UNITED STATES INTERNATIONAL TRADE COMMISSION

SOFTWOOD LUMBER FROM CANADA
Investigations Nos. 701-TA-414 and 731-TA-928 (Preliminary)

DETERMINATIONS AND VIEWS OF THE COMMISSION
(USITC Publication No. 3426, MAY 2001)

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DETERMINATIONS

On the basis of the record[1] developed in the subject investigations, the United States International Trade Commission determines,[2] pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1671b(a) and 1673b(a)) (the Act), that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports from Canada of softwood lumber, provided for in subheadings 4407.10.00, 4409.10.10, 4409.10.20, and 4409.10.90 of the Harmonized Tariff Schedule of the United States, that are alleged to be subsidized by the Government of Canada and sold in the United States at less than fair value (LTFV).

COMMENCEMENT OF FINAL PHASE INVESTIGATIONS

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigations. The Commission will issue a final phase notice of scheduling, which will be published in the *Federal Register* as provided in section 207.21 of the Commission's rules, upon notice from the Department of Commerce of affirmative preliminary determinations in the investigations under sections 703(b) and 733(b) of the Act, or, if the preliminary determinations are negative, upon notice of affirmative final determinations in those investigations under sections 705(a) and 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase of the investigations. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

BACKGROUND

On April 2, 2001, a petition was filed with the Commission and Commerce by the Coalition for Fair Lumber Imports Executive Committee,[3] Washington, DC; the United Brotherhood of Carpenters and Joiners, Portland, OR; and the Paper, Allied-Industrial, Chemical and Energy Workers International Union, Nashville, TN, alleging that an industry in the United States is materially injured and threatened with material injury by reason of imports of subsidized and LTFV imports of softwood lumber from Canada. Accordingly, effective April 2, 2001, the Commission instituted countervailing and antidumping duty

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[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

[2] Commissioner Bragg not participating.

[3] The Coalition for Fair Lumber Imports Executive Committee is comprised of Hood Industries, International Paper Co., Moose River Lumber Co., New South, Inc., Plum Creek Timber Co., Potlatch Corp., Seneca Sawmill Co., Shearer Lumber Products, Shuqualak Lumber Co., Sierra Pacific Industries, Swift Lumber, Inc., Temple-Inland Forest Products, and Tolleson Lumber Co., Inc.

investigations Nos. 701-TA-414 and 731-TA-928 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of April 9, 2001 (66 FR 18508). The conference was held in Washington, DC, on April 23, 2001, and all persons who requested the opportunity were permitted to appear in person or by counsel.

VIEWS OF THE COMMISSION

Based on the record in these investigations, we find that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada that are alleged to be subsidized by the Government of Canada and sold in the United States at less than fair value.[1]

I. THE LEGAL STANDARD FOR PRELIMINARY DETERMINATIONS

The legal standard in preliminary antidumping and countervailing duty investigations requires the Commission to find, based upon the information available at the time of the preliminary determination, whether there is a reasonable indication that a domestic industry is materially injured, threatened with material injury, or that the establishment of an industry is materially retarded, by reason of the allegedly unfairly traded imports.[2] In applying this standard, the Commission weighs the evidence before it and determines whether "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation."[3]

II. DOMESTIC LIKE PRODUCT AND INDUSTRY

A. In General

In determining whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of the subject merchandise, the Commission first defines the "domestic like product" and the "industry."[4] Section 771(4)(A) of the Tariff Act of 1930, as amended ("the Act"), defines the relevant domestic industry as the "producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product."[5] In turn, the Act defines "domestic like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation … ."[6]

The decision regarding the appropriate domestic like product(s) in an investigation is a factual determination, and the Commission has applied the statutory standard of "like" or "most similar in

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[1] Commissioner Bragg did not participate in these investigations.

[2] 19 U.S.C. § 1671b(a), 1673b(a); see also American Lamb Co. v. United States, 785 F.2d 994, 1001-04 (Fed. Cir. 1986); Aristech Chemical Corp. v. United States, 20 CIT 353, 354 (1996).

[3] American Lamb, 785 F.2d at 1001 (Fed. Cir. 1986); see also Texas Crushed Stone Co. v. United States, 35 F.3d 1535, 1543 (Fed. Cir. 1994).

[4] 19 U.S.C. § 1677(4)(A).

[5] Id.

[6] 19 U.S.C. § 1677(10).

characteristics and uses" on a case-by-case basis.[7] No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a particular investigation.[8] The Commission looks for clear dividing lines among possible like products and disregards minor variations.[9] Although the Commission must accept the determination of the Department of Commerce ("Commerce") as to the scope of the imported merchandise allegedly subsidized or sold at less than fair value, the Commission determines what domestic product is like the imported articles Commerce has identified.[10]

B. Product Description

Commerce's notice of initiation defined the imported merchandise within the scope of these investigations as:

> softwood lumber, flooring and siding ("softwood lumber products"). Softwood lumber products include all products classified under headings 4407.1000, 4409.1010, 4409.1090, and 4409.1020, respectively, of the HTSUS, and any softwood lumber, flooring and siding described below. These softwood lumber products include:
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> > (1) coniferous wood, sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding six millimeters;
> > (2) coniferous wood siding (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed;
> > (3) other coniferous wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces (other than wood mouldings and wood dowel rods) whether or not planed, sanded or finger-jointed; and

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[7] See, e.g., NEC Corp. v. Department of Commerce, 36 F. Supp.2d 380, 383 (Ct. Int'l Trade 1998); Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995); Torrington Co. v. United States, 747 F. Supp. 744, 749 n.3 (Ct. Int'l Trade 1990), aff'd, 938 F.2d 1278 (Fed. Cir. 1991) ("every like product determination 'must be made on the particular record at issue' and the 'unique facts of each case'"). The Commission generally considers a number of factors including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) common manufacturing facilities, production processes and production employees; and, where appropriate, (6) price. See Nippon, 19 CIT at 455 n.4; Timken Co. v. United States, 913 F. Supp. 580, 584 (Ct. Int'l Trade 1996).

[8] See, e.g., S. Rep. No. 96-249 at 90-91 (1979).

[9] Nippon, 19 CIT at 455; Torrington, 747 F. Supp. at 748-49; see also S. Rep. No. 96-249 at 90-91 (1979) (Congress has indicated that the like product standard should not be interpreted in "such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not 'like' each other, nor should the definition of 'like product' be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under consideration.")

[10] Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1568 (Fed. Cir. 1996) (Commission may find single like product corresponding to several different classes or kinds defined by Commerce); Torrington, 747 F. Supp. at 748-52 (affirming Commission determination of six like products in investigations where Commerce found five classes or kinds).

(4) coniferous wood flooring (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed.

Although the HTSUS subheadings are provided for convenience and U.S. Customs purposes, the written description of the merchandise under investigation is dispositive.[11]

C. Domestic Like Product

The Commission must base its domestic like product determination on the record in these investigations, and it is not bound by prior determinations pertaining even as to the same imported products.[12] In each of the three prior countervailing duty investigations of softwood lumber from Canada, the Commission found one domestic like product consisting of softwood lumber.[13] In the most recent investigation, the Commission considered and rejected arguments raised by certain parties that remanufactured products (and in particular wooden bed-frame components) were a separate domestic like product.[14]

In the preliminary phase of the instant investigations, petitioners argued that the domestic like product should be defined coextensively with the scope as softwood lumber.[15] The Canadian Lumber Trade Alliance ("CLTA") did not take issue with petitioners' proposed definition of the domestic like product for purposes of the preliminary phase of these investigations.[16] The National Lumber and Building Material Dealers Association and the National Association of Home Builders ("Dealers/Builders") argued that this case involves a myriad of products within a single domestic like product.[17] Several respondents argued that the Commission should treat two particular species of softwood lumber – Thuja Plicata, also known as western red cedar ("WRC"), and Pinus Strobus ("white pine") – each as a separate domestic like product.[18] The Canadian Lumber Remanufacturers Alliance ("CLRA") argued that remanufactured products are a separate domestic like product, and the International Sleep Products Association ("ISPA") argued that wooden bed-frame components are a separate domestic like product.[19] Fred Tebb & Sons, a

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[11] Certain Softwood Lumber Products from Canada, 66 Fed. Reg. 21328 (Apr. 30, 2001); Certain Softwood Lumber Products from Canada, 66 Fed. Reg. 21332 (Apr. 30, 2001).

