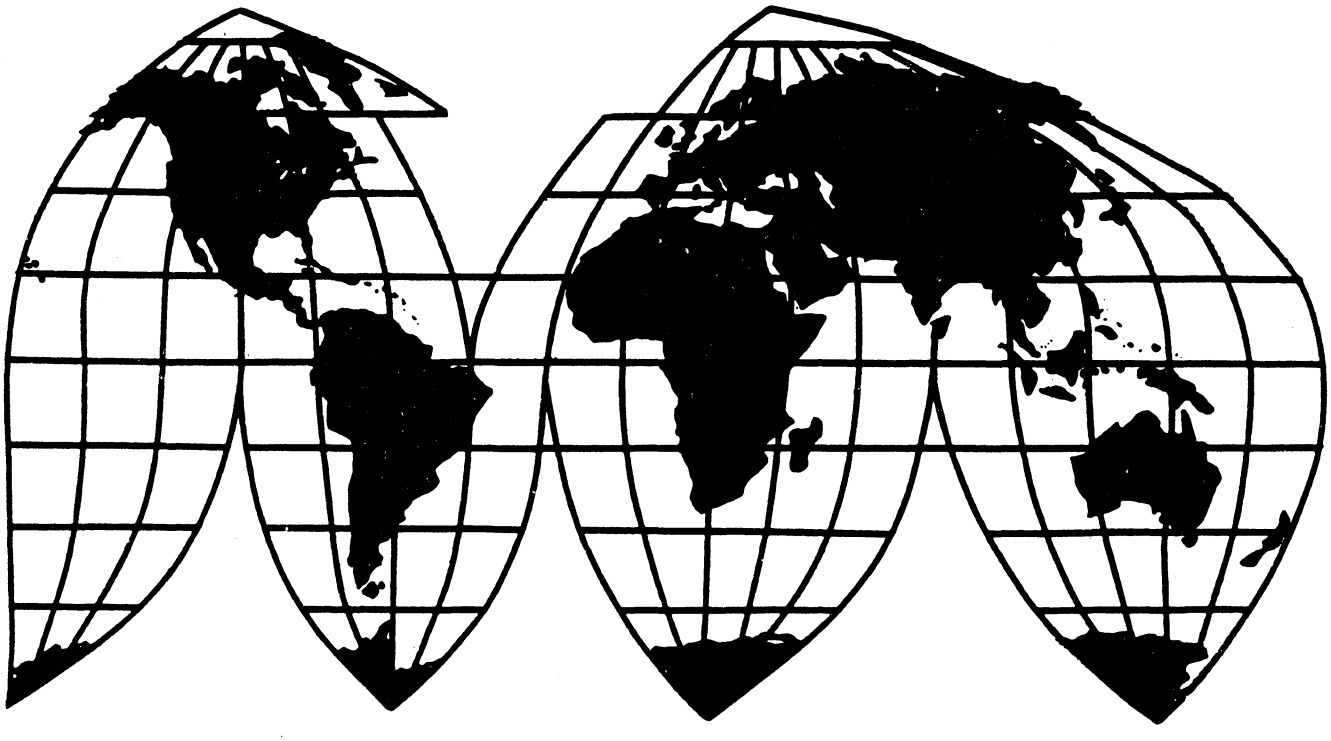
Softwood Lumber From Canada

Investigation No. 701-TA-312 (Remand)

Publication 2689 **October 1993**

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

COMMISSIONERS

Don E. Newquist, Chairman
Peter S. Watson, Vice Chairman
David B. Rohr
Anne E. Brunsdale
Carol T. Crawford
Janet A. Nuzum

Robert A. Rogowsky
Director of Operations

Staff assigned:

Jim McClure, Investigator
Fred Ruggles, Industry Analyst
Joe Baremore, Economist
John Ascienzo, Accountant
Judith Czako, Attorney

Robert Eninger, Supervisory Investigator

Address all communications to
Secretary to the Commission
United States International Trade Commission
Washington, DC 20436

U.S. International Trade Commission

Washington, DC 20436

Softwood Lumber From Canada

Publication 2689

October 1993

In July 1992, the U.S. International Trade Commission determined that an industry in the United States was materially injured by reason of imports from Canada of softwood lumber, (USITC Publication No. 2530 (July 1992)). The Commission's determination was appealed to Binational Panel Review (Binational Panel) under Article 1904 of the United States-Canada Free Trade Agreement, and on July 26, 1993, the Binational Panel remanded the Commission's determination (USA-92-1904-02). The attached views were submitted to the Binational Panel in response to the remand.

CONTENTS

Note.--Information that would reveal confidential operations of individual concerns may not be published and, therefore, has been deleted. Such deletions are indicated by asterisks.

PUBLIC VERSION

VIEWS OF CHAIRMAN NEWQUIST, VICE CHAIRMAN WATSON, AND COMMISSIONER ROHR

Pursuant to the decision of the Binational Panel in Softwood Lumber from Canada, USA 92-1904-02, (July 26, 1993), and based on the evidence on the record, we determine in this remand investigation that an industry in the United States is materially injured by reason of imports of softwood lumber from Canada that the Department of Commerce has determined are subsidized.

A. Like product and domestic industry

Our original findings concerning the like product and domestic industry were not challenged before the Panel, and were not subject to the Panel's remand instructions. We therefore adopt our original determination that the like product is all softwood lumber, including all remanufactured lumber products within the scope of Commerce's investigation.[1] We also adopt our original determination that there is one domestic industry producing the like product, consisting of mill operators, including remanufacturers and manufacturers of bed frame components, and do not exclude any producers from the domestic industry.[2]

B. Conditions of competition and condition of the industry

In our original determination, we discussed at length the condition of the domestic industry, including the conditions of competition in the industry.[3] No party challenged our conclusions in this regard. We therefore adopt our original views for purposes of this remand investigation.

In each investigation, the Commission considers the relevant economic factors that have a bearing on the state of the industry in the "context of the business cycle and conditions of competition that are distinctive to the affected industry."[4] There are two cyclical and competitive conditions particularly relevant to our analysis in this investigation: (1) restricted timber supplies, which resulted in significant increases in the price of softwood logs, the principal cost in lumber production, in all regions of the United States; and (2) declining demand for lumber during the period of investigation.

We recognized in our original determination, and no party disputes, that these factors adversely affected the domestic lumber industry during the period of investigation. This fact, however, does not answer the question the statute requires us to answer in this investigation -- whether the domestic softwood lumber industry is materially injured by reason of subsidized imports of softwood lumber from Canada. While we may consider alternative

---

[1] Softwood Lumber from Canada, Inv. No. 701-TA-312 (Final), USITC Pub. 2530 (July 1992) (hereinafter Softwood Lumber) at 3-11.

[2] Id. at 11, 13.

[3] Id. at 14-22. Chairman Newquist and Commissioner Rohr specifically adopt their original conclusion that the domestic industry is currently experiencing material injury. Id. at 22 n.78. They note that their conclusion that the domestic industry is currently experiencing material injury was not challenged on review before the Panel.

[4] 19 U.S.C. § 1677(7)(C)(iii). See H.R. Rep. No. 317, 96th Cong., 1st Sess. 36 (1979); S. Rep. No. 249 at 88.

causes of injury, we do not weigh causes.[5] Thus, even if we were to conclude that the adverse effect of timber supply constraints and declining demand have been greater than the adverse effects of subsidized imports, an affirmative determination nonetheless would be warranted under the statute.[6] Moreover, we may also consider whether factors other than the subsidized imports, such as declining demand and timber supply constraints, have made the industry more susceptible to the effects of the subsidized imports.[7]

Fundamentally, in this investigation, the question before us is whether, as the Canadian respondents argue, the admitted material injury to the domestic industry is solely due to declining demand and timber supply constraints, or whether, as the domestic industry argues, material injury to the domestic industry is also by reason of subsidized imports from Canada as well. Much of the record evidence is ambiguous and could support either view and, obviously, reasonable minds may differ as to the conclusions to be drawn from the evidence. We conclude, however, that the evidence more fully supports the domestic industry's proposition, and therefore determine that the domestic industry is materially injured by reason of subsidized imports of softwood lumber from Canada.

