court will not do this. The Commission reasonably exercised the discretion afforded to it by Congress to discount the value of post-petition data.[143]

Finally, with respect to argument that the Commission's decision to give controlling weight to the 2014-2016 data is in tension with instances in which the Commission invokes 2017 data to support its findings,[144] we find that the three instances where 2017 data was referenced in the redetermination are explicable by the context and purpose of the citations.[145] In any event, such references to support the Commission's reasoning are not remandable errors.

For these reasons, the Panel finds that the Commission has complied with the Panel's directions in our Interim Decision and that the remand determination on post-petition data is in accordance with law and supported by substantial evidence.

C. Whether the Commission Erred in Its Findings of Relative Substitutability and Assumed Perfect Substitutability Contrary to Its Own Findings

1. Background

i. Panel Remand

In its Interim Decision, the Panel remanded two aspects of the Commission's Substitutability decision and directed it to:

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[143] *LG Elecs., supra* note 137 at 1355.
[144] 73(2)(b) Brief of Can. Parties at 25-26.
[145] 73(2) Brief of ITC at 38.

1. reconsider its calculation of substitution elasticity, explaining how it reached its conclusion and demonstrating how that conclusion was applied in the Commission's analysis of volume, price effects, impact, and causation; and

2. demonstrate how, and to what extent, the limitations to substitutability implied in its conclusion that the goods were "at least moderately substitutable" factored into the Commission's analysis of volume, price effects, impact, and causation.[146]

ii. ITC Remand Determination

In its Remand Determination, the Commission indicates,

1. with regard to the calculation of substitution elasticity, that it was not required to use any particular methodology to determine the degree of substitutability of subject and like goods, and that it relied on the "qualitative record evidence as support for [its] conclusion that the domestic like product and subject imports are at least moderately substitutable,"[147] and

2. with regard to the matter of how the Commission factored its finding that the goods were "at least moderately substitutable" into its analyses of volume, price effects, impact, and causation, that the overlap in the market was sufficient to justify concluding that the imports competed with the domestic like goods in all geographic regions and across the full spectrum of species and end-uses, thus minimizing any mitigating influence on competition and obviating the need to adjust its calculations.[148]

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[146] Panel Dec. at 77-78.
[147] Remand Det. at 15.
[148] *Id.* at 15-16.

2. Arguments of the Parties

1. In responding to the Panel's directive regarding substitution elasticity, the Commission argues that the statute does not require it to analyze substitutability in any particular manner, or to adopt elasticity estimates provided either by its own staff or by any party. It refers to a previous ruling by the U.S. Court of International Trade that "the Commission is not required to consider such estimates, or any particular model, in its analysis because an econometric study based on a theoretical model and a set of assumptions may be outweighed by real world data."[149] The Commission asserts that it did not use elasticity estimates, but relied on "qualitative record evidence as support for our conclusion that the domestic like product and subject imports are at least moderately substitutable."[150]

For its part, the Petitioner states that the Commission should disregard estimations of substitution elasticity, "because the Commission properly relied on alternative, real-world reporting …."[151] It argues that the analysis provided by the Canadian Parties is flawed for a variety of reasons. Following issuance of the Commission's Remand Determination, the Petitioner provides further support for the ITC position in its Rule 73(2)(c) Brief,[152] noting that "the Commission enjoys wide discretion in determination [of] the probative value of the evidence."[153] It argues that the Commission satisfied the need to explain its decision to accord little weight to the elasticity studies put forward by the Canadian Parties. It then goes on to comment on the substitution elasticity studies submitted by the Canadian parties, arguing that shortcomings in the studies render them of little probative value.[154]

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[149] *Id.* at 14; *See also* 73(2) Brief of ITC at 16 *et seq.*
[150] Remand Det. at 15.
[151] 73(2) Brief of ITC at 13.
[152] 73(2)(c) Brief of COALITION at 95 *et seq.*
[153] *Id.* at 98.
[154] *Id.* at 97.

In responding to the Panel's remand on this point, the Canadian Parties agree that the Commission is not required to adopt its staff's estimate, but insist in reference to the studies they submitted that the Commission disregarded "quantitative evidence of substitution elasticity" that it was "required to account for."[155] The studies in question purport to show elasticities well below the Staff's estimated range of 2.0-5.0. Further, they argue that in most cases where the ITC has returned a finding of "at least moderately substitutable," and also adopted a numerical substitution elasticity finding, the latter has always been at or above 2.0.[156]

2. On the question of how, and to what degree, the ITC applied its finding of "at least moderately substitutable" to its analysis of volume, price effects, impact, and causality, the Commission argues the validity of its conclusions by reference to producer, importer, and purchaser questionnaires. It also cites to other quantitative and qualitative evidence on the record, including submissions by the National Association of Homebuilders.[157] In responding to the Canadian Parties' criticisms of its approach, the Commission notes that the Panel acknowledged that "at least moderately substitutable" was 'susceptible to widely varying interpretations.'[158]

In its Rule 73(2) Brief, the Commission returns to the question of its original finding on substitutability. In order to respond fully to the Panel's directive, the Commission sees it as "incumbent upon the Commission to clarify its finding of 'at least moderate substitutability' as it pertained to competition in the U.S. softwood lumber market."[159] It states that "a 'moderate' degree of substitutability was the absolute minimum level … although a greater degree of substitutability could exist. In fact, the record demonstrates

[155] 73(2)(b) Brief of Can. Parties at 55. These arguments largely duplicate those made earlier in the Comments of the Joint Canadian Parties on the NAFTA Panel's Interim Decision, at 15 *et seq*.
[156] *Id*. at 58.
[157] Propr. Remand Det. at 13.
[158] 73(2) Brief of ITC at 19 (quoting Panel Dec. at 75).
[159] *Id*. at 19.

the reasonableness of this finding in light of the substantial overlap with respect to species …"[160]

The Petitioner argues that, although the Canadian Parties saw species as the distinguishing criterion for determining substitutability, this view is too narrow: substitutability depends as well on factors such as product dimensions, grading, moisture content, regionality, and seasonality.[161] The Petitioner then goes on to state that competition is not attenuated, despite "customer and regional preferences," arguing that there is "exhaustive record evidence of direct competition in all end-use markets, including lumber for so-called 'appearance' uses, decking, fencing, bed-frame components, and remanufactured products."[162]

The Canadian Parties object to the Commission's alleged "recasting" of its finding, asserting that "the Commission seeks to evade the Panel's instructions by 'clarify[ing]' that its finding of 'at least moderate substitutability' does not mean that there is 'significant' attenuation of competition."[163] They characterize the Commission's response as an attempt, through selective reference to the evidence, to render its original finding on substitutability "indistinguishable from a finding of 'highly substitutable' or 'fungible'…"[164] The Canadian Parties provide their analysis of overlap with respect to species and end uses, arguing that the Commission discounted the non-overlapping aspects of the market, thereby treating the products as fungible.

3. Opinion of the Panel

1. With regard to elasticity calculations, the ITC noted that there is no statutory requirement that it analyze substitutability in any given manner or adopt staff

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[160] *Id.* at 20.
[161] 72(3)(c) Brief of COALITION at 30.
[162] *Id.* at 33, 34. Petitioner here adds reference to its own Post-conference Brief and Prehearing Brief.
[163] 73(2)(b) Brief of Can. Parties at 31, 32 (emphasis added).
[164] *Id.* at 36.

estimates.[165] The Panel recognizes that statutes generally do not lay down methodologies or tie the hands of agencies with requirements for their internal workings. Instead, they typically create a framework of legal requirements, without prescribing in detail how those requirements are to be met.