[12] Nippon, 19 CIT at 455; Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. 1165, 1169 n.5 (Ct. Int'l Trade 1988) (particularly addressing like product determination); Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1087-88 (Ct. Int'l Trade 1988).

[13] Softwood Lumber from Canada, Inv. No. 701-TA-197 (Prelim.), USITC Pub. 1320 (Nov. 1982) at 4-5; Softwood Lumber from Canada, Inv. No. 701-TA-274 (Prelim.), USITC Pub. 1874 (July 1986) at 5-7; Softwood Lumber from Canada, Inv. No. 701-TA-312 (Final), USITC Pub. 2530 (July 1992) at 5-11.

[14] Softwood Lumber from Canada, Inv. No. 701-TA-312 (Final), USITC Pub. 2530 (July 1992) at 5-11. The Commission's domestic like product determination was not contested during the binational panel appeal.

[15] See, e.g., Petition at I-13 to I-15; Petitioners' Postconference Brief at 5-7, Exhibits 6-7.

[16] See, e.g., CLTA's Postconference Brief at 4 n.6; Conference Tr. at 91.

[17] See, e.g., Dealers/Builders' Postconference Brief at 5; Conference Tr. at 130-31.

[18] See, e.g., Weyerhaeuser's Postconference Brief at 1; U.S. Red Cedar Manufacturers' Association's ("USRCMA") Postconference Brief at 3; White Pine Respondents' Postconference Brief at 6; Conference Tr. at 146-53.

[19] See, e.g., CLRA's Postconference Brief at 1-2; ISPA's Postconference Brief at 1-7; Conference Tr. at 123-24, (continued...)

domestic remanufacturer of high-grade hemlock, fir, and spruce, argued that the Commission properly found that remanufactured lumber was not a separate domestic like product in previous investigations and it should do so again here.[20]

Based on the current record, for purposes of the preliminary phase of these investigations, we determine that there is a single domestic like product that is coextensive with the scope of these investigations.

1. Whether WRC Is a Separate Domestic Like Product

WRC grows in the United States in the coastal and interior forests of Washington, Idaho, and Montana, as well as in parts of Alaska, Oregon, and California. WRC accounts for less than one percent of total domestic softwood lumber production.[21] Weyerhaeuser Company, a domestic producer, foreign producer, and importer of subject softwood lumber, and the U.S. Red Cedar Manufacturers Association ("USRCMA"), a U.S.-based trade association consisting of manufacturers, wholesalers, distributors, retailers and others in over twenty-seven states (together "the WRC respondents"), argued that WRC is a separate domestic like product from other softwood lumber.[22] Petitioners argued that the Commission has always considered WRC and other softwood lumber products to be part of the same domestic like product, and that there is no reason to deviate from that finding now.[23]

Physical characteristics and uses: The record in the preliminary phase of these investigations indicates that WRC has several physical characteristics that may distinguish it from other softwood lumber products, such as its coloring; fragrance; high heartwood to sapwood ratio (which enables it to withstand harsh weather conditions and insulate well); natural toxicity to decay-causing fungi; natural resistence to insect attack; hygroscopic nature (which gives it a low shrinkage factor, more dimensional stability, and lower likelihood of warping, twisting, checking, swelling, or cracking); and light weight. Because WRC is not generally used in applications requiring strength, the grading process for WRC is different than for other softwood lumber products, which are generally graded on characteristics such as strength, durability, utility, and/or appearance.[24]

The WRC respondents argued that WRC is not a framing or structural lumber like other softwood lumber products, and that it is superior for a variety of non-structural uses.[25] Sixty-eight percent of apparent domestic consumption of softwood lumber in 2000 was used in new residential construction (new housing) and repair and remodeling, and the largest categories of domestically-produced softwood lumber

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[19] (...continued)
140-44.

[20] See, e.g., FT&S Postconference Brief at 4.

[21] See, e.g., U.S. Census Bureau, Current Industry Report, Lumber and Mill Stocks (July 2000); Weyerhaeuser's Postconference Brief at 2.

[22] They defined WRC as "Softwood lumber products manufactured from Western Red Cedar (Thuja Plicata), including timbers, decking, fencing, siding, facia and trim. Such products fall within HTS numbers 4407.10.00, 4409.10.10 and 4409.10.90."

[23] See, e.g., Petitioners' Postconference Brief at 5, 7, Appendix F, Exhibits 8, 9, 10.

[24] See, e.g., Weyerhaeuser's Postconference Brief at 2-4, Exhibits 1-3; USRCMA's Postconference Brief at 3-6, Exhibits 1-9; CR at I-15 and I-16; PR at I-11 to I-12; CR/PR at Table I-1.

[25] These include shakes, shingles, siding, clapboards, paneling, shutters, fencing components, arbors, trellises, benches, planter boxes, bird houses, hot tub skirts, playground equipment, agricultural stakes, lawn furniture, gazebos, exterior trim, indoor paneling, specialty window treatments, and particularly applications where appearance is emphasized.

are studs and dimension lumber. Petitioners argued, and the record indicates, that WRC is used in some applications (including structural applications) such as decks and siding where other softwood lumber products (such as southern yellow pine, Port Orford cedar, yellow cedar, and redwood) also may be used, although some (e.g., southern yellow pine) require chemical treatment for such uses. The record also indicates that, due to its higher price and specialized characteristics, WRC is used primarily in non-structural applications in place of non-wood products.[26]

Interchangeability: While most softwood lumber is used in structural applications, WRC is used primarily in non-structural applications because of its higher price and its specialized characteristics. For those applications, WRC may be more interchangeable with non-wood substitutes, such as high-end premium composite products, plastics, cement and brick. The record indicates that some purchasers, such as Rainbow Play Systems, will not substitute softwood lumber treated with chemicals such as arsenic for WRC at any price, due to safety concerns. Others purchase WRC to reproduce the appearance of historical features or to comply with building codes or covenants. Petitioners argued, and the record indicates, that WRC may be interchangeable in some applications (such as decks and siding) with other softwood lumber products (such as southern yellow pine, Port Orford cedar, yellow cedar, and redwood), although some (e.g., southern yellow pine) require chemical treatment for such applications.[27]

Channels of distribution: The WRC respondents contended that WRC is sold through predominantly different channels of distribution than most other softwood lumber: under brand names or via special marketing, by specially trained sales personnel, in stores for which WRC is an anchor or exclusive product, or in stores with exclusive dealerships or that are specially certified as WRC dealers. Contrary information is also on the record, however, indicating that WRC is distributed through the same channels of distribution (wholesale distributors) as other softwood lumber products (including douglas fir, white fir, and ponderosa pine).[28]

Customer and producer perceptions: There is some evidence to suggest that customers and producers distinguish WRC from other softwood lumber products due to its appearance, physical characteristics, and higher price, and that WRC is graded differently than other softwood lumber.[29]

Manufacturing facilities, production processes, and employees: The WRC respondents argued that, compared to production of other softwood lumber products, WRC production involves different manufacturing facilities that can accommodate large-diameter WRC trees, and requires different production processes and equipment, special maintenance procedures, and employees with expertise in handling WRC. On the record in the preliminary phase of these investigations, however, the extent and significance of these differences are unclear.[30]

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[26] See, e.g., CR at I-14 to I-16, I-18, II-1 to II-2, II-10 to I-16; PR at I-10 to I-12, I-14, II-1, II-7 to II-12; CR/PR at Table I-1; Conference Tr. at 110-31; Weyerhaeuser's Postconference Brief at 4-6, Exhibits 1, 4, 6; USRMCA's Postconference Brief at 7-11, Exhibits 1, 10-20; Petitioners' Postconference Brief at Appendix F, Exhibits 8, 9, 10.

[27] See, e.g., Weyerhaeuser's Postconference Brief at 5-6, Exhibit 6; USRMCA's Postconference Brief at 7-11, Exhibits 10-20; CR at I-18, II-1 to II-2, II-10 to II-16; PR at I-14, II-1, II-7 to II-12; Conference Tr. at 110-31; Petitioners' Postconference Brief at Appendix F, Exhibits 8, 9, 10 (citing questionnaire responses of an importer and a domestic producer).