C. Material injury by reason of subsidized Canadian imports

As the Panel recognized, the impact of imports on domestic sales and prices is greater when, first, imports are available in significant volumes (absolute or relative to total consumption); second, consumers are unwilling to purchase significantly more of the product

---

[5] H.R. Rep. No. 317, 96th Cong., 1st Sess. 47 (1979). The Commission need not determine that subsidized imports are the only cause of harm to the domestic industry. E.g., Encon Industries, Inc. v. United States, Slip op. 92-164 (Sept. 24, 1992) at 5; USX Corp. v. United States, 682 F. Supp. 60, 67 (1988).

Chairman Newquist and Commissioner Rohr note that the Commission need not determine that subsidized imports are the principal or a substantial cause of material injury, see S. Rep. No. 249 at 57 ("Any such requirement has the undesirable result of making relief more difficult to obtain for industries facing difficulties from a variety of sources; such industries are often the most vulnerable to subsidized imports.") only whether subsidized imports are a cause of injury. E.g., Granges Metallverken AB v. United States, 716 F.Supp. 17, 25 (Ct. Int'l Trade 1989).

Vice Chairman Watson interprets the statute's causation requirement in a different manner. Vice Chairman Watson notes that the courts have interpreted the statutory requirement that the Commission consider whether there is material injury "by reason of" the subject imports in a number of different ways. Compare, e.g., United Engineering & Forging v. United States, 779 F. Supp. 1375, 1391 (Ct. Int'l Trade 1991) ("rather it must determine whether unfairly-traded imports are contributing to such injury to the domestic industry. Such imports, therefore need not be the only cause of harm to the domestic industry." (citations omitted)) with Metallverken Nederland B.V. v. United States, 728 F. Supp. 730, 741 (Ct. Int'l Trade 1989) (affirming a determination by two Commissioners that "the imports were a cause of material injury") and USX Corporation v. United States, 682 F. Supp. 60, 67 (Ct. Int'l Trade 1988) ("any causation analysis must have at its core, the issue of whether the imports at issue cause, in a non de minimis manner, the material injury to the industry. . .") and Maine Potato Council v. United States, 613 F. Supp. 1237, 1243 (Ct. Int'l Trade 1985) (in which the Court declined to issue a further remand even though the ITC determination refers to whether or not imports were a "material cause" of the domestic industry's injury).

Accordingly, Vice Chairman Watson has decided to adhere to the standard articulated by Congress in the legislative history of the pertinent provisions, which states that the Commission must satisfy itself that, in light of all the information presented, there is a "sufficient causal link between the subsidization and the requisite injury." S. Rep. No. 249 at 58.

[6] Chairman Newquist and Commissioner Rohr note that such a hypothetical conclusion would require precisely the weighing of causes which Congress has directed the Commission not to undertake.

[7] Iwatsu Electric Co., Ltd. v. United States, 758 F. Supp. 1506, 1512 (Ct. Int'l Trade 1991) ("the woes of the domestic industry were exacerbated by LTFV imports.")

even if the prices go down (demand is inelastic); and, third, consumers view the imported and like product as close substitutes. All three conditions are satisfied in the case of the softwood lumber industry.[8] As the Commission has noted, and the Panel agreed, in a competitive market for price sensitive commodity products such as lumber, "the impact of seemingly small import volumes and penetrations is magnified in the marketplace."[9] This is particularly true when, as here, demand is inelastic and there is negligible third-country import competition.[10]

1. Volume of imports

Significantly, in this investigation we are not examining the effects of a small volume of imports. As the Panel recognized, subsidized Canadian imports retained a significant share of the U.S. market throughout the period of investigation.[11] At the same time that U.S. demand was declining, subsidized imports of Canadian lumber accounted for approximately 28 percent of U.S. consumption throughout the period of investigation. Thus, this is not a case where a small import volume causes material injury because of the nature of the product, the industry, or the market. Rather, in this case, the large volume of imports of subsidized lumber perforce has had a significant impact on the domestic industry.

Widely accepted economic principles applied to the facts of record on the nature of the marketplace for softwood lumber buttress our conclusion. As all parties agree, the market for softwood lumber is highly competitive, with large numbers of buyers and sellers in both Canada and the United States, and rapid dissemination of information about price. The parties do not appear to disagree fundamentally that market prices are determined by the interaction of overall supply and demand.

In this investigation, however, 28 percent of the supply is unfairly traded. We are required by the statute to determine whether there is material injury to the domestic industry by reason of the subsidized imports from Canada. In making this determination, we consider the impact of the unfairly traded imports, and not just the effects of the unfair practice. We cannot therefore look just to what would be the case if that 28 percent of supply were fairly traded. Rather, we must consider what effect the 28 percent of supply that is unfairly traded has on the domestic industry. If, as Canadian respondents themselves contend, supply and demand determine market prices, it is inconceivable as a matter of economic logic that prices would not have been higher were it not for the significant volume of subsidized imports.[12]

---

[8] The Panel specifically affirmed our original determination that imported and domestic lumber are highly substitutable for one another. Panel determination at 28.

[9] Panel determination at 28. Certain Carbon Steel Products from Spain, Inv. Nos. 701-TA-155, 157-160 & 162 (Final), USITC Pub. 1311 (Dec. 1982) at 17. USX Corp. v. United States, 655 F. Supp. 487, 490 (Ct. Int'l Trade 1987)(inherent product fungibility and price sensitivity "make small quantities of imports particularly significant in the U.S. market."); Shop Towels from Bangladesh, Inv. No. 731-TA-514 (Final), USITC Pub. 2487 (March 1992) at 20 (price very important despite quality differences).

[10] See Certain Light-Walled Rectangular Pipes and Tubes from Argentina, Inv. No. 731-TA-409 (Final), USITC Pub. 2187 (May 1989) at 11-12.

[11] We continue to include imports from Quebec in our analysis. In response to the Panel's instructions on remand, our reasons for this conclusion are set out in detail below.

[12] Vice Chairman Watson notes that the economic analysis performed by the Commission's Office of Economics supports a conclusion that the subject imports had significant negative price and revenue effects on the domestic industry during the period of investigation. See Office of Economics Memorandum EC-P-039 (June 22, 1992) at 28, 31, Tables 1 and 4; Office of Investigations Memorandum INV-Q-174 (October 14, 1993), Attachment C at 2.

We do not, however, rely solely on this basic analysis for our affirmative determination. Subsidized Canadian lumber imports have demonstrable price effects, as discussed below. However, if the nature of the lumber market is as the Canadian respondents contend, an affirmative determination is warranted.

2. Price effects of imports

As we found in our original determination, consideration of the price effects of subsidized imports of lumber is complex. We concluded, based on our evaluation of the evidence on the record and the arguments of the parties, that the significant volume of subsidized Canadian imports had significant price suppressing effects and, therefore, we made an affirmative determination. Having reviewed the record in this case, both the information obtained originally, and that gathered on remand, as well as the arguments of the parties, we reach the same conclusion on remand.

Under the conditions of competition in this market, economic reality dictates that price increases, all other things being equal, will closely follow industry-wide cost increases. Here, however, the domestic industry's costs increased more than did prices, resulting in dismal financial performance. The effects of the significant volume of subsidized imports of Canadian lumber on prices in part explain the price suppression suffered by the domestic industry.

By contrast, the recession and other causes do not fully account for material injury to the domestic industry. In fact, the adverse effects of these factors caused the industry to be more susceptible to the injurious effects of subsidized imports. Increasing log costs exert a negative influence on operating returns of the industry, creating a situation in which increased prices are necessary to prevent a serious deterioration in the industry's profit and loss position. It is also indisputable that declining demand makes the price increases necessary to offset the increased costs more difficult to achieve.