There was no suggestion by the Panel that the use of elasticity estimates was required, by statute or otherwise. Nor did the Panel suggest how ITC decision-makers should go about pursuing their relationship with their own staff. Rather, the Panel was concerned with gaps in the language of the original Views of the Commission that reflect possible breaks in the chain of reasoning.[166] In its original Views, the ITC appeared to indicate that it had used elasticity estimates in some manner. As noted in our Interim Decision,[167] the phrase "the methodologies and data used to estimate elasticities in this case" appearing in its Confidential Views[168] leaves the distinct impression that elasticity calculations of some nature were used as a tool in the ITC's analysis of substitutability. While in this footnote the Commission indicated why it had dismissed the elasticity estimates put forward specifically by the Canadian Parties, at no place in its original determination did it explicitly indicate that it had turned its back on the use of elasticity calculations altogether.

The Panel has no quarrel with the Commission's assertion, based in part on U.S. Court of International Trade cases, that theoretical constructs such as elasticity calculations may be eclipsed by "real world data."[169] The clarification offered by the Commission in its remand determination, and its subsequent Rule 73(2) Brief, provide the necessary explanation that the Commission had, in fact, considered elasticity estimates but discarded them entirely as a tool in its analysis. The ITC also provides further background to its reasons for doing so. The Panel accepts this explanation, which

[165] Remand Det. at 14.
[166] Panel Dec. at 75-76.
[167] *Id*. at 76.
[168] Remand Det. at 45, note 162 (emphasis added).
[169] Propr. Remand Det. at 14.

renders moot the Canadian Parties' specific arguments on how the Commission treated the elasticity studies that they had placed on the record.

We agree that elasticity estimates are not required for the calculation of actual substitutability. We note the Commission's statement that it "generally has not relied on quantitative elasticity estimates in arriving at its substitutability conclusions,"[170] and we accept that such was true in the present instance. The Panel is satisfied that the ITC did, in fact, rely on the "qualitative record evidence" for its finding on substitutability. The Panel therefore finds that the manner in which the Commission dealt with elasticity of substitution was reasonable and in accordance with law.

2. With regard to the second remand on substitutability, the Panel, while accepting the Commission's finding that the products were "at least moderately substitutable," directed it to demonstrate how, and to what extent, this finding factored into the Commission's analysis of volume, price effects, impact, and causation.[171]

In its Remand Determination, the Commission takes an oblique approach in responding to this directive, choosing to focus first on "clarify[ing]" its finding of "at least moderate substitutability" but then moving almost immediately to deal with the related concept of competition.[172] On its face, the Canadian Parties' objection to the ITC's shift from discussing substitutability to discussing attenuation of competition may appear justified. However, this is not an abstract exercise where an analysis of substitutability itself necessarily stands on its own. The point of assessing substitutability is that it is one of a number of threads leading to the analysis of competition, and thence to a greater understanding of injury.

The Panel notes in particular that substitutability is a condition of competition, and thus accepts the validity of the Commission's couching its response to the remand largely in

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[170] *Id*. at 16.
[171] Panel Dec. at 78.
[172] Propr. Remand Det. at 16 *et seq*.

terms of competition and competitiveness. We further note that in our Interim Decision, the Panel explicitly linked the two concepts because of their close relationship.[173] In our view, the Commission's approach through a discussion of competition and attenuation of competition is an acceptable way of explaining how, and to what degree, the relative substitutability of the imported and domestic products is applied in the analysis of volume, price effects, impact, and causation.

We do not take issue with the ITC's conclusion that there was considerable overlap between domestic and imported products in the marketplace. In fact, the Panel established this in its Interim Decision, and the matter does not need to be re-argued. The Commission's finding that the products are "at least moderately substitutable" reflects the evidence on the record that the overlap is not total, and the Commission has recognized this fact. After reviewing the degree of overlap in its Remand Determination, the Commission concludes that this finding "does not imply that there is a significant lack of competition,"[174] and states that "competition between subject imports and the domestic like product during the POI was … meaningful in every end-use application."[175]

In the Panel's view, the Commission's position that its finding "does not imply that there is a significant lack of competition" indicates that, however the term "significant" may be defined, the Commission recognizes that there is at least in some instances a lack of competition between domestic and imported products. That view is supported by the evidence that shows that preferences clearly exist in the market – for example, where species choice is dictated by existing practice, or where differences in end use are created by factors such as the dedication of a significant proportion of pressure-treated SYP to applications where Canadian products cannot compete.[176] Although these differences clearly apply in a minority of situations, they nevertheless constitute actual limits on substitutability. It is then incumbent on the Commission to explain how those

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[173] Panel Dec. at 75.
[174] *Id*. at 16.
[175] *Id*. at 17.
[176] *See* 73(2)(b) Brief of Can. Parties at 48 *et seq*.

limitations do not alter its calculations with regard to volume, price effects, impact, and causation.

In their Rule 73 Brief, the Canadian Parties provide a critique of the Commission's analysis with respect to several measures of substitutability: species overlap,[177] overlapping end uses,[178] and competition involving pressure-treated SYP and green Douglas Fir.[179] In these discussions, the Canadian Parties appear to argue that anything less than perfect overlap of subject products with domestic products requires the detailed analysis of any evidence that detracts from the ITC's conclusions. As we noted in our Interim Decision, the Commission must take into account salient evidence that is at odds with its conclusions.[180] But here, the Canadian Parties appear to try to re-litigate the weight the Commission has given to the evidence in question, and even ask the Panel for its part to reweigh the evidence presented. As we also noted in our Interim Decision, the Panel is barred from doing this and so will not pursue the matter further.

As the Panel understands the Commission's approach to this remand, it builds on the evidence of a significant degree of overlap in the market to demonstrate that, while substitutability was not total, the competition of imported products with domestic products during the POI nevertheless occurred across species and end-uses, and in all geographic regions.[181] The ITC's care in expressing this point is telling: the Commission repeatedly refers to competition in language that implicitly acknowledges the incompleteness of the overlap, while still allowing for the view that the overlap is sufficiently large to minimize the attenuation of competition.[182] Thus the subject goods

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[177] *Id.* at 38 *et seq.*
[178] *Id.* at 41 *et seq.*
[179] *Id.* at 48 *et seq.*
[180] "[R]egardless of any presumption in its favor, the Commission is in no way absolved … of its responsibility to explain or counter salient evidence that militates against its conclusions." Panel Decision at 20 (quoting *Usinor v. United States,* 262 CIT 767, 783 (2002)).
[181] Propr. Remand Det. at 16.
[182] For example, "<u>substantially</u> overlapping end uses"; "<u>35 of 40</u> responding purchasers … <u>usually or sometimes</u> purchase the lowest-priced softwood lumber" (Propr. Remand Det. at 16); "SYP and SPF competed in <u>virtually</u> allof the same end-use applications in all regions of the United States"; "the <u>majority</u> of

and like goods can be "at least moderately substitutable" while those limited areas in which they are not substitutable do not significantly affect overall competitiveness.