[28] See, e.g., Weyerhaeuser's Postconference Brief at 6-7, Exhibit 7; USRMCA's Postconference Brief at 11-14, Exhibits 21-22; Petitioners' Postconference Brief at Appendix F, Exhibits 8, 9; CR at I-19, II-2 to II-4; PR at I-14, II-1, II-7 to II-12; CR/PR at Table I-2.

[29] See, e.g., Weyerhaeuser's Postconference Brief at 9, Exhibit 5; USRCMA's Postconference Brief at 15-17, Exhibits 13, 24.

[30] See, e.g., CR at I-18; PR at I-14; Weyerhaeuser's Postconference Brief at 7-9, Exhibit 8; USRMCA's

(continued...)

Price: Although some information on the record suggests that WRC is sold at a premium and that price trends for WRC differ from those of other softwood lumber products, the record also indicates that there may be other softwood lumber products (such as redwood, Eastern red cedar, yellow cedar, port orford cedar, bald cyprus, Atlantic white cedar, and white pine) that also sell at the higher end of the price spectrum.[31]

The record in the preliminary phase of these investigations indicates some differences between WRC and other softwood lumber products in terms of physical characteristics and uses, interchangeability, channels of distribution, customer and producer perceptions, and price, but also indicates some similarities with respect to those factors. The record is inconclusive with respect to differences in manufacturing facilities, production processes, and employees. Based on the current record, we do not find that WRC is a separate domestic like product for purposes of the preliminary phase of these investigations. In any final phase investigations, we intend to collect additional information, particularly separate financial data for domestic producers, and to revisit this issue. We will also consider in more detail whether there are clear dividing lines between WRC and other species of softwood lumber, or if softwood lumber is more accurately characterized as a continuum of products without clear dividing lines.

2. Whether White Pine is a Separate Domestic Like Product

White pine production is primarily located in the northeastern United States and it accounts for less than one percent of total domestic softwood lumber production.[32] The Ontario Forest Industries Association, the Ontario Lumber Manufacturers Association, and Tembec, Inc. (collectively "the white pine respondents") argued that white pine is a separate domestic like product from other softwood lumber products.[33] Petitioners argued that the Commission has always considered white pine to be part of the same domestic like product, and that there is no reason to deviate from that finding now.[34]

Physical characteristics and uses: White pine is a light-weight, straight-grained softwood lumber with relatively few knots that readily and uniformly seasons, and when air-dried, has low shrinkage. It is easy to work by hand and machine tools, easy to glue, and has good nailing and screw-holding properties. Due to its high quality, it is often used for its aesthetic and appearance purposes in the manufacture of furniture and other specialty products such as toys, carvings, and woodenware. Although the white pine respondents argued that white pine is too costly and physically unsuitable for the general construction uses (studs and dimension lumber) of other softwood lumber, petitioners contended that white pine has similar end uses as other softwood lumber, including sugar pine, ponderosa pine, and Idaho pine.[35]

Interchangeability: The heartwood of white pine is moderately durable but very permeable (i.e., it carries fluids easily through the wood); its permeability is nearly seven times higher than that of balsam fir and almost fourteen times higher than that of red spruce. White pine must be treated with preservatives

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[30] (...continued)
Postconference Brief at 14-15, Exhibit 23; Petitioners' Postconference Brief at Appendix F, Exhibits 6, 8, 9.

[31] See, e.g., Weyerhaeuser's Postconference Brief at 9-10, Exhibits 9-10; USRCMA's Postconference Brief at 17-19, Exhibits A to C; CR at V-1; PR at V-1.

[32] See, e.g., U.S. Census Bureau, Current Industry Report, Lumber and Mill Stocks (July 2000); CR at III-10; PR at III-8 to III-9.

[33] See, e.g., White Pine Respondents' Postconference Brief at 1-10; Conference Tr. at 149-51.

[34] See, e.g., Petitioners' Postconference Brief at 5, 7, Appendix F, Exhibits 6, 10, 56.

[35] See, e.g., White Pine Respondents' Postconference Brief at 6-8; Petitioners' Postconference Brief at Appendix F, Exhibits 6, 56; CR at I-14; PR at I-11; CR at I-15 to I-16; PR at I-11 to I-12; CR/PR at Table I-1.

where conditions are favorable to decay.[36] White pine's qualities (such as its weakness, softness, and fairly low resistance to impact) are not conducive for use in construction of studs, joists, and flooring, or more general construction uses, but it is used for window sashes and frames, molding and millwork, doors, shelving, cabinetwork, and other items that require dimensional stability, but do not bear substantial loads. Petitioners argued that other softwood lumber products such as sugar pine, ponderosa pine, Idaho pine, and spruce also may be used in the same non-load-bearing applications as white pine.[37]

Channels of distribution: The white pine respondents argued that white pine is advertised differently, is sold by only a few domestic producers (exclusively by many of these), is sold directly to furniture manufacturers through separate, specialized sales staff, and is displayed separately in stores. Petitioners argued that white pine is sold through the same channels of distribution (wholesalers) as other softwood lumber, including spruce and pine.[38]

Customer and Producer Perceptions: There is some evidence to suggest that customers and producers perceive white pine differently from other softwood lumber products. For example, Random Lengths quotes a price for a 2x4 of SPF and a 1x8 of white pine, but it does not quote a price for a 2x4 of white pine or a 1x8 of SPF. Because white pine is not generally used in strength applications, the grading process is different than for other softwood lumber products. Other evidence on the record, however, suggests that pine and spruce may both be cut into boards and priced accordingly.[39]

Manufacturing facilities, production process, and employees: The white pine respondents argued that white pine production involves different manufacturing facilities, production processes, and employees. On the record in the preliminary phase of these investigations, however, it is not clear that there are significant differences with other softwood lumber.[40]

Price: There is limited information regarding price differences between white pine and other softwood lumber on the record in the preliminary phase of these investigations. The white pine respondents argued that white pine is expensive for use in general construction, and cited an example where white pine was priced almost five times higher than a somewhat similar dimension of western spruce-pine-fir. The record also indicates that there may be other softwood lumber products (such as redwood, Eastern red cedar, yellow cedar, port orford cedar, bald cyprus, Atlantic white cedar, and WRC) that sell at the higher end of the pricing spectrum.[41]

The record in the preliminary phase of these investigations indicates some differences between white pine and other softwood lumber products in terms of physical characteristics and uses, interchangeability, channels of distribution, customer and producer perceptions, and price, but also indicates some similarities with respect to these factors. The record is inconclusive with respect to differences in manufacturing facilities, production processes, and employees. Based on the current record, we do not find that white pine is a separate domestic like product for purposes of the preliminary phase of

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[36] For example, the average service of an untreated white pine fence is six years compared to twenty-seven for eastern cedar. White Pine Respondents' Postconference Brief at 8.

[37] See, e.g., White Pine Respondents' Postconference Brief at 7-8; CR at I-18, II-1 to II-2, II-10 to I-16; PR at I-14, II-1 to II-2, II-7 to II-12; Conference Tr. at 110-31; Petitioners' Postconference Brief at Appendix F, Exhibits 6, 56.

[38] See, e.g., White Pine Respondents' Postconference Brief at 9; Petitioners' Postconference Brief at Appendix F, Exhibits 6, 10, 56; CR at I-19, II-2 to II-4; PR at I-14, II-1 to II-2; CR/PR at Table I-2.

[39] See, e.g., CR at I-13 and I-16; PR at I-10 to I-12; CR/PR at Table I-1; White Pine Respondents' Postconference Brief at 9; Petitioners' Postconference Brief at Appendix F, Exhibits 6, 10, 56.

[40] See, e.g., White Pine Respondents' Postconference Brief at 9; CR at I-18; PR at I-14; Petitioners' Postconference Brief at Appendix F, Exhibits 6, 10, 56.