There can be no dispute that the domestic industry's cost increases far outstripped price increases during the period of investigation, resulting in a severe cost/price squeeze, depressing the operating returns of the industry.[13] The inability of producers to pass along cost increases to customers is a hallmark of price suppression. Indeed, the Canadian respondents did not dispute that the domestic industry's costs increased more and faster than prices -- they merely argued that the failure of prices to keep up with cost increases was due to declining demand, and not imports.[14] The record evidence, however, indicates otherwise.

The Panel directed us, should we again find price suppression by reason of imports, to address the question whether price increases would otherwise have occurred.[15] The Panel's decision in this regard was apparently based on the conclusion that the Commission failed to calculate the relative impact of the decline in demand for lumber, and failed to distinguish prior determinations discussing the impact of a cyclical downturn on prices.[16]

---

[13] This is reflected in the increased ratio of cost of goods sold to net sales and the poor financial performance of the industry during the period of investigation. Softwood Lumber at A-53, Table 23. The ratio of cost of goods sold to net sales increased from 87.6 percent in 1988 to 92.9 percent in 1991. Id. The ratio of direct materials costs to total costs increased throughout the period of investigation. Id. at A-55, Table 24. Softwood log costs are the principal material costs of softwood lumber producers. While the domestic industry's cost of goods sold increased 6.5 percent per thousand board feet during the period of investigation, and direct materials costs increased 12.2 percent, sales value increased only 0.5 percent. Id. at A-53, Table 23, A-54, Table 24.

[14] Canadian respondents' pre-hearing brief at 18-21.

[15] Panel determination at 49.

[16] Id. at 48.

At the outset, we note that Canadian respondents' arguments on remand concerning this issue misinterpret the statutory provision on which they rely. Canadian respondents argue that, in order to find price suppression under the statute, the Commission must conclude that "significantly greater lumber price increases should have occurred during the period of investigation."[17] Thus, Canadian respondents argue that since demand for lumber declined, prices would not have increased significantly, and therefore the Commission cannot make an affirmative determination based on price suppression. This analysis, however, is not contemplated by the statute.

The statute provides that, in evaluating the effect of subsidized imports on prices, the Commission shall consider whether "the effect of imports of such merchandise otherwise . . . prevents price increases, which otherwise would have occurred, to a significant degree."[18] As indicated by the punctuation, the phrase "to a significant degree" modifies the phrase "prevent price increases," not the phrase "which otherwise would have occurred." In other words, the Commission must determine that there is significant price suppression by reason of imports, not that prices would otherwise have increased significantly.

This has been our consistent interpretation of the statute. We are aware of no case in which the Commission has analyzed "whether prices would otherwise have increased significantly" in assessing the question of price suppression. The legislative history of the provision supports our interpretation. "With respect to prices in the United States of the like product, the ITC would consider . . . whether such imports have depressed or suppressed such prices to a significant degree."[19] "With regard to price effect, the ITC shall consider whether domestic prices are being significantly undercut or suppressed."[20] If the effect of imports is to prevent even relatively modest price increases which otherwise would have occurred, the Commission may find significant price suppression.

Moreover, the statute provides first that the Commission shall consider whether "there has been significant price underselling by the imported merchandise," and then goes on to direct the Commission to determine whether "the effect of imports of such merchandise otherwise" causes price suppression.[21] Thus, it is clear on the face of the statute that the absence of underselling does not preclude the Commission from finding price suppression. The CIT has confirmed this interpretation. "[T]he statute does not require [the Commission] to assess the price depressing or suppressing effects of imports in any particular manner."[22]

The Panel instructed that we make explicit the basis for our conclusion, which is implicit in any finding of price suppression, that prices would otherwise have increased.[23] The undisputed facts concerning the conditions of supply and demand in the lumber market support our conclusion. In a competitive market, which all parties agree the lumber market is, an increase in the cost of industry's primary input, softwood logs, will, all else being equal, cause an inward shift in the industry's supply curve. There is no dispute that the domestic industry experienced a significant increase in the cost of its major input, softwood logs.[24] In a market characterized by inelastic demand, which all parties agree the domestic lumber market is, the effect of such a shift is to "cause[] equilibrium price to rise

---

[17] Canadian respondents' brief on remand at 6.
[18] 19 U.S.C. § 1677(7)(C)(ii)(II).
[19] S. Rep. No. 249, 96th Cong., 1st Sess. 87 (1979).
[20] H.R. Rep. No. 317, 96th Cong., 1st Sess. 73 (1979).
[21] 19 U.S.C. § 1677(7)(C)(ii)(I).
[22] CEMEX, S.A. v. United States, 790 F. Supp. 290, 299 (Ct. Int'l Trade 1992), aff'd, 989 F.2d 1202 (Fed. Cir. 1993).
[23] Panel determination at 49.
[24] As we found in our original determination, this increase in costs was experienced throughout the industry, in all geographic regions, and by producers of all sizes. Softwood Lumber at 22.

substantially. . . ."[25] Indeed, given the inelastic demand for lumber,[26] domestic producers should be able to pass cost increases along to customers almost dollar for dollar.[27] This clearly did not happen in the lumber industry during the period of investigation.

Canadian respondents make much of the statement in Coated Groundwood Paper from Belgium, Finland, France, Germany, and the United Kingdom that "prices are expected to soften during the downturn in the business cycle."[28] Contrary to Canadian respondents' belief, apparently shared to some extent by the Panel,[29] this is not a statement of immutable economic principle, but a conclusion based on the operation of the business cycle particular to the coated groundwood paper industry.[30] Moreover, it is not binding as to the question whether prices would otherwise have increased in the lumber industry.[31] In Coated Groundwood Paper, the Commission found that, in light of the business cycle distinctive to the coated groundwood paper industry and the conditions of competition in the domestic market, prices for coated groundwood paper would not be expected to increase during a downturn in the business cycle. Of course, the lumber industry and lumber market are not characterized by the same business cycle and conditions of competition as the coated groundwood paper industry and market.[32] Statements concerning expected price trends in the coated groundwood paper industry simply have no bearing on expected price trends in the lumber industry. Given the conditions of competition in the lumber industry, specifically the significant increase in the industry's costs of production and inelastic demand, price increases would have been expected during the period of investigation.

---

[25] E.g., Nicholson, Microeconomic Theory, 4th ed., 413 (1989).

[26] Memorandum EC-P-039 (June 22, 1992) at 21.

[27] This is true despite the fact that individual producers in a competitive industry are price takers. We are concerned with changes in the industry's costs, which affect the determination of market prices. That individual producers are price takers does not change our conclusions based on shifts in the industry's supply curve, which affect the prices all producers can obtain in the market. The Commission makes determinations based on its consideration of the effect of imports on the domestic producers "as a whole." See 19 U.S.C. § 1677(4)(A).

[28] Inv. Nos. 731-TA 487-90 and 494 (Final), USITC Pub. 2467 (Dec. 1991) at 21.

[29] Panel determination at 48.

[30] To the extent this statement reflects economic principles, it merely reflects the fact that an inward shift in demand or an upward movement along a demand curve results in a lower equilibrium market price, assuming all else remains the same, including supply. However, supply is not constant in the real world. Thus, while a decline in demand will exert downward pressure on prices, prices may or may not actually decline, depending on such factors as changes in supply and the relative shapes of the demand and supply curves. It is also clear that the nature of the market and the product at issue will affect actual price movements.

[31] Factual similarities in cases involving different industries "do not require similar conclusions." Maine Potato Council v. United States, 613 F. Supp. 1237, 1244 n.7 (Ct. Int'l Trade 1985). Commission determinations are sui generis, and the Commission's determination in each case "must be based on the particular record at issue including the arguments raised by the parties." Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. 1165, 1169 n.5 (Ct. Int'l Trade 1988) (emphasis deleted). Citrosuco Paulista S.A. v. United States, 704 F. Supp. 1075, 1087-88 (Ct. Int'l Trade 1988); Armstrong Bros. Tool Co. v. United States, 483 F. Supp. 312, 328-29 (Cust. Ct.), aff'd, 626 F.2d 168 (CCPA 1980).