While the Panel continues to view this incomplete substitutability as having some attenuating effect on competition, it accepts the Commission's conclusion that in the present circumstances this is true to such a limited extent that the degree to which competition is attenuated is minimal. The Panel is satisfied that the Commission took into account the limitations on substitutability when performing its analyses of volume, price effects, impact, and causation. It therefore finds that the Commission's response to the remand on this issue is supported by substantial evidence and in accordance with law.

D. WHETHER THE COMMISSION'S VOLUME ANALYSIS WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IN ACCORDANCE WITH LAW

1. Background

i. Panel Remand

The Commission concluded in its Final Determination that "the volume of subject imports and the increase in that volume are significant both in absolute terms and relative to consumption in the United States."[183] The Canadian Parties, in their Rule 57(1) Brief, subsequently asserted that the Commission's conclusion was not supported by substantial evidence because the Commission failed to consider four factors in its volume analysis, including the Commission's substitutability findings.[184] In particular, the

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purchasers … <u>frequently or sometimes</u> used or were willing to substitute other species for preferred species" (*Id.* at 17 (emphasis added)).

[183] *Lumber V ITC Final Det.* at 48.

[184] 57(1) Brief of Can. Parties at 136. The Panel upheld the Commission's volume analysis regarding the other three factors alleged by the Canadian Parties: the historical context and the business cycle; the impact of third-party imports; and regional U.S. demand and supply issues. *See* Panel Dec. at 80, 83 and 84.

Canadian Parties submitted that the Commission failed to consider its finding of "moderate substitutability" in determining that subject imports experienced significant gains directly at the expense of the domestic industry.[185]

After reviewing the Commission's Final Determination, the Panel concluded that the Commission failed to include its finding of "at least moderate substitutability" in its volume analysis, thus rendering this analysis not based on substantial evidence.[186] The Panel remanded the Commission's volume analysis and directed the Commission to consider all record evidence to demonstrate how, and to what extent, the limitations of substitutability implied in its conclusion that the goods were "at least moderately substitutable" factored into its conclusion that subject imports experienced significant gains in market share directly at the expense of the domestic industry.[187] The Panel directed the Commission to further reconsider its volume analysis as the Commission determined appropriate.[188]

ii. ITC Remand Determination

The Commission reiterated the earlier finding in its Remand Determination regarding substitutability that it does not find significantly attenuated competition between the domestic like product and the subject imports.[189] It then found that although the domestic like product and subject imports are not perfect substitutes due to customer and regional preferences for certain species for particular end-use applications, record evidence, including data submitted by the National Association of Home Builders, demonstrated a willingness for customers to substitute different species based on price and an overlap between domestic softwood lumber and Canadian softwood lumber in virtually all end-use applications.[190] Taking the above into account and the volume

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185 57(1) Brief of Can. Parties at 136.
186 Panel Dec. at 82.
187 *Id.*
188 *Id.*
189 Propr. Remand Det. at 25.
190 *Id.* at 25-26.

analysis in its Final Determination, the Commission concluded that the volume of subject imports and the increase in that volume are significant, both in absolute terms and relative to consumption in the United States.[191]

The Commission then responded to the Canadian Parties' argument that there was limited overlap in demand for subject imports and the domestic like product. The Commission observed that this argument was based on an econometric study performed by the Canadian Parties' own experts, and then found record data to be more probative and that this data demonstrates that both sets of products were used in the same end-use applications.[192] Regarding the Canadian Parties' assertions that whether lumber was pressure treated or whether in "green" form versus kiln-dried limited the overlap in competition, the Commission concluded that record evidence showed that the "vast majority" of domestic lumber and subject imports were both non-treated and kiln-dried, thereby indicating substantial overlap.[193]

2. *Arguments of the Parties*

The Canadian Parties assert that the Commission failed to account for any attenuation of competition between the domestic like product and the subject imports because the Commission did not address the extent to which there is no overlap between domestic and Canadian products.[194] The Canadian Parties further allege that the evidence relied on by the Commission in its volume analysis does not support finding a lack of significant attenuation of competition.[195] In particular, the evidence regarding pressure-treated SYP and green Douglas Fir,[196] demand for Canadian imports due to new

[191] *Id*. at 27.
[192] *Id*. at 28.
[193] *Id*. at 28-29.
[194] 73(2)(b) Brief of Can. Parties at 61-67.
[195] *Id*. at 68-80.
[196] *Id*. at 69.

housing construction,[197] variations in regional preferences,[198] and regional supply differences.[199]

The Commission in response argues that its analysis of the overlap of competition between the domestic like product and the subject imports complies with the Panel's decision.[200] It also submits that the Commission's volume analysis was supported by substantial evidence regardless of the limitations on substitutability identified by the Canadian Parties.[201]

3. Opinion of the Panel

The Panel finds that the Commission considered all record evidence to demonstrate how, and to what extent, the limitations of substitutability implied in its conclusion that the goods were "at least moderately substitutable" factored into its conclusion that subject imports experienced significant gains in market share directly at the expense of the domestic industry. As explained by the Commission, substitutability is one factor considered by the Commission in assessing the degree of competition between the domestic like product and the subject imports.[202] The Commission then concluded that, regardless of the extent of substitutability, record evidence demonstrated that:
1) purchasers and their customers were willing to substitute different species for all applications (other than decks and decking structures) based on price; and 2) such overlap between domestic softwood lumber and Canadian softwood lumber does indeed occur.[203] As a result, the Commission complied with the Panel's remand instructions in continuing to find that the volume of subject imports and the increase in that volume are significant, both in absolute terms and relative to consumption in the United States regardless of any moderate limitations on substitutability.

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[197] *Id*. at 69-75.
[198] *Id*. at 75-77.
[199] *Id*. at 77-80.
[200] 73(2) Brief of ITC at 41-46.
[201] *Id*. at 46-52.
[202] Propr. Remand Det. at 15-16.
[203] *Id*. at 25-26.

The Canadian Parties' arguments against the Commission's volume analysis remand determination overall ignore the Commission's consideration of substitutability as *a* factor in determining the degree of competition. Their assertions, instead, are based on substitutability being *the* factor in determining the degree of competition. Contrary to the Canadian Parties' allegation, the Commission did indeed account for any limitations on competition, but did so by assessing substitutability in the context of other record evidence regarding purchasers' perceptions and actual purchasing behavior.

The Canadian Parties' arguments that the Commission should have conducted its competition analysis in a different manner are also unavailing. The plain language of the statute does not require the Commission to conduct its volume analysis, including its consideration of competition, in a particular way. Moreover, regardless of whether the Canadian Parties accurately describe the Commission's analyses in past cases, the Commission's material injury determinations are *sui generis*[204] because "(t)he Commission must consider the many economic variables unique to each (determination) and there is limited precedential value to previous (determinations)…[205]

Finally, the Canadian Parties' arguments that the Commission's analysis is not supported by record evidence do not detract from the Commission's remand determination. The Canadian Parties' allegations here of differences in treatment and drying status between U.S. and Canadian softwood lumber are the same as those made regarding the Commission's remand determination on substitutability. The Panel rejected these allegations in its above review of the Commission's Remand Determination regarding substitutability and do so again here for the same reasons.[206] Moreover, the Commission provided in its volume Remand Determination a reasonable explanation for the factual analysis behind its conclusion that treatment and drying

[204] *Nucor Corp. v. United States*, 318 F. Supp. 2d 1207, 1246-47 (Ct. Int'l Trade 2004).
[205] *Usinor v. United States*, 342 F. Supp. 2d 1267, 1291 (Ct. Int'l Trade 2004).
[206] See *supra* at Section C.

status actually demonstrate substantial overlap between the domestic like product and subject imports.[207]

The Commission likewise provided a reasoned basis for not relying on the econometric study performed by the Canadian Parties' own experts.[208] The Canadian Parties are now asking the Panel to reweigh the evidence in favor of the econometric study, which is contrary to the Panel's standard of review.[209] The Panel further notes the Canadian Parties' assertion that the Panel allegedly found that the Commission did not take into account evidence regarding the alleged connection between new housing construction and demand for Canadian softwood.[210] Neither the page of the Panel's remand determination cited by the Canadian Parties nor any other portion of the Panel's remand determination supports this description of the Panel's determination.