[41] See, e.g., White Pine Respondents' Postconference Brief at 8-9; CR at V-1; PR at V-1.

these investigations. In any final phase investigations, we intend to collect additional information, particularly separate financial data for domestic producers, and to revisit this issue. We will also consider in more detail whether there are clear dividing lines between white pine and other species of softwood lumber, or if softwood lumber is more accurately characterized as a continuum of products without clear dividing lines.

3. Whether Remanufactured Products (and in particular Wooden Bed-Frame Components) are a Separate Domestic Like Product

Based on the Commission's semifinished products analysis,[42] the CLRA argued that remanufactured products are a separate domestic like product,[43] and ISPA argued that wooden bed-frame components (a type of remanufactured product) are a separate domestic like product.[44]

The CLRA argued that the upstream article, lumber, is not dedicated to the production of the downstream article, remanufactured lumber products, as lumber is a finished product of its own right with many independent uses. It argued that there are separate markets for lumber and remanufactured products, with remanufactured products sold to end-users and lumber sold to both end-users and remanufacturers. It argued that there are some clear differences in the physical characteristics and functions between lumber and many remanufactured products because many remanufactured products have features that specially adapt them to a particular use, whereas lumber can be dressed or worked, is not necessarily further manufactured, and has many uses.[45] It argued there are significant differences in cost and value between lumber and some remanufactured products, and that I-joist flanges, for example, cost significantly more in terms of labor and machinery to produce than equivalent dimension lumber and therefore have a higher value because they are not merely fingerjointed lumber. Finally, it argued that the processes used to transform lumber into remanufactured products can be significant and extensive and they are not traditional lumber mill processes.[46]

ISPA argued that under the Commission's semifinished products analysis, wooden bed-frame components are downstream products that are further processed from off-spec or byproduct softwood

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[42] In a semi-finished product analysis, the Commission examines: (1) whether the upstream article is dedicated to the production of the downstream article or has independent uses; (2) whether there are perceived to be separate markets for the upstream and downstream articles; (3) differences in the physical characteristics and functions of the upstream and downstream articles; (4) differences in the costs or value of the vertically differentiated articles; and (5) significance and extent of the processes used to transform the upstream into the downstream articles. See, e.g., Uranium from Kazakhstan, Inv. No. 731-TA-539-A (Final), USITC Pub. 3213 (July 1999) at 6, n.23.

[43] The CLRA defined remanufactured products as lumber that is manufactured beyond sanding, planing and fingerjointing, whether by drilling, notching, angle cutting, combing, resawing or otherwise in a way that adapts it to a particular use. Conference Tr. at 141.

[44] See, e.g., ISPA's Postconference Brief at 1-7; CLRA's Postconference Brief at 1-2; Conference Tr. at 123-24, 140-45.

[45] The CLRA contended that a recent World Customs Organization ruling on predrilled studs, and the SLA arbitral ruling on predrilled studs and notched lumber, confirm that there is a clear dividing line between lumber and remanufactured lumber. Conference Tr. at 143.

[46] See, e.g., CLRA's Postconference Brief at 1-2; Conference Tr. at 140-45. In response to a request at the conference to identify domestic remanufacturers, CLRA pointed to three companies that filed objections to the initiation of these investigations because the U.S. remanufacturing industry was not included in the petition's calculation of industry support – Universal Forest Products, Boston Pacific LLC, and Fred J. Beiten Lumber Company – and to Random Length's Big Book industry directory.

lumber, and therefore are a separate domestic like product.[47] It argued that the principal uses of softwood lumber are for new residential construction and repair and remodeling, whereas wooden bed-frame components are not suitable for these purposes due to size and load-bearing differences, and they would be cost-prohibitive for use in such applications. It argued that wooden bed-frame components are produced from the sideboards of the tree whereas other softwood lumber is produced from the center of a tree. ISPA argued that wooden bed-frame components are covered during shipment and distributed directly to box-spring manufacturers or consumed internally in bed-frame manufacturing operations, whereas other softwood lumber is exposed to the elements during delivery and sold by a sawmill through a broker to a distributor and to the ultimate customer. It argued that the marketing and advertising practices for wooden bed-frame components are much more limited than for other softwood lumber products, and that wooden bed-frame components are often sold in kits. It argued that significant differences exist between the physical characteristics and functions of wooden bed-frame components and softwood lumber with respect to sizes, customization, the quality of the wood used to produce them, and other requirements of end users such as moisture control. Finally, it argued that the process used to transform softwood lumber into wooden bed-frame components is significant and expensive, and the price of a typical wooden bed-frame component is over 100 percent more than the price of the rough lumber consumed to make it.[48]

Petitioners argued that respondents are unable to define remanufactured products except in terms of various manufacturing processes. Petitioners stated that the physical characteristics of remanufactured lumber are largely indistinguishable from the characteristics of other lumber, as remanufactured lumber retains the physical characteristics of the species from which it is manufactured, and there are few inherent limitations on the specific dimensions of the lumber to be produced at the outset. They contended that remanufactured products are sold through the same channels of distribution as all other softwood lumber products; for example, wholesalers carry siding and decking as well as dimension products. They argued that customer and user preferences are insufficient to differentiate remanufactured products from all other lumber products, and that remanufactured lumber is used in the same or similar ways as all softwood lumber, including in residential and commercial construction and remodeling applications. They argued that many remanufactured items are produced in the same facilities with the same employees as all other softwood lumber products, and that remanufacturing entails the same kinds of processes as production of softwood lumber. They contended that the prices for all lumber, including remanufactured lumber, vary widely. They argued that this is just like other cases in which the Commission has found that a single domestic like product encompasses a broad continuum of products with a wide array of end uses.[49] Fred Tebb & Sons, Inc., a U.S. remanufacturer of high-grade hemlock, fir, and spruce, argued that the Commission properly included remanufactured lumber in the domestic like product in previous investigations and should do so here.[50]

There is no widespread agreement on an exact definition of "remanufactured lumber." Remanufactured products include a continuum of products such as wooden bed-frame components (box spring components), shipping materials, flooring and siding, ladder stock, dimension lumber, and stock for furniture manufacturing, and there does not appear to be a clear line between remanufactured products and other softwood lumber or between wooden bed-frame components and other remanufactured products or

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[47] They defined wooden bed-frame components as products generally made of wood that have nominal dimensions that do not exceed 83 inches in length, 4 inches in width, and 1 1/4 inches in thickness, and that are assembled in the United States (usually by means of nails or staples) with other components to form the internal frame of a box-spring.

[48] See, e.g., ISPA's Postconference Brief at 1-7; Conference Tr. at 123-24.

[49] See, e.g., Petitioners' Postconference Brief at 5-7, Exhibits 6, 7.

[50] See, e.g., FT&S Postconference Brief at 4.

other softwood lumber. Six domestic producers indicated that they converted some of their softwood lumber into a more specialized or higher grade product through further remanufacturing, but none of these firms maintained separate trade and financial information relative to those operations, and there is no other information on the record on domestic remanufacturers.[51] We determine that remanufactured lumber (and in particular wooden bed-frame components) is part of a continuum of softwood lumber products, and there is no clear dividing line that separates it from other softwood lumber products. Accordingly, we determine that neither remanufactured lumber nor wooden bed-frame components is a separate domestic like product.

D. Domestic Industry

1. Generally

In defining the domestic industry, the Commission's general practice has been to include in the industry all of the domestic production of the like product, whether toll-produced, captively consumed, or sold in the domestic merchant market.[52] Based on our domestic like product determination, we determine that the domestic industry consists of all softwood lumber mill operators.

2. Related Parties

We must further determine whether any producer of the domestic like product should be excluded from the domestic industry pursuant to 19 U.S.C. § 1677(4)(B). That provision of the statute allows the Commission, if appropriate circumstances exist, to exclude from the domestic industry producers that are related to an exporter or importer of subject merchandise or which are themselves importers.[53] Exclusion of such a producer is within the Commission's discretion based upon the facts presented in each case.[54]

A number of domestic producers imported subject softwood lumber from Canada, purchased subject softwood lumber from Canada, or have corporate relationships with subject foreign producers or exporters or importers of subject softwood lumber, and as such are or may be related parties under the statute.[55] The record in the preliminary phase of these investigations relating to these relationships is

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[51] See, e.g., CR at I-16 n.53, I-18 & n.54; PR at I-12.