[32] The Commission found that the coated groundwood paper industry was characterized by a five year price/investment cycle. An assumption underlying the business cycle was continued steady increases in demand. As demand increased and capacity utilization increased, supplies tightened, prices and profits rose, attracting increased imports and inducing some producers to add capacity. Subsequently, capacity utilization, prices, and imports would decline, until demand rose sufficiently to start the upward trends. Coated Groundwood Paper at 5-6. We do not find that such a cycle exists in the lumber industry. In particular, there is nothing in Coated Groundwood Paper to suggest that demand and supply conditions in that market are the same as in the lumber market.

It is of course true that demand also plays a role in determining market prices, and demand for lumber declined during the period of investigation. From 1988 to 1991, consumption of lumber declined 12.7 percent, while the domestic industry's costs, on a per-unit basis, increased 10 percent.[33] Domestic supply of lumber is more elastic than demand.[34] Under these circumstances, relatively equivalent shifts in demand and supply would be expected to result in a greater price increase as a result of the shift in supply than the price decrease resulting from the shift in demand, and thus a higher market price. Thus, despite declining demand, the increased costs of producing lumber during the period of investigation should have resulted in overall price increases.[35] This did not happen. At the beginning of the fourth quarter of 1991, composite price levels were at approximately the same level as in January 1990.[36] While the pricing data do show increases at various times during the period, lumber prices did not show sustained overall increases as would otherwise be expected.[37]

Other evidence in the record also supports the conclusion that price increases should have occurred as a result of increased costs over the period of investigation. The volume of domestic lumber production declined 4.8 percent from 1990 to 1991.[38] By-product production, by its very nature, declined to a commensurate degree, yet by-product revenues increased 9 percent while lumber revenues declined 4 percent.[39] Clearly, prices for by-products increased. Similarly, plywood prices increased at a faster rate than lumber prices during the period, despite the fact that log costs are a less significant portion of plywood production costs than lumber costs, and thus increased log costs exerted less upward pressure

---

[33] Softwood Lumber at A-24, Table 2, and A-55, Table 24. In our calculation of the financial performance indicators of the domestic industry, we treated by-product revenues as a reduction in costs. While this is a reasonable method of dealing with those revenues in order to obtain an accurate picture of the performance of the industry on softwood lumber operations, it affects the calculation of cost of goods sold. By-product revenues, on a per-unit basis, increased 28.1 percent from 1988 to 1991. Id. Since we are concerned with the actual costs of producing lumber, we have not subtracted by-product revenues in our analysis of whether prices increases would otherwise have occurred. There is no evidence in the record to suggest that other factors, such as technological changes or changes in the number of producers, had any significant effect on lumber supply during the period.

[34] Memorandum EC-P-039 at 8, 21.

[35] Our determination does not depend on a precise quantification of the shifts in supply and demand. Nor do we attempt to predict a specific equilibrium market price which would have obtained as a result of those shifts. We simply conclude that, given the relative equivalence in the decline in demand and increase in industry costs, these shifts would have been expected to result in increased prices.

[36] Softwood Lumber at A-85, Figure 6. Prices for most products showed the largest increases between the fourth quarter of 1991 and the first quarter of 1992. Price increases during this period were reportedly due, at least in part, to the initiation of this investigation and Commerce's imposition of preliminary countervailing duties on March 6, 1992. Softwood Lumber at A-86 & n.89, citing Random Lengths, yardstick at 1 (March 1992). We therefore do not give much weight to those increases. See USX v. United States, 655 F. Supp. 487, 492 (Ct. Int'l Trade 1987). They do, however, demonstrate the responsiveness of prices to events in the market.

[37] We note that lumber prices respond rapidly to events affecting lumber supply. Thus, for instance, "lumber prices increased following the U.S. Government's spring 1990 decision to withhold logging permits for some federal lands in the Pacific Northwest as a means of preserving the habitat of the Northern Spotted Owl." Softwood Lumber at A-86. However, this increase in price was not sustained, despite increasing costs.

[38] Softwood Lumber at A-24, Table 2.

[39] Softwood Lumber at A-55, Table 24, A-53, Table 23.

on plywood prices.[40] On the whole, we find that the record supports the conclusion that price increases in the U.S. lumber market "would otherwise have occurred."

The question remaining for us is whether subsidized imports of Canadian lumber are a cause of the price suppression experienced by the domestic industry. Our review of the evidence convinces us that subsidized imports of Canadian lumber "prevent[ed] price increases, which otherwise would have occurred, to a significant degree."[41] In our original determination, we relied on evidence indicating that imports of subsidized Canadian spruce-pine-fir (SPF) played a significant role in the U.S. market, limiting potential increases in the prices of not only U.S. produced SPF, but other species as well.[42] In addition, we found that subsidized Canadian imports do not face the same cost pressures as the domestic industry.[43] We concluded that a comparison of the performance of U.S. lumber producers on their operations producing softwood lumber and their operations producing wood products and other building materials confirmed the conclusion that timber supply constraints and declining demand were not the only causes of injury to the domestic softwood lumber industry.[44]

In this remand determination, we find that the price suppressive effect of the Canadian imports is evidenced by a number of facts. First, comparison of price indices shows that Canadian prices tended to rise more slowly and fall more rapidly than domestic prices. Second, the price of subsidized Canadian imports, particularly SPF, has a dominant impact on lumber prices in the U.S. market. Third, the weighted average composite U.S. price in the Northern market, where Canadian import penetration is highest, is lower than that price in the Southern market, where import penetration is lower.[45] Finally, the disparity between the performance of domestic softwood lumber producers' lumber operations and their wood products and other building materials operations, supports the conclusion that declining demand and timber supply constraints do not fully account for the material injury to the domestic industry.

Comparing trends in composite price indices for U.S. and Canadian lumber indicates that, during the period of investigation, prices for imported subsidized Canadian lumber increased more slowly, and declined more rapidly, than did U.S. lumber prices.[46] In the latter part of the period of investigation, as U.S. prices showed recovery, reportedly due in part to the initiation of this investigation, prices of imported Canadian lumber continued to rise more slowly.[47] The vast majority of imported Canadian lumber is SPF.[48] Thus, trends in Canadian lumber prices are significantly influenced by trends in imported SPF prices.

---

[40] Coalition Pre-hearing brief at Figure 18. In this regard, we note that, in the preliminary investigation, Canadian respondents argued that

> [b]cause plywood does not face import competition, plywood prices provide a useful benchmark against which to compare the performance of softwood lumber in order to judge whether or not U.S. lumber prices are being suppressed or depressed by Canadian imports.

Post-conference brief on behalf of the Canadian Forest Industries Council and the Government of Canada at 15. We find it extraordinarily disingenuous of Canadian respondents to have subsequently changed their position and argued not only that cross sectoral comparison in this case is methodologically unsound, but improper as a matter of law. In our view, the particular comparison we undertook in this case is neither.

[41] 19 U.S.C. § 1677(7)(C)(ii)(II).

[42] Softwood Lumber at 31.

[43] Id. at 32-33.

[44] Id. at 33-34.

[45] See Additional Views of Vice Chairman Watson fur further discussion of the impact of the subject imports on the Northern region.

[46] Coalition Pre-hearing Brief at 61-62.

[47] Coalition brief on remand at Figure 5.

[48] Softwood Lumber at A-68.