The Canadian Parties' arguments that the Commission was required to analyze differences in regional supply and demand in its volume analysis were dismissed by the Panel in its determination.[211] Moreover, even to the extent that the impact of regional differences is limited to the Commission's finding of at least moderate substitutability, this does not negate the Commission's consideration of substitutability as one factor in assessing competition and its finding of meaningful competition based on the record as a whole. Once again, the Panel cannot accept the Canadian Parties' invitation to reweigh evidence.

For these reasons, we find that the volume analysis in the Commission's remand determination is lawful and supported by substantial evidence.

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[207] Propr. Remand Det. at 28-29.
[208] *Id.* at 27-28.
[209] *See Siemens Energy, Inc. v. United States*, 806 F.3d 1367, 1374 (Fed. Cir. 2015).
[210] 73(2)(b) Brief of Can. Parties at 69-70 (citing Panel Dec. at 82).
[211] Panel Dec. at 83-84.

E. WHETHER THE COMMISSION'S PRICE EFFECTS ANALYSIS WAS SUPPORTED BY SUBSTANTIAL RECORD EVIDENCE AND IN ACCORDANCE WITH LAW

1. Background

i. Panel Remand

Section 771(7)(C)(ii) of the *Tariff Act of 1930* requires the Commission to consider whether, *inter alia*, "the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which would otherwise have occurred, to a significant degree."[212]

In its Original Views, the Commission found:

> Accordingly, based on the record in the final phase of these investigations, we find that the increasing and significant volume of subject imports gained market share at the expense of the domestic industry during a time of rising demand and prevented price increases, which otherwise would have occurred, to a significant degree. We therefore conclude that the subject imports had significant price effects.[213]

As stated by the Commission in its Reply 57(2) Brief:

> In arriving at this (price suppression) conclusion, the Commission not only considered corroborating purchasers' narrative responses, but importantly also relied on COGS data in combination with demand and price trends.[214]

2. Analysis and Panel Opinion

In the Interim Decision, the Panel remanded four aspects of the Commission's price suppression analysis.[215] The Commission's remand determination, the Submissions of the Parties, and the Opinion of the Panel with respect to these remands, are set out in the sections below.

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[212] *Tariff Act of 1930* § 771(7)(C)(ii); 19 U.S.C. § 1677(7)(C)(ii).
[213] *Lumber V ITC Final Det.* at 56.
[214] 57(2) Rebuttal Brief of ITC at 151.
[215] Panel Dec. at 8-9.

i. Domestic Capacity Data

In coming to its price suppression conclusion in the Original Views, the Commission indicated that it relied on domestic capacity data acquired from secondary sources, including publications from the WWPA.[216]

In their Rule 57(3) Brief, the Canadian Parties' stated that the WWPA publication *Lumber Track* obtains capacity information from FEA, which "continues to update its data – including capacity numbers – in subsequent months as more information becomes available, but back issues of WWPA Lumber Track are not updated to account for FEA revisions."[217] Accordingly, the Canadian Parties submitted that the failure to use the most current FEA data rendered the Commission's determination unsupported by substantial evidence.[218]

In its Interim Decision the Panel issued the following remand:

> As to the Domestic Capacity aspect of the price suppression analysis in paragraph (4)(b), the Panel remands this determination to the Commission and directs the Commission to consider whether to take the more recent Forest Economic Advisors ("FEA") data into account in its domestic capacity analysis, explain its decision, and, if it decides to take the updated FEA data into account, reconsider its price effects analysis as it determines is appropriate.[219]

a. ITC Remand Determination

In its remand determination, the Commission dealt with the Panel's remand by confirming its reliance on the data from the WWPA.

The Commission clarified that, in the Original Views, the Commission determined domestic capacity with reference to WWPA reports on U.S. production and capacity

[216] *Lumber V ITC Final Det.* at 56, note 205.
[217] 57(3) Reply Brief of Can. Parties at 35-36.
[218] *Id.*
[219] Panel Dec. at 8.

utilization.[220] The domestic industry's capacity utilization was reported by WWPA based on its own survey information as well as FEA data.[221]

In the Remand Determination, the Commission found that the WWPA publications used for its calculations were not outdated[222] and explained that it relied upon "WWPA publications issued in July of each year, which contained 'final revisions' for the prior year."[223]

The Commission also noted that the record did not contain any specific revision information from FEA with respect to the WWPA reported "production" or "capacity utilization" data which was used by the Commission.[224]

The Commission noted that the Canadian Parties had relied on FEA data which was indicated to be from the second quarter of 2017. The Commission indicated that it was unclear whether the data was actually from 2013 and in any event, found that this information did not demonstrate that the particular WWPA data used by the Commission was outdated.[225]

In summary, the Commission continued to rely on the WWPA data and confirmed the finding from the Original Views that the domestic industry's capacity declined from [   ] board feet in 2014 to [______________] board feet in 2015 and [   ] board feet in 2016 and again rejected the Canadian Parties' price correction theory that the decline in prices in 2015 was due to an increase in domestic industry capacity.[226]

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[220] Remand Det. at 10. *See also* Text at notes 98-99.
[221] *Id*. at 10, note 30.
[222] *Id*. at 39, note 136.
[223] *Id*. at 11, note 32.
[224] *Id*. at 10, 39.
[225] Remand Det. at 11, note 34.
[226] *Id*. at 11, note 31.

b. Arguments of the Parties

A. Canadian Parties

The Canadian Parties submit that the Commission has attempted to misdirect rather than addressing the Panel's remand to consider whether to take the more recent FEA data into account. Specifically, they say that the Commission has focused on whether the Canadian Parties had disavowed data from WWPA, rather than considering whether the WWPA data was superseded by more recent FEA data.[227]

In terms of the FEA data, the Canadian Parties also focus on whether there was any ambiguity or doubt as to whether the second quarter 2017 data was actually from 2013. The Canadian Parties say that the Commission had a duty to seek clarification from FEA to resolve any confusion on this point. [228]

The Canadian Parties also suggest that the Commission has failed to offer a persuasive defense of its decision to rely on the WWPA capacity utilization data rather than relying on questionnaire data as it does in other instances in the Remand Determination.[229]

B. ITC Rebuttal

In its Rule 73(2)(c) Brief, the Commission stated that it had considered the FEA data and decided that the WWPA publications were still the most reliable data source for its calculations of domestic capacity.[230] The Commission stated that the FEA data did not represent an "update" to the WWPA data relied upon by the Commission, and that the record did not establish that the WWPA data was outdated given that the WWPA