[52] See United States Steel Group v. United States, 873 F. Supp. 673, 681-84 (Ct. Int'l Trade 1994), aff'd, 96 F.3d 1352 (Fed. Cir. 1996).

[53] 19 U.S.C. § 1677(4)(B).

[54] Sandvik AB v. United States, 721 F. Supp. 1322, 1331-32 (Ct. Int'l Trade 1989), aff'd mem., 904 F.2d 46 (Fed. Cir. 1990); Empire Plow Co. v. United States, 675 F. Supp. 1348, 1352 (Ct. Int'l Trade 1987). The primary factors the Commission has examined in deciding whether appropriate circumstances exist to exclude the related parties include: (1) the percentage of domestic production attributable to the importing producer; (2) the reason the domestic producer has decided to import the product subject to investigation, i.e., whether the firm benefits from the less than fair value sales or subsidies or whether the firm must import in order to enable it to continue production and compete in the U.S. market; and (3) the position of the related producers vis-a-vis the rest of the industry, i.e., whether inclusion or exclusion of the related party will skew the data for the rest of the industry. See, e.g., Torrington Co. v. United States, 790 F. Supp. 1161, 1168 (Ct. Int'l Trade 1992), aff'd mem., 991 F.2d 809 (Fed. Cir. 1993). The Commission has also considered the ratio of import shipments to domestic production for related producers and whether the primary interests of the related producers lie in domestic production or in importation. See, e.g., Melamine Institutional Dinnerware from China, Indonesia, and Taiwan, Inv. Nos. 731-TA-741-743 (Final), USITC Pub. 3016 (Feb. 1997) at 14, n.81.

[55] See, e.g., CR at III-6, IV-3; PR at III-6, IV-3. None of the parties argued that the Commission should exclude (continued...)

limited[56] and does not allow a complete identification of all related parties. For purposes of the preliminary phase of these investigations, we do not find appropriate circumstances to exclude any domestic producers from the domestic industry as related parties. In any final phase investigations, we intend to seek additional information on this issue, including with respect to individual producers' levels of domestic production, direct imports and purchases of subject imports, and relationships with Canadian producers and exporters.

III. CONDITIONS OF COMPETITION[57]

Several conditions of competition are relevant to our analysis.

On May 29, 1996, the United States and Canada formally entered into the U.S./Canada Softwood Lumber Agreement ("SLA"), which remained in effect for five years, from April 1,1996 until March 31, 2001. Under the SLA, in exchange for commitments from the United States not to initiate or otherwise take action under several U.S. trade statutes with respect to imports of softwood lumber from Canada, Canada agreed to place softwood lumber on its export control list and to collect a fee on issuance of a permit for export to the United States of softwood lumber first manufactured in the provinces of Ontario, Quebec, British Columbia, or Alberta ("the covered provinces"), for quantities above a negotiated baseline. Under the SLA, up to 14.7 billion board feet of softwood lumber could be exported to the United States from the covered provinces duty-free, a fee of US$50 per thousand board feet applied to annual exports between 14.7 and 15.35 billion board feet, and a fee of US$100 per thousand board feet applied to annual exports that exceeded 15.35 billion board feet. All fees were subject to adjustment for inflation. The SLA was structured to spread out the volume of imports of softwood lumber from Canada over the course of each year. The SLA also contained a trigger price mechanism allowing for the duty-free export of 92 million additional board feet of softwood lumber first manufactured in the covered provinces over the four quarters following a calendar quarter in which prices exceeded a certain level.[58]

The parties disagreed about how the Commission should view the SLA. The language of the SLA stated that its purpose was to "ensure that there is no material injury or threat thereof to an industry in the United States from imports of softwood lumber from Canada." This purpose was also stated in letters from domestic producers accounting for more than 60 percent of domestic production; these letters were expressly incorporated in the SLA. These representations, however, also expressly stated that they would have "no force or effect" once the SLA was terminated. These representations do not per se bind the Commission's analysis, and they do not relieve the Commission of its obligation to investigate the actual facts and legal arguments in subsequent cases after the termination of the SLA.[59] Accordingly, we do not

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[55] (...continued)
any domestic producers from the domestic industry as related parties. See, e.g., Petition at I-15 to I-17, Exhibits IB-6 and IB-7; Conference Tr. at 107-08.

[56] For example, only two domestic producers provided quantity and value data concerning their subject imports of softwood lumber from Canada. CR at IV-3; PR at IV-3.

[57] To the extent possible, we have used publicly available data. Data compiled from questionnaire responses is so indicated.

[58] Until March 31, 1998, the trigger price was US$405 per thousand board feet for Spruce-Pine-Fir, Eastern, Kiln Dried, 2x4 random length, Standard & Better, Great Lakes delivered as published in Random Lengths. After March 31, 1998, the trigger price rose to $410.

[59] The Commission has uniformly not viewed various voluntary export arrangements and suspension agreements under the statute as being legally dispositive of the question of whether a domestic industry is materially injured or threatened with material injury by reason of subject imports. See, e.g., Aramid Fiber Formed
(continued...)

view the stated purpose of the SLA as legally binding on our injury analysis in these investigations, but we acknowledge the SLA itself as a significant condition of competition during the period of investigation.

The demand for softwood lumber in the United States has been at an all-time high in recent years, including during the period of investigation.[60] Apparent domestic consumption increased every year between 1995 and 1999, from 47,641 mmbf in 1995 to 54,353 mmbf in 1999, an overall increase of 14.1 percent, before decreasing 0.8 percent to 53,942 mmbf in 2000.[61] Demand for softwood lumber is derived primarily from demand for new home construction (40 percent), repairs and remodeling (28 percent), materials handling and other miscellaneous uses (17 percent), and commercial construction (15 percent).[62] Domestic softwood lumber consumption, real GDP, and housing starts generally increased between 1996 and 1999, while mortgage interest rates generally declined. In 2000, domestic softwood lumber consumption and housing starts declined as mortgage rates increased, although real GDP continued to increase. Forecasts suggest continued growth in U.S. real GDP in 2001 and 2002, but a 1.9 percent decline in U.S. housing starts in 2001 followed by an unchanged level of housing starts in 2002 from that in 2001.[63]

Demand for softwood lumber also is impacted by other factors. A number of products (such as engineered wood products, steel studs, brick and block, composites, plastic resins, and oriented-strand-board) may substitute for softwood lumber in certain applications. These substitutes have increased in importance over the last few years, although they appear to account for a small portion of apparent domestic consumption.[64] Demand for softwood lumber is also seasonal, with the highest building activity generally occurring between March and September, weather permitting.[65] At least in the short term, changes in price do not impact the volume of softwood lumber demanded.[66]

The supply of softwood lumber available to the U.S. market increased throughout the period of investigation, with both domestic and Canadian producers increasing production during this time through

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[59] (...continued)
of Poly Para-Phenylene Terephthalamide from the Netherlands, Inv. No. 731-TA-652 (Final), USITC Pub. 2783 at I-12 n.70 (June 1994) (cross-licensing agreement that restricted import volumes); Certain Carbon Flat-Rolled Steel Products, Inv. Nos. 701-TA-319 et seq., 731-TA-573 et seq. (Final), USITC Pub. 2664, vol. I at 19 (Aug. 1993) (voluntary restraint agreements); Shop Towels from Bangladesh, Inv. No. 731-TA-514 (Final), USITC Pub. 2487 at 20 (March 1992) (quota pursuant to Multifiber Arrangement).

[60] CR/PR at Table IV-2.

[61] CR at IV-3; PR at IV-3; CR/PR at Table IV-2.

[62] CR at II-9; PR at II-6 to II-7; CR/PR at Table I-1. A 20 percent change in the price of the lumber and panel components of a house would increase or decrease the price of the house by approximately $1,400. Conditions of Competition in the U.S. Forest Products Trade, Inv. No. 332-400, USITC Pub. 3246 (Oct. 1999) at 3-11 (citing Weekly Market Report of Lumber and Panel Products, The Value of Forest Products Then and Now (C.C. Crow's Pub.: Portland, OR, June 11, 1999) as the source for the data calculations). Demand for new residential housing depends on domestic income levels and the cost of housing, and an important component in considering the cost of housing is the mortgage interest rate because most buyers finance their home purchases for periods of up to 30 years; interest costs during the full payment period can equal or exceed the initial purchase price. CR at II-9 to II-10; PR at II-6 to II-7.