Specific comparisons of SPF price trends and price trends for other species also show that, during the period of investigation, SPF prices fell more rapidly or increased more slowly than did prices for other species.[49] As discussed below, SPF remains the dominant species group sold in the United States. Information obtained on remand supports the conclusion that SPF prices, which are predominantly import prices, have a significant effect on lumber prices overall.[50] Producers, importers, and purchasers consistently indicated that competing quotes were important in establishing transaction prices.[51] Several Canadian producers and U.S. importers and wholesalers distributing imported Canadian lumber, i.e., primarily SPF, were identified as tending to lead prices or having a significant impact on prices in the U.S. market.[52] The majority of questionnaire respondents who identified a particular species as a reference for establishing transaction prices for sales of other species specified SPF.[53]

The Panel determined that the evidence on which we relied in concluding that subsidized Canadian SPF has a significant influence on U.S. prices, limiting potential price increases, was insufficient to support our conclusion, because it was based on information relating to a period prior to the period of investigation in this case.[54] The Panel's conclusion was based on its determination that a decline in the relative market share of SPF compared to southern yellow pine (SYP) precluded the Commission from relying on information

---

[49] Coalition Pre-hearing Brief at Appendix A, Figures 22-24.

Contrary to respondents' assertion, Canadian Complainants' Joint Brief on remand at 12, the Commission never concluded that the pricing data were not probative on the issue of causation. We did conclude in our original determination that the usefulness of the pricing data in the record was limited for the purpose of reflecting price comparisons. Softwood Lumber at 30. However, as we explicitly stated, id. we were satisfied with its accuracy, and that it reflected price trends in the market. Thus, an analysis of price trends is entirely consistent with our prior statement concerning the usefulness of the pricing data.

[50] Canadian respondents argue that the questionnaire responses obtained on remand are insufficient to support a finding of causation. Canadian Complainants' Joint Brief on remand at 11. Contrary to respondents' assumption, evidence in a title VII investigation is not limited to "actual empirical data." Id. Moreover, questionnaire responses discussing subjective matters are "data" on which the Commission may rely. Maine Potato Council v. United States, 617 F. Supp. 1088, 1090 (Ct. Int'l Trade 1985). The Commission is not required to ensure that the information on which it relies is "consisten[t] with some ambiguous level of scientific reliability." Alberta Pork Producers' Mktg. Bd. v. United States, 669 F. Supp. 445, 463 (Ct. Int'l Trade 1987). Title VII proceedings are investigatory in nature, not adjudications. H.R. Rep. No. 317, 96th Cong., 1st Sess. 77 (1979); S. Rep. No. 249, 96th Cong., 1st Sess. 100 (1979). Nothing in the statute limits the Commission to considering any particular type of evidence in making its determinations. It is the Commission's task to consider the evidence, whatever its nature, determine its probative value and weight, and make a determination. See Copperweld Corp. v. United States, 682 F. Supp. 552, 564 (Ct. Int'l Trade 1988).

[51] Memorandum INV-Q-174, Attachment A at 3, 7, 11.

[52] Canadian respondents make much of the fact that one of the companies identified in this context is [* * *], a domestic producer. However, [* * *

]

[53] Memorandum INV-Q-174 (Oct. 14, 1993), Attachment A at 1-2, 5, 9. Of 122 responses for different markets where a species was identified as a reference for establishing prices, 93 responses identified SPF.

[54] Panel determination at 41-42.

concerning the significance of SPF prices from a period when SPF held the largest share of the market.[55]

With all respect for the Panel's consideration of the record evidence, we find that market conditions have not changed since the time the studies on which we relied were conducted, so as to invalidate the conclusion that SPF prices have a significant influence. The Panel found that a "reversal" in market share between SPF and southern yellow pine (SYP) indicated a significant change in market conditions.[56] This reversal, however, is illusory. Between 32 and 39 percent of all SYP produced is, and has been since 1986 and throughout the period of investigation, pressure treated.[57] Although we did not exclude pressure treated lumber from the like product, it does not compete directly with other lumber for the same applications.[58] Pressure treated lumber occupies a unique sector of the lumber market, with specific applications, for which untreated lumber is not often used. Most other lumber, including specifically SPF, is not suitable for pressure treating, and thus does not compete with SYP for use as pressure treated lumber.[59] While SYP which is not pressure treated does compete with other species for the same uses, it does not occupy as significant a share of the softwood lumber market as SPF.[60] Taking this into account, SPF has accounted for the single largest portion of U.S. consumption of softwood lumber throughout the period of investigation, as it did at the time the studies on which we relied were written.[61]

The record demonstrates that the proportion of production accounted for by each of the various species of softwood lumber has remained stable in both the United States and Canada since 1986, including the period of investigation.[62] In addition, questionnaire responses do not indicate that there have been significant changes in the market that would lessen the importance of SPF identified in the studies on which we relied.[63] Price correlations on the record demonstrate that the prices of various species tend to move together, maintaining fairly constant differentials.[64] As the single largest species consumed in the U.S. market, over 75 percent of which is subsidized Canadian imports,[65] SPF prices continue to have a significant influence on prices in the U.S. market.

As discussed above, SPF prices, and Canadian lumber prices in general, fell more rapidly and increased more slowly during the period of investigation than did U.S. lumber prices. Canadian producers did not experience the severe cost/price squeeze experienced by the domestic industry. Canadian producers' log costs did not increase as steeply as did the domestic industry's.[66] Consequently, prices of subsidized Canadian lumber did not have to increase as much to keep pace with increases in Canadian log costs.[67] Since, as we found in

---

[55] Id. at 42.
[56] Id.
[57] Softwood Lumber at A-31.
[58] Thus, for instance, we did not consider prices for pressure-treated SYP.
[59] More than 80 percent of all pressure treated lumber produced in the United States is SYP. Softwood Lumber at A-31, Table 6 n.5.
[60] Indeed, excluding pressure treated SYP, SYP at best occupies third place in the market, behind SPF and Douglas fir. Softwood Lumber at A-31, Table 6.
[61] Softwood Lumber at A-8.
[62] Softwood Lumber at A-31, Table 6, and A-66, Table 33.
[63] Of the 101 market area responses identifying a reference species, 39 identified changes in the reference species. Of those, 29 referred to increased dominance, market share, or value of SPF.
[64] Softwood Lumber at 28.
[65] Softwood Lumber at 31 & n.108.
[66] Softwood Lumber at 32.
[67] As we observed in our original determination, one obvious and relevant factor affecting Canadian lumber producers' log costs is the subsidization found by Commerce, which lowers their lumber production costs. As a result, Canadian producers are able to sell lumber at lower prices than they

(continued...)

our original determination, prices for different species tend to move together, maintaining fairly consistent price differentials, the effect of subsidized Canadian imports is to act as a brake on rising prices, and a weight on falling prices.

Further, we compared weighted average composite U.S. lumber prices in the different regions of the United States, for which we have import penetration ratios. In making this comparison, we note that the basket of lumber species in the West, the Los Angeles market, is composed of a limited number of species that are not comparable to the baskets in the other regions. We find that the average U.S. composite lumber price in the Northern market, comprised of Chicago and Boston, was $262.48, while in the Southern market, comprised of Atlanta, Baltimore, and Dallas, the price was a significantly higher $270.40.[68] The record shows that, in 1991, the import penetration in the North was 42.7 percent, while the import penetration in the South was a significantly lower 29.9 percent.[69] This correlation between lower prices and higher imports supports our conclusion of the price suppressive effects of the imports.

These price effects support the conclusion that subsidized imports are a cause of the price suppression suffered by the domestic industry. As noted above, suppression of relatively modest price increases can be significant. In the lumber industry, because demand is inelastic, higher prices would have had little effect on sales volumes. However, even a relatively modest increase in prices would have significantly increased the industry's revenues. We conclude that the significant volume of subsidized imports of Canadian lumber suppressed domestic prices to a significant degree, causing material injury to the domestic industry.

3. Other factors do not fully account for material injury to the domestic industry.

In our original determination, we found that

> The evidence of price suppression caused by the subject imports demonstrates that the recession and timber supply constraints are not the sole causes of material injury to the domestic industry. A comparison of the performance of U.S. producers on their softwood lumber operations and their operations producing other wood products and building materials confirms that conclusion.[70]

The Panel observed that it had "serious concerns as to the legal authority per se of the Commission to conduct cross-sectoral comparisons."[71] The Panel also found our methodology in conducting the cross-sectoral comparison in this case to be seriously flawed.[72] Apparently the Panel misunderstood both the nature of the so-called cross-sectoral comparison set forth in our original determination, and the purpose of that comparison.