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[227] 73(2)(b) Brief of Can. Parties at 103.
[228] *Id*. at 104.
[229] *Id*. at 105.
[230] 73(2) Brief of ITC at 11.

publications relied upon by the Commission were published yearly and incorporated revisions for prior years. [231]

The Commission also noted that the Panel's Interim Decision did not direct the Commission to reconsider the domestic producer questionnaire data and noted that this data accounted for only 63.3% of 2016 U.S. capacity.[232]

In its Rule 73(2)(c) Brief, the Petitioner noted that, with respect to the 2015 and 2016 WWPA data, the Canadian Parties' Prehearing Brief contained Exhibits which included statements that "final revisions for 2015 have been made in all WWPA statistical reports"[233] and

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].[234] Similarly Exhibit 2 of the Petition includes the cover letter to the April 2015 edition of *Lumber Tracks* which notes that "final revisions for 2014 have been made in all WWPA statistical reports."[235] Based on the foregoing, the Petitioners state that "as a factual matter, there is no need for the Commission to consider "updated" FEA data because such data has already been incorporated into the WWPA's *Lumber Tracks* for Table III-4." [236]

c. Opinion of the Panel

As a preliminary point, the Panel notes that the Commission is entitled to rely on secondary information[237] and that the WWPA publications were accepted by all parties as a reliable data source. In this regard, the Canadian Parties referred to WWPA publications as the "industry's most reliable sources for U.S. production and shipment data."[238]

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[231] *Id*. at 12-13.
[232] *Id*. at 13-14, note 54.
[233] 73(2)(c) Brief of COALITION at 124, note 448.
[234] *Id*. at 124.
[235] *Id*.
[236] *Id*.
[237] Remand Det. at 9, note 24.
[238] 73(2) Brief of ITC at 11, note 45.

In responding to the remand, the Commission expressly found that the WWPA publications relied upon for its calculations were, in fact, not outdated. As the Commission and the Petitioner explained, the final revisions for prior years were incorporated into the WWPA data in July of each following year.

Accordingly, the Panel affirms that the Commission's finding, that the FEA data had already been incorporated into the WWPA data used by the Commission in its determination of domestic capacity, is supported by substantial evidence and in accordance with law.

The Panel also finds that there is no need to decide whether or not the FEA data indicated to be from the second quarter of 2017 was actually from 2013. This is because this FEA data was stated to be a forecast of capacity, and did not represent an update to either the actual WWPA "production" or "capacity utilization" data sets used by the Commission in its domestic capacity calculations.

In arriving at its domestic capacity determination, the Commission indicated that it had considered the questionnaire responses from US producers, but did not rely on them because of "incomplete questionnaire response coverage."[239] These questionnaires accounted for only 63.3% of domestic industry capacity and 59.0% of domestic production in 2016.

Accordingly, the Panel finds it was reasonable for the Commission not to rely on these questionnaire responses because, unlike the WWPA data used, it did not account for the entirety of the domestic industry.

In summary, it is the opinion of the Panel that the Commission's reliance on the WWPA data is based on substantial evidence and in accordance with law.

[239] Propr. Remand Det. at 9, note 22.

ii. Pricing of Different Softwood Species

In coming to its price suppression conclusion in the Original Views, the Commission indicated that the evidence it had gathered in terms of questionnaire responses and published data "demonstrates that the prices of different species closely track each other and seem to have an effect on others' prices, particularly those that are used in the same or similar applications."[240]

In its Interim Decision the Panel issued the following remand:

> As to the Different Softwood Species aspect of the price suppression analysis in paragraph (4)(d), the Panel remands this determination to the Commission and directs the Commission to reconsider its conclusion that the prices of different species closely track each other to take into consideration that price movements of one species "affect" prices of other species, the existence of a "great difference in price movement" of one species compared to another, and that prices for different species "generally track" each other, as well as any other record evidence, and to determine what effect such reconsideration has on its price suppression analysis.[241]

a. ITC Remand Determination

In its Remand Determination, the Commission stated: "Upon reconsideration of the record evidence, we find that the pricing data from *Random Lengths* demonstrate that prices for different lumber species *generally* tracked each other during the POI."[242]

Specifically the Commission found that, despite there being slight and temporary deviations, prices of both primarily domestically produced and primarily imported softwood lumber products generally declined substantially from 2014 to 2015 and, although prices for all products increased overall in 2016, prices generally did not return to levels similar to those at the beginning of the POI until 2017.[243]

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240 *Lumber V ITC Final Det*. at 54.
241 Panel Dec. at 9.
242 Propr. Remand Det. at 36, note 122.
243 *Id*. at 36.

Citing the transaction-by-transaction spot market for softwood lumber as reported in the *Random Lengths* publications, the Commission also found that "in addition to generally tracking each other's prices, price differences in one species tended to have an effect on other species' prices."[244]

b. Arguments of the Parties

A. Canadian Parties

The Canadian Parties submit that the Commission's finding that prices for different lumber species *generally* tracked each other during the POI is not supported by substantial evidence. The Canadian Parties say that this finding relies on isolated tidbits of evidence that are in conflict with the record as a whole.[245]

Specifically, the Canadian Parties have alleged that the Commission has selectively cited four articles and mischaracterized the statements in those articles.[246] The Canadian Parties review and comment on these four articles at length, arguing that they do not support the conclusion that the prices of SPF, the predominant imported species, influenced the prices of the predominant domestic species.[247]

The Canadian Parties argue that prices for Canadian and U.S. lumber species respond, along with construction materials generally, to the same general trends in the U.S. economy; in effect, to the influence of broader economic forces.[248]

The Canadian Parties further submit that the Commission has misrepresented the importance of species in purchasing decisions and assumes, without evidence, that price overrides product selection in purchasing decisions.[249] The Canadian Parties state

[244] *Id*. at 37.
[245] 73(2)(b) Brief of Can. Parties at 87.
[246] *Id*. at 88.
[247] 73(2)(b) Brief of Can. Parties at 88-92.
[248] *Id*. at 91-92.
[249] *Id*. at 92.

that there is no rational basis for the Commission to assume that purchasers reported choosing between different softwood lumber species on the basis of price.[250]

B. ITC Rebuttal

In its Rule 73(2)(c) Brief, the Commission states that its findings were not based on tidbits of data as alleged by the Canadian Parties "but rather upon monthly prices between 2014 through 2016 of SYP, DF, HF, Western SPF, Eastern SPF, and Western Red Cedar reported by *Random Lengths*."[251]

The Response refers to the four articles mentioned by the Canadian Parties which, the Commission states, plainly support the Commission's finding that prices for species generally tracked each other.[252]

The Commission states in its Response that it did not assume that purchasers reported choosing between different softwood lumber species on the basis of price.[253] Instead, the Commission says that it based its price effects findings on the facts and that, although factors other than price affected purchasing decisions, price was an important consideration.[254] In this regard, the Response notes that price was most frequently cited by purchasers as the first-most important factor in purchasing decisions over all other factors, including species. [255]

c. Opinion of the Panel

In reaching its conclusion that the prices of different lumber species generally tracked each other during the POI, the Panel notes that the Commission looked at prices

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[250] *Id.* at 93.
[251] 73(2) Brief of ITC at 61, note 232.
[252] *Id.* at 62-64.
[253] *Id.* at 64.
[254] *Id.*
[255] *Id.* at 65, note 247.

throughout the period as reported by *Random Lengths* and finds that the Commission did not rely on isolated tidbits of evidence.