[63] CR at II-10; PR at II-7.

[64] CR at II-16 to II-19; PR at II-12 to II-13.

[65] CR at II-1; PR at II-1.

[66] In any final phase investigations, we intend to seek more information regarding demand factors that affect prices and volumes in the U.S. market.

improvements in capacity utilization and/or expansion of production capacity.[67] Subject imports of softwood lumber from Canada accounted for 34.6 percent of apparent domestic consumption in 1998, 33.6 percent in 1999, and 34.0 percent in 2000.[68] Nonsubject imports were present in the U.S. market during the period of investigation but never exceeded 3 percent of apparent domestic consumption.[69] Apparent domestic consumption exceeds domestic production, due in part to insufficient domestic timber supplies as a result of environmental restrictions. In addition, there is a limited domestic supply of high-quality, large-diameter logs and logs of certain individual species.[70]

In the United States, southern yellow pine was the highest volume commercial lumber species produced (44.4 percent) in 1999, followed next by Douglas fir (21.8 percent) and hem-fir (12.5 percent) lumber, and then by a variety of other lumber species, including spruce-pine-fir. Domestic producer questionnaire responses indicate that approximately one-third of domestically-produced southern yellow pine is pressure-treated. In Canada, spruce-pine-fir was the overwhelmingly predominant commercial lumber species produced (84.4 percent) in 1999, followed next by hem-fir (5.8 percent) and Douglas fir (3.4 percent) lumber, and then by a variety of other lumber species.[71]

The parties disagreed regarding the level of substitutability between subject imports and the domestic like product, in particular whether there is species segmentation by application, region of the country, or builder preferences, and about the importance of building codes, climate, and wood characteristics in driving demand. They also disagreed about the extent to which such preferences may transcend differences in prices among the species.[72] On balance, the record suggests that subject imports of

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[67] Domestic production of softwood lumber increased from 34,678 mmbf in 1998 to 36,606 mmbf in 1999 and then fell to 35,848 mmbf in 2000, a level 11.2 percent higher than in 1995, and capacity utilization was 86.7 percent in 1998, 90.4 percent in 1999, and 89.6 percent in 2000. Domestic production capacity was fairly level during the POI, following a growth period between 1995 and 1997; the level in 2000 was 5.5 percent higher than in 1995. CR/PR at Table III-5. Domestic producers' questionnaire responses (covering approximately 53 percent of domestic production) indicated increases in production from 16,929 mmbf in 1998 to 19,005 mmbf in 1999 and 19,016 mmbf in 2000, and capacity from 18,452 mmbf in 1998 to 20,031 mmbf in 1999 and 21,098 mmbf in 2000; reported capacity utilization was 90.0 percent in 1998, 93.2 percent in 1999, and 88.5 percent in 2000. CR/PR at Table III-6. Canadian production increased from 27,602 mmbf in 1998 to 29,041 mmbf in 1999 and 29,054 mmbf in 2000. CR/PR at Table VII-1. Canadian producers' capacity increased from 31,600 mmbf in 1998 to 32,100 mmbf in 1999 and remained level in 2000, and their capacity utilization rose from 87.3 percent in 1998 to 90.5 percent in 1999, where it remained in 2000. Canadian producers questionnaire responses (covering approximately 73 percent of production in Canada) indicated increases in production from 19,642 mmbf in 1998 to 21,327 in 1999 and 21,931 mmbf in 2000. CR/PR at Table VII-2. Reported capacity in Canada was 22,546 mmbf in 1998, 23,822 mmbf in 1999, and 24,275 mmbf in 2000, and reported capacity utilization was 85.9 percent in 1998, 88.4 percent in 1999, and 89.2 percent in 2000. CR/PR at Table VII-2. Information on the record in the preliminary phase of these investigations indicates that increases in supply (including domestic supply) may have contributed at least in some degree to price declines in the U.S. market. See, e.g., CLTA's Postconference Brief at 25-33 (citing various domestic producers' annual and quarterly reports).

[68] CR/PR at Table IV-2.

[69] The volume of nonsubject imports increased from 647 mmbf in 1998 to 1,116 mmbf in 2000; as a share of apparent domestic consumption, nonsubject imports increased from 1.2 percent in 1998 to 2.1 percent in 2000. CR at II-8; PR at II-6; CR/PR at Tables IV-1, C-1.

[70] CR at II-5 to II-6 & n. 13, III-1; PR at II-3 to II-4 & n.13, III-1.

[71] CR/PR at Tables III-8, VII-4.

[72] See, e.g., Petition at I-11, I-18 to I-20; Conference Tr. at 12; Petitioners' Postconference Brief at 9-16, Appendix G, Exhibit 27 (including excerpts from producer and importer questionnaire responses regarding

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softwood lumber from Canada are at least moderately substitutable for domestically-produced softwood lumber, but we intend to seek additional information regarding this issue in any final phase investigations.

Softwood lumber prices can fluctuate considerably from year to year, day to day, and even from hour to hour. Price changes depend on a number of factors, including seasonal demand patterns, access to timber supplies, weather, the strength of competition among various lumber species within a particular region, and expected future market conditions. Domestic producers and importers of softwood lumber from Canada negotiate selling prices with their customers based on these and other factors, including reference to weekly market price reports such as Random Lengths, inventory levels, the size of an order, and demand in export markets. With a large number of suppliers and purchasers, and a multiplicity of daily transactions, the record in the preliminary phase of these investigations indicates that prices respond quickly to changes in supply and demand and that producers are price-takers in a highly competitive market.[73] Softwood lumber prices generally differ substantially depending on grades and dimensions, and may differ by the species and applications involved, with better grades and wider dimensions usually carrying higher prices than lower grades and narrower dimensions.[74] The particular grades/species/dimensions of softwood lumber chosen by each builder or contractor are based on the building code requirements, uses, and regional/individual builder preferences for particular lumber species, as well as on relative prices of the softwood lumber products. As a result, price/performance considerations for softwood lumber can involve a number of factors in the downstream market, and may differ markedly across regions of the United States and from customer to customer within a single region.[75]

IV. REASONABLE INDICATION OF THREAT OF MATERIAL INJURY BY REASON OF SUBJECT IMPORTS THAT ARE ALLEGEDLY SUBSIDIZED AND SOLD AT LESS THAN FAIR VALUE[76] [77]

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[72] (...continued)
substitutability); Dealers/Builders' Postconference Brief and Exhibits; CLTA's Postconference Brief at Economic Assessment Appendix; CR at II-1 to II-5, II-11 to II-19, V-1; PR at II-1 to II-3, II-7 to II-14.

[73] In any final phase investigations, we intend to assess the extent to which factors other than subject imports determine pricing.

[74] CR at V-1; PR at V-1.

[75] CR at V-7 to V-8; PR at V-5.

[76] Several parties argued that the Commission should treat softwood lumber imports from the Canadian Maritime Provinces as fairly traded and that the Maritime Provinces are entitled to a separate injury determination. The bases of their arguments are that the Maritime Provinces have historically been treated differently, the petition did not allege that the Maritime Provinces benefitted from countervailable subsidies, Commerce did not initiate a countervailing duty investigation of any programs involving Maritime producers, and the antidumping margins were predicated on receipt of subsidies. See, e.g., Maritime Respondents' Postconference Brief at 1-9, Exhibit 1; JD Irving's Postconference Brief at 1-4; Conference Tr. at 11, 14-15, 21-22, 28, 33, 44, 88-90. We note the statute directs the Commission to make its injury determination in the preliminary phase of an investigation based on the subject merchandise as defined by Commerce. See 19 U.S.C. §§ 1671(a), 1671b(a)(1), 1673, 1673b(a)(1), and 1677(25). Commerce's notices initiated antidumping and countervailing duty investigations of softwood lumber products from Canada. 66 Fed. Reg. 21328 (Apr. 30, 2001); 66 Fed. Reg. 21332 (Apr. 30, 2001). The statute vests in Commerce, not the Commission, the authority to determine whether entities should be considered a country for purposes of U.S. international trade laws. See, e.g., Algoma Steel Corp. v. United States, 688 F. Supp. 639, 644 (Ct. Int'l Trade 1988), aff'd, 865 F.2d 240 (Fed. Cir.), cert. denied, 492 U.S. 919 (1989); In the Matter of Softwood Lumber from Canada, Decision of the Panel on Review of the Remand Determination of the U.S. International Trade Commission, USA-92-1904-02 at 4-7 (July 26, 1993) (upholding the Commission's
(continued...)