We agree with the panel that a comparison of the performance of the specific domestic industry under investigation with that of some other industry, for the purpose of determining whether the industry under investigation is materially injured, or whether

---

[67] (...continued)
would in the absence of the subsidy. Estimates of the reduction in Canadian lumber prices as a result of the subsidies found by Commerce range from 3.1 percent to 9.8 percent. Memorandum INV-Q-174, Attachment C at 2. Estimates of the reduction in domestic prices caused by subsidized Canadian imports range from 1.1 percent to 4.5 percent. Id. See also, Memorandum EC-P-039 at 28, 31, Tables 1 and 4.

[68] Memorandum INV-Q-174, Attachment B. Comparing composite prices in regional markets minimizes differences in the baskets of species used to calculate those prices.

[69] Softwood Lumber at A-28, Table 4.

[70] Softwood Lumber at 33.

[71] Panel determination at 20.

[72] Id.

material injury is by reason of imports, is inappropriate. This was not our analysis in the original determination. We do believe, however, that certain comparisons may aid the Commission in evaluating the arguments and evidence on the record.

It was precisely the concern expressed by the Panel that the Commission noted in its preliminary determination.[73] The Panel cited the Commission's preliminary opinion as indicating the Commission's "reservations" about cross sectoral comparison as a general legal matter. Contrary to the Panel's apparent belief, we did not change our views from expressing "reservations" about a cross-sectoral comparison in the preliminary investigation to "embracing" such a comparison in our final determination.[74]

In the preliminary determination, arguments were made by both the domestic industry and the Canadian respondents concerning whether the domestic industry was materially injured, based on comparisons of its performance to the performance of other construction-related industries. The Commission noted that it did "not believe these comparisons clearly and convincingly demonstrate that the domestic industry is not materially injured."[75] It was in this regard that we cited the legislative history referred to by the Panel, which we believe precludes the Commission from determining whether a domestic industry is materially injured by comparing the performance of the domestic industry under investigation to the performance of some other industry. As Congress noted, "the condition of an industry should be considered in the context of the dynamics of that particular industry sector, not in relation to other industries or manufacturers as a whole."[76]

In our final determination, we did not compare the performance of the lumber industry with the performance of other industries to determine whether the lumber industry was materially injured. Indeed, we did not compare the performance of the lumber industry with the performance of other "industries" at all. We also did not rely on the cross-sectoral comparison to "confirm" that Canadian imports of lumber in part caused the price suppression suffered by the domestic industry.[77] Rather, we compared financial data regarding the softwood lumber operations and the "wood products and other building materials operations" of the domestic softwood lumber producers who responded to the Commission's questionnaires.[78] Simply, the purpose of this comparison was to evaluate Canadian respondents' proposition that timber supply constraints and the downturn in housing starts were the sole causes of material injury to the softwood lumber industry. The comparison indicates that the proposition fails.

Because the Commission does not weigh various causes of injury, for the Commission to reach a negative determination, it must effectively determine that material injury to the domestic industry is fully accounted for by factors other than subsidized

---

[73] Softwood Lumber from Canada, Inv. No. 701-TA-312 (Preliminary), USITC Pub. 2468 (Dec. 1991) (hereinafter Softwood Lumber Preliminary) at 14-15.

[74] Panel determination at 72. We also note the different standard applicable to a preliminary negative determination, which requires clear and convincing evidence of no material injury to the domestic industry, and a final determination, which requires evidence a reasonable mind could find adequate to support a conclusion. Clearly, evidence which is insufficient to support a preliminary negative determination can be sufficient to support a final determination.

[75] Softwood Lumber Preliminary at n. 56.

[76] H.R. Rep. No. 40, Pt. 1, 100th Cong., 1st Sess. (1987) at 128 (emphasis added). Accord S. Rep. No. 71, 100th Cong., 1st Sess. (1987) at 117 (same language). Although the Committees were specifically addressing provisions in the predecessor bills to the Omnibus Trade and Competitiveness Act of 1988 which effected the amendment, the specific proposed statutory language is the same as that actually enacted, compare section 154 of H.R. 3 and section 330 of S. 490 with 19 U.S.C. § 1677(7)(C)(iii), and Congress adopted the legislative histories of the predecessor bills as the legislative history of the Omnibus Trade and Competitiveness Act. Pub. L. No. 100-418 § 2, 102 Stat. 1107, 1119 (1988).

[77] See Panel determination at 63.

[78] Most companies in this group of producers reported operations producing both lumber and wood products and other building materials. Their wood products operations fared better than their lumber operations despite common management and ability to purchase softwood logs.

imports. The Canadian respondents argued throughout this investigation that the admitted material injury to the lumber industry was exclusively due to factors other than the impact of imports, specifically timber supply constraints and the downturn in housing starts. We believed, and continue to believe, that comparison of the financial performance of the same producers in two areas of their operations subject to the effects of the factors asserted to be the sole causes of injury to the domestic industry under investigation, is relevant and probative in assessing the Canadian respondents' argument.

The Panel also expressed concern about the methodology underlying the comparison in our original determination. Because the Panel apparently misunderstood our comparison, it is not clear that those concerns are relevant in the context of what we actually did. Nonetheless, we feel constrained to point out that the collection of information concerning the financial performance of domestic softwood lumber producers on their operations producing wood products and other building materials was not ad hoc, as the Panel suggested.[79] The Commission's request for information concerning wood products and other building materials was specifically designed to seek information regarding production operations closely related to lumber production.

The information concerning operations on wood products and other building materials was gathered in the normal course of this investigation. It is standard practice for the Commission, in addition to gathering financial information specific to production of the like product, to also gather financial information concerning production of all products in the establishments in which the like product is produced. In this investigation, the "establishment" information sought was specifically defined. The Commission asked producers to report:

> revenues and related cost information on wood products and building materials. Wood products and building materials are those products corresponding to standard industrial code 24 -- lumber and wood products, except furniture.[80]

This definition clearly does not include non-wood products.

The questionnaire responses provide reliable data on which to base our comparison. Respondents to Commission questionnaires are required to certify that the information provided is "accurate and complete to the best of that person's knowledge."[81] A comparison of the information reported to the Commission for wood products and building materials and the annual reports of reporting companies demonstrates that producers complied with the Commission's instructions by not reporting revenues and costs attributable to non-wood products produced by corporate divisions which also produce the wood products and other building materials about which the Commission sought information.[82] Thus, there is no reason to believe that domestic producers reported information for anything other than the specific products about which the Commission inquired.

The products making up the lion's share of the category wood products and other building materials are in fact wood products, used in the construction industry -- plywood, oriented strand board, particleboard, panelboard, and veneers. Thus, timber supply constraints, and the consequent increased cost of softwood logs, will clearly have an effect on the costs of production in both areas of operations, particularly by the same producers. Moreover, these products compete with softwood lumber for certain of the same uses.[83] Domestic producers consistently emphasized that the housing industry is the primary source

---

[79] Panel determination at 71.

[80] Producers' questionnaires at page 21.

[81] 19 U.S.C. § 1677e(a). A false certification subjects a respondent to criminal liability under 18 U.S.C. § 1005.

[82] For instance, producers reported different amounts as "building products sales" in their annual reports than they reported as sales of wood products and other building materials to the Commission.

[83] Softwood Lumber at A-9 n.24. While these products have uses in applications beyond residential construction, such as furniture and cabinets, softwood lumber is also used in those applications.

of demand for wood products and other building materials.[84] The evidence supports the conclusion that wood products and other building materials were affected by the same macroeconomic factors as softwood lumber, timber supply constraints and the downturn in housing starts.