Further, with respect to the four articles referred to by the Commission, the Panel notes the following.

The *Random Lengths* articles cited included the following observations:

- [ ];
- [ ];
- [ ];[256]

The *Madison Lumber Reporter* article cited including the following observations:

- "With the largest volumes sold, WSPF price trends generally lead the market."
- "Given that these three products, WSPF, ESPF and SYP, are basically interchangeable in terms of end-user and application, such a great difference in price movement of one compared to the other two is definitely worth watching. All three products sell into Canada and the US for home building, renovation, and remodeling." [257]

In the Panel's view, it was reasonable for the Commission to refer to these articles in support of its conclusion that the prices of species generally track each other with subject imports putting competitive pressure on prices.

In this context, the Panel accepts as reasonable the position set out by the Commission that the references in the *Madison Lumber Reporter* article to "a great difference in price movement" being a "cause for concern" and "worth watching," as being consistent with "the (Commission's) understanding that price movements among species normally will track each other."[258]

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[256] 73(2) Brief of ITC at 63.
[257] *Id.* at 63-64, note 243.
[258] Propr. Remand Det. at 37, note 126.

In attempting to disconnect the prices of Canadian imports from U.S. lumber species, the Canadian Parties have again referred to construction materials generally and the influence of broader economic forces to suggest that it is general demand trends which have influenced prices of both imported and domestic species. The Panel in its Interim Decision previously dealt with the Canadian Parties' argument regarding broader market forces and stated that: "The fact that other construction materials experienced similar movements in prices does not, in and of itself, mean that subject imports did not supress domestic prices."[259]

The Panel also finds that there was a rational basis for the Commission's conclusion that the prices of one species tended to affect the price of other species. In addition to referring to *Random Lengths* publications, the Commission referenced the purchaser questionnaire responses which demonstrated that price was an important purchasing factor, and was most frequently cited as the first-most important factor in purchasing decisions above all other factors, *including* species, with most large purchasers reporting that they usually or sometimes purchased the lowest-priced softwood lumber.[260]

In summary, it is the opinion of the Panel that the Commission's finding that the prices of different lumber species generally tracked each other during the POI and that the price difference in one species tended to have an impact on other species' prices is based on substantial evidence and in accordance with law.

iii. COGS and Pricing Trends

In coming to its price suppression conclusion in the Original Views, the Commission found that there was a cost-price squeeze as evidenced in part by the Cost of Goods Sold ("COGS") and the ratio of COGS to net sales. In this respect the Commission stated:

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[259] Panel Dec. at 97.
[260] Propr. Remand Det. at 16; Propr. 73(c)(2) Brief of ITC at 64-65.

> [F]rom 2014 to 2015 the domestic industry faced rising costs as prices declined. As a result, the industry experienced a cost-price squeeze. The domestic industry's ratio of costs of goods sold ("COGS") to net sales increased from [ ] in 2014 to [ ] in 2015, and then declined to [ ] in 2016. Because demand was increasing during this period, we find that the substantially increasing volumes of subject imports at declining prices placed pressure on the domestic like product from 2014 to 2015.
> …
> While the domestic industry's ratio of COGS to net sales improved in 2016, it did not recover to 2014 levels due to increasing volumes of subject imports, which prevented sufficient price increases relative to cost increases over the full POI. [261]

In its Interim Decision the Panel issued the following remand:

> As to the Cost of Goods Sold ("COGS") and Pricing Trends aspect of the price suppression issue in paragraph (4)(f), the Panel remands this determination to the Commission and directs the Commission to reconsider its COGS and price trends analysis to take into account the Commission's finding that subject imports and domestic products are at least moderately substitutable, and determine what effect such reconsideration has on its finding that subject imports prevented price increases(,) which otherwise would have occurred(,) to a significant degree. [262]

a. ITC Remand Determination

In dealing with this Remand, the Commission reiterated its finding in the Remand Determination that "competition between the domestic like product and subject imports was meaningful in virtually all end-use applications."[263] Based on this "overlap in competition", the Commission found that the impact of the significant and increasing volume of subject imports would have been felt throughout the market. [264]

In this regard, the Commission noted that the increase in the industry's COGS to net sales ratio from 2014 through 2016 occurred at the same time subject imports substantially increased in volume. [265]

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[261] *Lumber V ITC Final Det.* at 55-56.
[262] Panel Dec. at 9.
[263] Propr. Remand Det. at 32.
[264] *Id.* at 33.
[265] *Id.* at 34.

Given the foregoing, the Commission stated that it "does not alter the conclusion in the Original Views that prices of subject imports prevented price increases, which otherwise would have occurred, to a significant degree."[266]

b. Arguments of the Parties

A. Canadian Parties

The Canadian Parties state that the Commission is required to give particular weight to the more recent part of the POI and that the data at the end of the POI did not show any adverse price effects.[267]

The Canadian Parties assert that the Commission's discussion of the ratio of COGS to net sales as an indication of price suppression does not address the issue of limited substitutability as instructed by the Panel and "requires an assumption of competition without any attenuation."[268]

The Canadian Parties further state that "an improving COGS to net sales ratio that was 'only slightly higher' in 2016 than in 2014…does not constitute substantial evidence of any, much less *significant*, price suppression." [269]

c. Opinion of the Panel

As an initial point, the Panel in its Interim Decision previously dealt with the Canadian Parties' argument that the Commission is required to focus on the more recent part of the POI. The Panel found that the Commission based its price suppression analysis on a consideration of the entire POI and, in doing so, acted on the basis of substantial evidence and in accordance with law.[270]

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[266] *Id.* at 32.
[267] 73(2)(b) Brief of Can. Parties at 83.
[268] *Id.* at 86.
[269] *Id.*
[270] Panel Dec. at 92.

The Canadian Parties' challenge to the Commission's COGS and price trends analysis is largely based on their view that there is attenuated competition between the imported and domestic products. However, as explained in Section C, the Panel has found that the Commission's conclusion that there is meaningful competition at virtually all end-use applications is based on substantial evidence and in accordance with law.

The Panel notes that there is no factual dispute as to the actual COGS or COGS to net sales ratio information and the weighing of this evidence is a matter within the Commission's jurisdiction. The Panel questions the Canadian Parties' position that the COGS to net sales ratio in 2016 [ ] was "only slightly higher" than it was in 2014 [ ] but, more importantly, notes that to accept the position that this did not constitute significant price suppression would require an impermissible reweighing of the evidence by the Panel.