Section 771(7)(F) of the Act directs the Commission to determine whether the U.S. industry is threatened with material injury by reason of the subject imports by analyzing whether "further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted."[78] The Commission may not make such a determination "on the basis of mere conjecture or supposition," and considers the threat factors "as a whole" in making its determination whether dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued.[79] In making our determination, we considered all statutory factors that are relevant to these investigations.[80]

For the reasons discussed below, we determine that there is a reasonable indication that the domestic softwood lumber industry is threatened with material injury by reason of subject imports of softwood lumber from Canada that are allegedly subsidized[81] and sold at less than fair value.[82]

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[76] (...continued)
determination that Quebec was not a separate country for purposes of the Commission's injury analysis). We, therefore, decline to treat the Maritime Provinces separately from the rest of Canada in our determinations.

[77] The questionnaire responses of domestic producers, importers, and foreign producers generally provided trade and financial data for the period 1998 through 2000, as well as some projections for 2001 and 2002. In addition, we also examined public information covering the period 1994 to 2000, as pertinent, because there is significant, reliable public information regarding this industry, because the SLA was in effect between 1996 and 2000, and because the parties' arguments were not limited to the post-1997 time frame. Except as noted, the data cited in the remainder of the opinion are based on publicly available information.

[78] 19 U.S.C. § 1677(7)(F)(ii).

[79] 19 U.S.C. § 1677(7)(F)(ii).

[80] 19 U.S.C. § 1677(7)(F)(i). The parties agreed that Factor V is not pertinent in these investigations because inventories are not generally maintained in this industry. See, e.g., Petition at I-48 to I-49; Petitioners' Postconference Brief at 48. Factor VII also is inapplicable because these investigations do not involve imports of both raw and processed agricultural products. We also do not find any indication of potential product-shifting based on the record in the preliminary phase of these investigations.

[81] Commerce informed the Commission of Commerce's initiation of investigations of several programs alleged in the petitions to have provided countervailable subsidies to Canadian producers and exporters of softwood lumber: the Federal and Provincial Timber Management Systems, three programs administered by the Government of Canada, three programs administered by the Province of British Columbia, seven programs administered by the Province of Quebec, two programs administered by the Province of Ontario, and one program administered by the province of Alberta. The programs include: Non-Repayable Grants and Conditionally Repayable Contributions from the Department of Western Economic Diversification; Canadian Forest Service: Industry, Trade and Economics Program; and Federal Economic Development Initiative in Northern Ontario; Grants, Loans and Loan Guarantees provided from Forest Renewal B.C.; Job Protection Act; and Subsidies to Skeena Cellulose Inc.; Société de Récupération, d'Exploitation et Développement Forestiers du Québec (REXFOR); Assistance under Article 7 of the Société de Développement Industriel du Québec (SDI); Export Assistance under SDI; Export Assistance from Investissement Québec; Redemption by Tembec, Inc. of Preferred Stock Held by SDI; Private Forest Development Program; and Funds to Create Jobs in Forest Industry under Budget of Quebec; Development Corporations of the Government of Ontario: Export Support Loan Program; and Sales Tax Exemption for Seedlings, and Loan Guarantees to Attract New Mills. Certain Softwood Lumber Products from Canada, 66 Fed. Reg. 21332 (Apr. 30, 2001).

[82] 19 U.S.C. §§ 1671b(a), 1673b(a).

Canadian producers are predominantly export-oriented toward the U.S. market, with exports to the United States consistently accounting for at least 63 percent of their production during the period of investigation.[83]

Canadian production capacity increased from 31,600 mmbf in 1998 to 32,100 mmbf in 1999, and remained level in 2000. Canadian producers' capacity utilization rose from 87.3 percent in 1998 to 90.5 percent in 1999, where it remained in 2000.[84] [85] Canadian producers increased production each year of the period of investigation, from 27,602 mmbf in 1998 to 29,041 mmbf in 1999 and 29,054 mmbf in 2000.[86] Moreover, in their questionnaire responses, Canadian producers projected additional capacity increases, improvements in capacity utilization, and additional production in 2001 and 2002.[87]

Because of the SLA and despite strong U.S. demand, the volume of subject imports from Canada increased only by a small amount over the period of investigation, from 18,039 mmbf in 1998 to 18,333 mmbf in 2000.[88] As a share of apparent domestic consumption, subject imports from Canada remained largely stable, decreasing from 34.6 percent in 1998 to 33.6 percent in 1999 and then increasing to 34.0 percent in 2000.[89] Each year during the pendency of the SLA, Canadian producers used all of their fee-free quota, and generally used most of their $50 fee quota.[90] The fact that during a strong U.S. market they did not use all of their $50 and $100 fee quotas indicates that the SLA restrained the volume of subject imports from Canada at least to some extent. This is consistent with the anecdotal information reported to the Commission by importers of subject merchandise and Canadian producers regarding the effects of the SLA.[91] Moreover, under the SLA, shipments from non-covered provinces to the United States increased at the same time that shipments from covered provinces to the United States decreased.[92]

Based on the record in the preliminary phase of these investigations, we find that subject imports from Canada are likely to increase substantially. This conclusion stems from several factors: the export-orientation of Canadian producers to the U.S. market; their projected increases in capacity, capacity utilization, and production; the elimination of the restraining effect of the SLA; and continued strong demand in the U.S. market. We also considered the increased level of imports from non-covered provinces during the pendency of the SLA, as well as the fact that imports of softwood lumber increased during the

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[83] CR/PR at Table VII-5. According to Canadian producers' questionnaire responses (covering approximately 73 percent of production in Canada), exports to the United States increased from 12,575 mmbf in 1998 to 12,960 mmbf in 1999, before decreasing to 12,448 mmbf in 2000, and as a share of total Canadian shipments they were 62.0 percent, 58.0 percent, and 55.3 percent respectively in those years. CR/PR at Table VII-2.

[84] CR/PR at Table VII-1. In questionnaire responses, Canadian producers reported production capacity increases each year of the period of investigation, increasing from 22,546 mmbf in 1998 to 23,822 mmbf in 1999 and 24,275 mmbf in 2000, and they also reported increased capacity utilization each year during that period, from 85.9 percent in 1998 to 88.4 percent in 1999 and 89.2 percent in 2000. CR/PR at Table VII-2.

[85] A number of Canadian mills closed during the pendency of the SLA, and we intend to seek additional information in any final phase investigations regarding whether the capacity of those mills remains viable.

[86] CR/PR at Table VII-1. Questionnaire responses showed increases in Canadian production levels, from 19,642 mmbf in 1998 to 21,327 mmbf in 1999 and 21,931 mmbf in 2000. CR/PR at Table VII-2.

[87] CR/PR at Table VII-2 (projecting capacity increases to 24,721 mmbf and capacity utilization increases to 93.0 percent in 2002).

[88] CR/PR at Table IV-1.

[89] CR/PR at Table IV-2.

[90] See, e.g., CR/PR at Table IV-1; CLTA's Postconference Brief at Economic Appendix at Appendix A at Figure II-1.

[91] CR/PR at Appendix D.