We acknowledge that we did not measure the precise degree to which these factors affected domestic softwood lumber producers' operations producing wood products and other building materials.[85] However, we also did not measure the precise degree to which these factors affected these same producers' softwood lumber production. Because we are directed not to weigh causes, the relative degree to which any factor affects the performance of the domestic industry is not determinative in our analysis. Thus, it is unnecessary to determine the precise degree to which various factors may be adversely affecting the industry. Our conclusion was not based on differences in the degree to which timber supply constraints and the downturn in housing starts affected domestic producers' operations producing softwood lumber and wood products and other building materials, but on the fact that a disparity existed between the financial performance of the same producers in these two sectors of their operations. That disparity suggests that some other factor is adversely affecting the producers' performance on their softwood lumber operations, in addition to the timber supply constraints and downturn in housing starts proposed by Canadian respondents as the sole causes of material injury.

One clear difference between domestic producers' softwood lumber operations and operations producing wood products and other building materials is that these domestic producers face little competition from imports in their sales of wood products and other building materials. As we noted in our original determination, there is a prohibitive tariff on imports of plywood. Plywood constitutes a significant proportion of domestic lumber producers' production of wood products and other building materials. Thus, one factor which could be adversely affecting domestic producers' softwood lumber operations, but not their operations producing wood products and other building materials, is imports of subsidized Canadian lumber. Thus, the cross-sectoral comparison corroborates the proposition that timber supply constraints and the downturn in housing starts are not the sole causes of material injury to the domestic softwood lumber industry.

We are troubled by the Panel's conclusion that our original determination failed to demonstrate the "actual price suppressing effect" of spruce-pine-fir (SPF), and its conclusion that it was "unable to discover any actual evidence of injurious shifts in market share, rising import volume, decreasing prices, underselling, lost sales, or even price leadership."[86]

---

[84] "The company's building products business is affected by the level of housing starts, the level of repairs, remodeling and additions..." Georgia Pacific 1991 annual report at 17 (attached to producers' questionnaire). "[C]onsumer confidence in the condition of the U.S. economy, along with mounting problems affecting many of the nation's financial institutions which starved developers of needed project capital, had very negative effects on the building products industry." Louisiana Pacific 1991 annual report at 6 (attached to producers' questionnaire). "[A] multitude of factors converged to make 1991 a particularly difficult year. Our earnings were depressed in an economic climate that included the lowest rate of U.S. housing starts since WW II, a 20 percent decrease in Japanese housing starts..." Weyerhaeuser 1991 annual report at 3 (attached to producers' questionnaire). "The Company's building products businesses are dependent on repair-and-remodel activity, housing starts, and commercial and industrial building..." Boise Cascade 1990 10-K at 1 (attached to producers' questionnaire). "[P]rices for timber and wood products are expected to improve. This stems from continued constraints on public timber supplies and strengthening demand for wood products as housing and repair and remodeling activity pick up in 1992." International Paper 1991 annual report at 21 (attached to producers' questionnaire).

[85] See Panel determination at 71.

[86] Panel determination at 53. Merely because the Panel concluded that the Commission has not made affirmative determinations in the past without at least one of these factors being present does not preclude the Commission from reaching an affirmative determination in this case. As noted above, Commission determinations are based on the evidence and arguments in each case. Asociacion

(continued...)

Although the Panel recognized that the Commission is not required to assess price suppression in any particular manner,[87] its analysis and decision might suggest that unless there is direct evidence of the price effects of subsidized imports of the sort anticipated by the Panel, the Commission is precluded from concluding that price suppression is caused by the imports under investigation.

The panel's discussion of the Commission's price suppression analysis in this case highlights the particular problems inherent in a title VII case involving highly substitutable goods traded in a highly competitive integrated North American market. The nature of such a market makes direct evidence of price effects of imports in the United States extremely difficult, if not impossible, to obtain.[88] Thus, the Panel appears to suggest that the Commission cannot reach an affirmative determination when there is only indirect evidence of the causal link between unfair imports and demonstrable price suppression. This suggestion would effectively read price suppression out of the statute in cases involving a highly competitive market for a commodity product, where the only obtainable evidence of the price effects of imports may be indirect. This result would be contrary to the intent of Congress,[89] and contrary to a sound understanding of competitive markets for commodity products. Contrary to the implications of Canadian respondents' arguments on remand, we do not believe the Panel's decision in this case necessarily leads to this troubling conclusion, or that the Panel has foreclosed the possibility of an affirmative determination on remand in this case.[90] We believe the Panel's insistence on "concrete evidence" of "verifiable events",[91] in light of the intent of the statute, is more appropriately read so as not to preclude affirmative determinations when the conditions of competition in the industry result in only inferential evidence being available.[92]

---

[86] (...continued)
Colombiana de Exportadores de Flores v. United States, 693 F. Supp. 1165, 1169 (Ct. Int'l Trade 1988). Thus, the Commission may be persuaded in one case to accept an argument rejected in another, on the basis of the evidence.

[87] Panel determination at 53.

[88] We note that Red Raspberries from Canada, Inv. No. 731-TA-196 (Final), USITC Pub. 1707 (June 1985) did not involve the large number of domestic producers and importers found in the lumber industry. That the Commission was able to identify a specific Canadian price leader based on specific price data is not surprising, given that only about half the 11 Canadian raspberry packers exported to the United States in any year of the period of investigation. Id. at A-40. By contrast, in this case, the number of buyers and sellers in the market makes gathering such specific price data well nigh impossible.

[89] Congress did not limit the type of evidence on which the Commission may rely in making an affirmative determination.

[90] We assume that the Panel is not suggesting that the Commission subvert Congressional intent that we issue an affirmative determination where the best evidence available warrants.

[91] Panel determination at 19, 29-30. We note that this language is drawn from the CIT's decision in Republic Steel Corp. v. United States, 591 F. Supp. 640, 646 (Ct. Int'l Trade 1984). The Panel recognized that Republic Steel involved the standard of determination in preliminary investigations, and that the Court's holding was reversed in American Lamb v. United States, 785 F.2d 994 (Fed. Cir. 1986). The Panel observed that the Courts comments on the "evidentiary requirements for a final determination remain unchallenged." Of course, since those comments were dicta, and Republic Steel itself could not be appealed, there was no opportunity to challenge the Court's comments. No other decision has since held that Commission final determinations are subject to these requirements. Indeed, Commission determinations are routinely affirmed by the CIT despite acknowledged shortcomings in the evidence on the record. E.g. Iwatsu Electric Co., Ltd. v. United States,, 758 F. Supp. 1506 (Ct. Int'l Trade 1991). In part, this is because the Commission is required to make its determinations within the statutory time frame, and is therefore entitled to rely on the best evidence available. Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556 (Fed. Cir. 1984).

[92] Indeed, as a general legal matter, the type of evidence on which the Commission may rely in a title VII investigation is not limited. For instance, in Matsushita Elec. Indus. Corp. v. United States 750 F.2d 927 (Fed Cir. 1984), the Court held that the Commission was entitled to rely on
(continued...)

D. Quebec is not entitled to a separate injury test

The Panel remanded the Commission's finding that the Province of Quebec was not entitled to a separate injury determination in this case. The Panel held that the Commission "failed to provide an adequate explanation of this aspect of its determination so as to permit meaningful review by the Panel."[93] The Panel noted that it reviewed the arguments of Commission counsel with respect to this issue, but concluded that those arguments were not "expressly evident" in our original disposition of this issue. Therefore, the Panel held that the Commission "failed to fulfill its obligation to provide an adequate explanation for its finding that imports of the subject merchandise from Quebec are not entitled to an injury determination separate from that accorded subject products imported from elsewhere in Canada" and remanded this aspect of our determination with instructions "to articulate a satisfactory explanation of [our] finding with respect to the treatment of imports from Quebec."[94]

Apparently, the Panel was not satisfied with our brief disposition of this issue. Our disposition was brief because we considered Quebec's arguments specious, and did not believe they merited more attention than we gave them in our opinion. Quebec asked the Commission to make a determination for which there was no basis in the law, which was without precedent in Commission practice, based on arguments which had already been rejected by Commerce.