In summary, it is the Opinion of the Panel that the Commission's finding with respect to COGS and price trends is supported by substantial evidence and in accordance with law.

iv. Purchaser Questionnaire Responses

In coming to its price suppression conclusion in the Original Views, the Commission indicated that purchasers had confirmed purchasing subject goods rather than domestic goods "due to" their lower prices.[271]

In its Interim Decision the Panel issued the following remand:

> With respect to the Questionnaire Responses aspect of the price suppression analysis in paragraph (4)(g), the Panel remands this determination to the Commission and directs the Commission to reconsider the record evidence, its conclusion that purchasers confirmed purchasing subject imports rather than

[271] *Lumber V ITC Final Det.* at 52.

domestic product solely due to their lower prices, and to determine what effect such reconsideration has on its price suppression analysis.[272]

a. ITC Remand Determination

In its remand determination, the Commission stated by way of clarification that it does not find that the relevant purchasers' questionnaire responses showed that all of their purchases of subject imports were *solely* driven by price. Rather, the Commission stated that it finds that the questionnaire responses indicate that price was an important reason cited by some purchasers for purchasing subject imports.[273]

In reaching this finding, the Commission stated that it was not required to find that unfairly traded subject imports are the sole or primary cause of injury, but rather that they are more than a tangential or inconsequential cause of injury.[274]

The Commission also stated that the fact that certain purchasers indicated other factors were important in their purchasing decisions "does not detract from the responses that price was a primary reason for purchasing subject imports rather than domestic like product".[275]

This reconsideration of the purchaser questionnaire responses did not lead the Commission to any change in its overall price suppression analysis.

b. Arguments of the Parties

A. Canadian Parties

It is the Canadian Parties' position that the Commission's conclusion that price was an important factor in the purchase of subject imports was not supported by substantial

[272] Panel Dec. at 9.
[273] Propr. Remand Det. at 37-38.
[274] *Id.* at 38, note 127.
[275] *Id.* at 39.

evidence.

First, the Canadian Parties state that the modified finding represents a significant dilution from the Original Views and that the Commission has not explained how it accounted for this new finding.[276]

Second, the Canadian Parties state that the Commission's finding was based on the evidence of a minority of purchasers, which represented only about [ ] of total purchases of Canadian lumber during the period of investigation who responded that they purchased subject imports "due to" price.[277]

Third, the Canadian Parties refer to specific questionnaire responses which they say refute the conclusion that the Purchasers switched "due to" price[278] and, in this regard, state that "the Commission's conclusion does not comply with the Panel's remand instructions to incorporate substitutability into its analysis."[279]

Fourth, the Canadian Parties argue that the Commission's conclusion that 5.6 billion board feet of purchases from Canada were the result of "switching" should be significantly reduced in volume because of alleged errors in the questionnaire responses of two purchasers [ ].[280]

B. ITC Rebuttal

In its Rule 73(2)(c) Brief, the Commission states that the Canadian Parties are attempting to "cherry-pick" statements from certain purchaser questionnaire responses to refute the Commission's conclusion that price was an important factor in the decision to purchase subject imports. The Commission also states that the information relied on

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[276] 73(2)(b) Brief of Can. Parties at 96.
[277] *Id.* at 97.
[278] *Id.*
[279] *Id.* at 99.
[280] *Id.* at 100-101.

by the Canadian Parties "merely demonstrated the unremarkable fact that these purchasers considered other factors in their purchasing decisions."[281]

In terms of the Canadian Parties' argument that the Commission relied on a minority of purchaser responses, the Commission notes in its Response that it did not rely primarily on the questionnaire responses for its price suppression determination. The Response states:

> In arriving at this conclusion, the Commission not only considered corroborating purchasers' narrative responses, but importantly also relied on COGS data in combination with demand and price trends.[282]

The Commission also takes issue with the Canadian Parties' claim that there are calculation errors with its conclusion that purchases of 5.6 billion board from Canada were the result of "switching" and further states that, even if the Canadian Parties' recalculated totals were correct, the Commission's price effects analysis would still be supported by substantial evidence.[283]

C. COALITION

In its Rule 73(2)(c) Brief, the Petitioner takes the position that the Commission's conclusion that price was an important reason for purchases of subject imports was supported by substantial evidence, and that the fact that other factors were considered in purchasing subject goods does not detract from the Commission's price suppression finding.[284] In this regard, the Petitioner has cited several cases indicating that price considerations need not be the sole or principal cause of injury.[285]

In terms of the Canadian Parties' taking issue with the Commission's use of the [ ] category in the purchaser questionnaire responses to support its finding

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[281] 73(2) Brief of ITC at 66.
[282] *Id*. at 68.
[283] *Id*. at 67, note 257.
[284] 73(2)(c) Brief of COALITION at 116-117.
[285] *Id*.

that price was an important factor, the Petitioners refer to caselaw which has found the Commission's treatment of the [ ] categories in the questionnaire responses as a single group is sufficient for determining the importance of price in purchasing decisions.[286]

The Petitioners also take issue with the Canadian Parties' calculations of the quantity of Canadian imports which were purchased due to "switching." With respect to the two purchasers specifically focussed on by the Canadian Parties, [ ] the Petitioners have set out their questionnaire responses.

These responses indicated that price was noted as a primary reason for purchasing imports instead of domestic products and their responses set out the purchase history of imported and domestic products. In terms of purchases, these responses indicated:

[ ]

[287]

c. Opinion of the Panel

In terms of the Canadian Parties' argument that the Commission has failed to incorporate substitutability into its analysis, the Panel in Section C has set out its opinion that the Commission's finding with respect to substitutability was supported by substantial evidence and in accordance with law.

The Panel acknowledges the Canadian Parties' position that the modified finding of price being a "primary reason" for purchasing subject goods may represent a significant dilution from the original finding that such purchases were "due to" price.

The Panel notes, however, that the jurisprudence makes clear that

[286] *Id*. at 118.
[287] *Id*. at 119-121.

> an affirmative material-injury determination under the statute requires no more than a substantial-factor showing. That is, the "dumping" need not be the sole or principal cause of injury. As long as its effects are not merely incidental, tangential or trivial, the foreign product sold at less than fair value meets the causation requirement. See *Gerald Metals, Inc. v. United States*,132 F.3d 716, 721-22 (Fed. Cir. 1997) (setting out standards for material-injury causation).[288]

As indicated above, the Commission found the fact that purchasers indicated factors other than price were important in their purchasing decisions “does not detract” from their responses that price was a primary reason for purchasing subject goods. It is a matter within the Commission’s discretion as to the appropriate weight to be placed upon these other factors.[289]

In this context, the Panel notes with approval the comments by the Petitioner that it was within the Commission’s prerogative to group the response categories in the questionnaires in a manner it considers appropriate.[290]

In light of the evidence on the record, the Panel views the Canadian Parties’ focus on selected questionnaire responses, in order to advance its position that price was not an important factor in decisions to purchase subject imports, as an impermissible attempt to reweigh the evidence. On this point, the Panel also notes that, contrary to the Canadian Parties’ submissions, the Commission in its remand determination no longer states that purchasers switched “due to” price. Rather, as noted above, the Commission’s modified finding is that price was an “important reason” in decisions to purchase subject imports.

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[288] Propr. Remand Det. at 38, note 127 (citing *Changzhou Trina Solar Energy Co. v. United States,* 879 F.3d 1377 (Fed. Cir. 2018)), and at 39, note 133 (citing *Nippon Steel v. United States Int’l Trade Comm’n,* 345 F.3d 1379, 1381 (Fed. Cir. 2003)); *See also* Propr. 73(2)(c) Brief of COALITION at 116, note 416.

[289] The Panel notes the following statement from Goss Graphics Sys: “the ITC has the discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis.” 73(2)(c) Brief of COALITION at 117, note 421.

[290] *Id*. at 118, note 426.