[92] CR at VII-2; PR at VII-1; CR/PR at Appendix D.

most recent period in which there were no restraints on their entry into the U.S. market (i.e., between 1994 and 1996).[93]

For purposes of our analysis of the likely price effects of subject imports from Canada in the preliminary phase of these investigations, we recognize that there is at least a moderate degree of substitutability between subject imports of softwood lumber from Canada and the domestic like product. There is an abundance of public pricing information regarding softwood lumber products, and we relied on this information in this preliminary phase for pricing trends. Prices for softwood lumber published in Random Lengths, the industry source most cited as a pricing guide in questionnaire responses of industry participants, indicate that both the domestically-produced and imported Canadian softwood lumber products first rose to period-high peaks in the third or fourth quarters of 1996 and then fell to relative lows by the second through fourth quarters of 1998. Prices then increased to generally more modest peaks by the second or third quarters of 1999, before falling to period lows by the third or fourth quarters of 2000. Prices during the first quarter of 2001 rose somewhat or remained near their levels in the fourth quarter of 2000, but were still well below price levels in the first quarter of 2000.[94]

The Commission also collected pricing data for four products (which were suggested in the petition) from domestic producers and importers.[95] The pricing data covered only a small fraction of domestic sales: the five responding domestic producers reported sales quantities for pricing purposes that totaled 6.417 mmbf, and the fourteen responding importers of subject softwood lumber from Canada reported sales quantities for pricing purposes that totaled 12.582 mmbf during 1999 to 2000. These data yielded a total of nine delivered price comparisons, all of which showed that subject softwood lumber from Canada was priced below domestically-produced softwood lumber.[96] We place little weight on this information because the reported quantities of softwood lumber involved in the delivered price comparisons are very limited, and therefore may not be representative of pricing in the broader market. Moreover, the reported delivered price data frequently represented a lone transaction for a single firm, and while the pricing data requested in the questionnaires controlled for some important product and sales factors, they did not fully account for the myriad of product and sales factors that can differentiate one softwood lumber shipment from another.[97] [98]

Based on the record in the preliminary phase of these investigations, and in light of our finding that the volume of subject imports is likely to increase substantially, the apparent intense price competition in

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[93] See, e.g., Petitioners' Postconference Brief at 40.

[94] CR at V-8 to V-16; PR at V-6 to V-14. These trends are consistent with information reported in other public sources. Official Commerce statistics indicate that the average unit value of imports of softwood lumber from Canada increased from $352.36 in 1998 to $395.42 in 1999 before decreasing to $347.98 in 2000. CR/PR at Table C-1. The average unit value of U.S. shipments of softwood lumber increased from $338.80 in 1998 to $395.79 in 1999 before decreasing to $315.40 in 2000, according to data published by Resource Information Systems, Inc. and the WWPA. CR/PR at Table C-1.

[95] The data were collected for sales of softwood lumber products to domestic customers on U.S. f.o.b. and delivered bases for shipments made on the first Tuesday of each month during January 1999 to December 2000 to each of four market areas.

[96] CR at V-24 to V-25; PR at V-20 to V-21.

[97] CR at V-25to V-27; PR at V-21 to V-22.

[98] We will collect pricing data in any final phase investigations. However, we may encounter similar problems obtaining pricing data that will be useful to us in assessing whether subject imports of softwood lumber from Canada are underselling the domestic like product. The parties agreed that, in this industry, accurate price comparisons are difficult to compile. See, e.g., Petition at I-29 to I-32; CLTA's Postconference Brief at 22-25, 35-36.

the U.S. softwood lumber market, the at least moderate degree of substitutability between subject imports and the domestic like product, the trends indicating a decline in prices in the U.S. market in 2000, and the lifting of the SLA and any price restraining effects it may have had, we find that subject imports from Canada are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports.[99]

With respect to the condition of the domestic industry, domestic production capacity remained stable overall between 1998 and 2000; capacity utilization for the domestic industry increased from 86.7 percent in 1998 to 90.4 percent in 1999, then decreased to 89.6 percent in 2000.[100] The domestic industry's production rose from 34,678 mmbf in 1998 to 36,606 mmbf in 1999, then fell to 35,848 mmbf in 2000. Domestic producers' shipments decreased from 35,175 mmbf in 1999 to 34,493 mmbf in 2000, after increasing from 33,418 mmbf in 1998.[101] Domestic producers' share of apparent domestic consumption increased from 64.1 percent in 1998 to 64.7 percent in 1999, but decreased to 63.9 percent in 2000.[102] The end-of-period inventories reported by the domestic industry rose from 1,011 mmbf in 1998 to 1,146 mmbf in 1999 and 1,235 mmbf in 2000.[103] The domestic industry's production workers, hours worked, wages paid, hourly wages, productivity, and unit labor costs generally improved during the period of investigation.[104] The domestic industry's capital expenditures decreased from $344 million in 1998 to $293 million in 1999 and then increased to $335 million in 2000.[105]

Although the record in the preliminary phase of these investigations shows that several domestic industry performance indicators were improving or basically steady during the period of investigation, price changes in 2000 led to a weakening of the domestic industry. The domestic industry's unit net sales value increased from $379.63 in 1998 to $415.05 in 1999, then decreased substantially in 2000 to $356.80.[106] Unit cost of goods sold decreased from $361.44 in 1998 to $358.36 in 1999 and decreased again to $353.43 in 2000.[107] Thus, despite declining unit cost of goods sold throughout the period of investigation, because of the sharp decline in net unit sales value in 2000 to a level that just exceeded unit cost of goods sold, the ratio of operating income to net sales fell from 9.9 percent in 1999 to a loss of 3.6 percent in

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[99] Most domestic producers responding to the Commission's questionnaires were unable to document lost sales or lost revenue allegations, and the Commission was unable to confirm any of the twenty-eight lost sales or twenty-three lost revenue allegations contained in the petitions. CR at V-27 to V-32; PR at V-21 to V-22; CR/PR at Tables V-8, V-9.

[100] CR/PR at Table III-5. In questionnaire responses, domestic producers reported capacity increases from 18,452 mmbf in 1998 to 20,031 mmbf in 1999 and 21,098 mmbf in 2000. Reported average capacity utilization for the domestic industry was 90.0 percent in 1998, 93.2 percent in 1999, and 88.5 percent in 2000. CR/PR at Table III-6. Domestic producers reported that they required minimum capacity utilization levels of 73 percent on average to operate their sawmills. CR at II-6; PR at II-4 to II-5.

[101] CR/PR at Table C-1. According to questionnaire responses, domestic producers' shipments increased each year of the period of investigation. CR/PR at Table III-10.

[102] CR/PR at Table IV-2.

[103] CR/PR at Table III-11 (data from questionnaire responses).

[104] CR/PR at Table III-12 (data from questionnaire responses).

[105] CR/PR at Table VI-5 (data from questionnaire responses).

[106] CR/PR at Table VI-1 (data from questionnaire responses).

[107] CR/PR at Table VI-1 (data from questionnaire responses).

2000.[108] Between 1995 and 1999, the number of domestic mills decreased from 824 to 807.[109] The parties disagreed about the extent to which the decline in the number of U.S. mills was attributable to mergers, permanent closure of older facilities, installation of new equipment, maintenance, or competition with subject imports in the U.S. market, but the record reflects that at least some of the mill closures were due to competition in the U.S. market.[110] A number of domestic producers reported actual and potential adverse effects on their development and production efforts, growth, investment, and ability to raise capital due to subject imports of softwood lumber from Canada.[111]

Based on the record in the preliminary phase of these investigations, we determine that further dumped and subsidized imports are imminent, that these imports are likely to exacerbate price pressure on domestic producers, and that material injury to the domestic industry would occur.

CONCLUSION

For the foregoing reasons, we determine there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada that are allegedly subsidized by the Government of Canada and sold in the United States at less than fair value.

[108] CR/PR at Table VI-1 (data from questionnaire responses). The ratio was 0.9 percent in 1998. Id.

[109] CR/PR at Table III-2.

[110] CR at III-1; PR at III-1; CR/PR at Tables III-2, III-3; Petition at I-12, I-24 to I-25; Petitioners' Postconference Brief at 22, 32-33, Exhibits 27, 35; CLTA's Postconference Brief at 29, Exhibits 12, 16, 21; Conference Tr. at 80, 168. Although there are large corporations with high volumes of production, most of the domestic softwood lumber producers are small firms. In 2000, the five largest producers accounted for about 32 percent of domestic softwood lumber production, and the twenty largest firms accounted for more than 50 percent. CR at III-6; PR at III-6; CR/PR at Table III-4.

[111] CR/PR at Appendix F (data from questionnaire responses).