Finally, the Panel finds that, whether the lost sales amounted to 5.6 billion board feet, or a lesser amount as argued by the Canadian Parties, does not render the Commission's finding that price was an important consideration unsupported by substantial evidence. First, the Panel notes that whether there were in fact calculation errors is not a matter free from doubt.[291] Second, as set out in the Petitioner's Brief, the two particular purchasers referred to by the Canadian Parties both expressly stated in their questionnaire responses that price was a primary reason for purchasing imports instead of domestic products.

In summary, it is the opinion of the Panel that the Commission's finding that price was an important reason for purchasing subject imports is based on substantial evidence and in accordance with law.

F. Whether the Commission's Impact Analysis Remand Determination Was Supported by Substantial Record Evidence and in Accordance with Law

1. *Background*

i. Panel Remand

The Commission concluded in its Final Determination that "subject imports have had a significant impact on the domestic industry."[292] The Canadian Parties advanced several arguments that the Commission's impact analysis was unlawful and unsupported by substantial evidence, including arguments based on the Commission's determinations regarding post-petition data, substitutability, volume, price effects, and the business cycle.[293] The Panel upheld the Commission's determination of adverse impact as lawful and supported by substantial evidence, but held that this finding is limited to the Commission's analysis in light of its determinations regarding post-petition data,

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[291] 73(2) Brief of ITC at 67, note 257.
[292] *Lumber V ITC Final Det.* at 61.
[293] 57(1) Brief of Can. Parties at 171-183.

substitutability, volume, price effects, and the business cycle, which had been remanded elsewhere in the Panel's decision.[294] As a result, the Panel ordered that if in any of these remands the Commission reaches a different finding or conclusion on the particular issue, the Commission is to determine and explain what effect such reconsideration has on its impact analysis.[295]

ii. ITC Remand Determination

The Commission adopted and incorporated in full from its Original Views its findings, analysis, and conclusions on impact, having again found on remand that the increasing and significant volume of subject imports gained market share at the expense of the domestic industry during a time of increasing demand and prevented price increases, which otherwise would have occurred, to a significant degree.[296] It further found that the Commission's reconsideration and clarification of the remanded issues do not require the Commission to provide additional explanation regarding any aspect of the Commission's findings on impact.[297]

2. Arguments of the Parties

The Canadian Parties argue that because the Panel directed the Commission to reconsider its determinations regarding post-petition data, substitutability, volume, price effects, and the business cycle, the Commission's remand redetermination should have included a discussion of how the reconsidered findings affect its impact analysis.[298] They assert that it is unreasonable for the Commission to reaffirm a finding of impact without discussing the domestic industry's performance and its relationship with subject imports.[299]

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[294] Panel Dec. at 112.
[295] *Id.*
[296] Propr. Remand Det. at 40.
[297] *Id.*
[298] 73(2)(b) Brief of Can. Parties at 105-107.
[299] *Id.* at 108-114.

The Commission responds that because on remand it has not changed its findings regarding post-petition data, substitutability, volume, price effects, and the business cycle, the Commission is not required to provide additional explanation regarding its impact analysis.[300] The Commission asserts that the Canadian Parties merely are relitigating the Panel's affirmation of the Commission's impact determination.[301]

3. Opinion of the Panel

The Commission's remand determination complies with the Panel's decision regarding impact. The Panel ordered the Commission to determine and explain what effect reconsideration of post-petition data, substitutability, volume, price effects, and the business cycle has on its impact analysis only if the Commission reaches a different finding or conclusion on the particular issue. The Commission on remand did not reach any different findings or conclusions on any of these issues. As a result, the Commission was correct in not providing additional explanation of its finding on impact of subject imports on the domestic industry. Indeed, doing so would have directly contradicted the Panel's instructions. As a result, the Canadian Parties' arguments fail, and the Panel reaffirms the Commission's determination of adverse impact as lawful and supported by substantial evidence.

G. WHETHER THE COMMISSION IDENTIFIED A CAUSAL RELATIONSHIP BETWEEN SUBJECT IMPORTS AND THE PERFORMANCE OF THE U.S. INDUSTRY

1. Background

i. Panel Remand

The Panel found that the Commission's finding of causation was lawful and supported by substantial evidence in light of its determinations regarding volume, price effects, and

[300] 73(2) Brief of ITC at 70-71.
[301] *Id.* at 71-72.

impact. However, the Panel stated that if the Commission were to reach a different finding or conclusion on any of these issues after reconsideration of the remands in the Panel's Interim Decision, then the Commission was to determine and explain what impact such reconsideration had on its causation analysis.[302]

ii. ITC Remand Determination

The Commission found again that the increasing and significant volume of subject imports gained market share at the expense of the domestic industry during a time of increasing demand and prevented prices increases, which otherwise would have occurred, to a significant degree. The Commission adopted and incorporated in full from its Original Views its findings, analysis, and conclusions on impact. The Commission confirmed that its reconsideration and clarification of the remanded issues do not require it to provide additional explanation regarding any aspect of its findings on the impact of subject imports on the domestic industry. The Commission concluded that, for the reasons in its original determination that were undisturbed by the Panel, and for the reasons in the Remand Determination, the subject imports caused material injury to the domestic industry.[303]

2. Arguments of the Parties

i. Canadian Parties

The Canadian Parties argue that given that the Panel directed the Commission to reconsider fundamental issues of context, evidence, and statutory analysis, the Commission's redetermination should have discussed how the reconsidered findings bear on the causation analysis.[304] The Canadian Parties argue that it is not reasonable

[302] Panel Dec. at 113.
[303] Remand Det. at 40.
[304] 73(2)(b) Brief of Can. Parties at 105-106.

for the Commission to reaffirm a finding of current material injury without any discussion of the domestic industry's performance and its relationship with subject imports.[305]

ii. ITC Rebuttal

The Commission argues that the Joint Respondents merely seek to relitigate the Panel's prior affirmances of the Commission's impact and causation findings, particularly with respect to the domestic industry's financial condition and causation. The Panel has already considered and rejected these arguments, and it should decline to reopen these settled issues.[306]

3. Opinion of the Panel

The Panel was clear in its Interim Decision that the Commission was only required to revisit its causation analysis if "the Commission reaches a different finding or conclusion" on any of the remanded issues. The Commission did not reach different conclusions in its remand determination and was not required to revisit its causation analysis, which the Panel found in its Interim Decision was lawful and supported by substantial evidence in light of the Commission's determinations regarding volume, price effects, and impact. The Canadian Parties' submissions are an attempt to relitigate the issue of causation. This is outside the scope of the Panel's review and the Panel rejects the request to remand.

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[305] *Id.* at 108-114.
[306] 73(2) Brief of ITC at 71-71.

IV. Order of the Panel

THEREFORE, on the basis of the evidence in the record, the applicable law, and the written submissions of the Parties,

the Commission's Remand Determination is, HEREBY,

AFFIRMED in its entirety.

SO ORDERED.

Issue Date: May 22, 2020

Signed in the original by:

/s/ Stephan Joseph Powell
Stephen Joseph Powell, Panel Chair

/s/ Stephen J. Claeys
Stephen J. Claeys, Panelist

/s/ W. Jack Millar
W. Jack Millar, Panelist

/s/ Andrew Newcombe
Andrew Newcombe, Panelist

/s/ James Ogilvy
James Ogilvy, Panelist