Our disposition of this issue reflected our conclusion that, since Commerce, after considering and rejecting the arguments Quebec urged before the Commission, had included imports from Quebec in the scope of its final affirmative determination "[t]here is no basis for a separate injury analysis with respect to imports from the Province of Quebec in this investigation."[95] Nonetheless, in view of the Panel's instructions, we discuss below the full basis of our determination.[96]

The imports that the Commission considers in its injury analysis are controlled by Commerce's final determination. In this case, Commerce determined that imports of softwood lumber from Canada, including the Province of Quebec, were subsidized. Commerce acted pursuant to the provision of the statute that requires it to "make a final determination of whether or not a subsidy is being provided with respect to the merchandise [subject to the investigation.]"[97] The statute also requires the Commission to determine whether

(A) an industry in the United States--
(i) is materially injured, or
(ii) is threatened with material injury, or

---

[92] (...continued)
circumstantial evidence to infer intent. Hearsay evidence, which is generally not admissible as proof in a trial, may nonetheless, standing alone, amount to substantial evidence sufficient to support an administrative determination. Richardson v. Perales, 402 U.S. 389 (1971). Accord, Sanders v. United States Postal Service, 801 F.2d 1328, 1331 (Fed. Cir. 1986)(hearsay evidence may be substantial evidence if there are circumstances which give it credibility and probative value to a reasonable mind); Hayes v. Department of the Navy, 727 F.2d 1535, 1538 (Fed. Cir. 1984) (hearsay document not in evidence may be relied upon in administrative proceeding).

[93] Panel determination at 74.

[94] Panel determination at 77.

[95] Softwood Lumber at 26 n.90.

[96] We note that Quebec challenged the Commerce determinations referred to in our original views in this case. The Binational Panel reviewing the Commerce determination affirmed Commerce's refusal to exclude Quebec from the investigation at the initiation stage. That Panel also affirmed Commerce's refusal to apply a province specific subsidy rate, which was based, inter alia, on Commerce's rejection of Quebec's argument that it should be treated as a "country" under the countervailing duty law. Certain Softwood Lumber Products from Canada, USA 92-1904-1 (May 6, 1993) at 133-43.

[97] 19 U.S.C. 1671d(a)(1).

(B) the establishment of an industry in the United States is materially retarded, by reason of imports, or sales (or the likelihood of sales) for importation, of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a) of this section.[98]

At the time we made our final determination in this case, the "merchandise with respect to which the administering authority has made an affirmative determination under subsection (a) of this section" comprised all exports of softwood lumber from Canada, as defined in the "Scope of Investigation" section of Commerce's determination, unless specifically excluded.[99] Imports from the Province of Quebec were not excluded, and the Commission was therefore bound by the plain language of the statute to include those imports in its consideration of whether subsidized imports of softwood lumber from Canada were a cause of material injury to the domestic industry.[100]

Quebec argued before the Commission that, notwithstanding the plain language of the statute and Commerce's determination, Commerce had in fact "found" that Quebec does not subsidize softwood lumber.[101] Based on that counterfactual assertion, Quebec argued that the Commission is bound by law to find no injury from merchandise that has been found to be fairly traded.[102]

Commerce did not make a separate subsidy determination with respect to Quebec, and certainly did not find imports from Quebec were not subsidized. Quebec's argument was and remains entirely specious as a matter of fact. Moreover, as a matter of law, the Commission lacks authority to make the determinations that would be necessary to grant Quebec a separate injury test in this investigation.

Quebec's argument would require the Commission to determine that certain imports are not subsidized despite the fact that Commerce has made a final affirmative determination with respect to those imports. The Commission has no authority to go behind Commerce's affirmative final determination which includes imports from Quebec, and conclude for itself that imports from Quebec are fairly traded.

The statute explicitly grants authority to determine whether imports are subsidized only to Commerce. Nor can the Commission "correct" any aspect of a Commerce determination.[103] The bifurcated system that the statute creates cannot operate effectively if

---

[98] 19 U.S.C. §1671d(b)(1) (emphasis added).

[99] Excluded from Commerce's affirmative final determination were imports from the provinces of Prince Edward Island, Nova Scotia, New Brunswick, and Newfoundland, and imports from certain named companies. 57 Fed. Reg. 22570, 22623 (May 28, 1992).

[100] The Court of International Trade has specifically held that the Commission may not exclude from its injury analysis imports which are included in Commerce's affirmative determinations.

> Because Sony's imports were part of the class or kind of merchandise for which Commerce had made an affirmative determination, the Commission was required to include such imports in its injury investigation.

Sony Corporation of America v. United States, 712 F. Supp. 978, 984 (Ct. Int'l Trade 1989) (emphasis added).

[101] Supplemental Pre-hearing Brief of the Gouvernement du Quebec and the Government of Canada at 1, 4; Quebec Post-hearing Brief 1-24.

[102] We agree that the Commission is precluded from considering fairly traded imports in its injury analysis. The Commission regularly excludes from the imports it considers those imports as to which Commerce has made a negative determination and excluded from its determination. The Commission has been upheld in this regard. Algoma Steel Corp. v. United States, 688 F. Supp. 639 (Ct. Int'l Trade 1988), aff'd, 865 F. 2d 240 (Fed. Cir.), cert. denied, 492 U.S. 919 (1989). However, in those situations, the Commission is specifically deferring to Commerce's exclusion of certain imports subject to investigation from its affirmative determination. Quebec's argument in this case asks the Commission to determine that certain imports are not subsidized despite the fact that Commerce had made a final affirmative determination with respect to those same imports.

[103] Thus, for example, the Commission has consistently disavowed any authority to determine whether a petitioner has "standing," that is, whether the petition was filed "on behalf of" a domestic

(continued...)

one agency revisits determinations that the statute delegates to the other.[104] Conversely, the Commission's reviewing courts have specifically directed the Commission to accept the terms of Commerce's determinations as to which imports are unfairly traded.[105]

Quebec cited Borlem S.A.-Empreedimentos Industriais v. United States, 913 F.2d 933 (Fed. Cir. 1990) for the proposition that the Commission has the authority to "correct" Commerce's errors. Borlem did not involve a Commission correction of a Commerce error. In the investigation underlying Borlem, Commerce corrected an error in its own determination, and the Commission initially concluded that it lacked authority to reconsider its own determination to take into account Commerce's action.[106] On appeal, the Commission was reversed. The Court held that reconsideration by the Commission merely required the Commission to take account of Commerce's corrected determination in making its own re-determination, and thus did not involve second-guessing Commerce. Thus, Borlem itself stands for the proposition that the Commission must effectuate the determination of Commerce as to which imports are unfairly traded. Borlem cannot be read as authorizing the Commission to second guess Commerce in the manner suggested by Quebec's argument.

Similarly, the fact that Commerce on occasion considers issues that are traditionally the Commission's province, such as like product, does not involve the intrusion of one agency in the other's province. Commerce's consideration of like product and industry is for its own purposes, principally in order to carry out its responsibility to determine whether a petition is filed "on behalf of an industry." Moreover, Commerce's determinations in this regard do not bind the Commission,[107] and do not intrude on the Commission's consideration of the same issues in the same investigation, even if the agencies reach disparate

---

[103] (...continued)
industry. 19 U.S.C. § 1671a(c) grants Commerce the authority to determine whether a petition is sufficient, including whether the petition is filed "on behalf of" the domestic industry. The Federal Circuit has held that the Commission's interpretation of the statute as requiring it to defer to Commerce on the issue of "standing" is reasonable. Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d at 665 n.6. See Minebea Co., Ltd. v. United States, Appeal No. 92-1289 (Fed. Cir., January 26, 1993) (confirming that it is Commerce's responsibility to determine "standing" and declining to remand the case to Commerce to reconsider its determination in light of information compiled by the Commission during the injury phase of the investigation, holding that "nothing in the antidumping laws requires [Commerce] to consider data assembled by the [Commission]."). Id., Slip op. at 7.

[104] Congress has enacted an "intricate administrative machinery" which has the unique feature of allocating responsibility to two agencies. Algoma Steel Corp. Ltd. v. United States, 865 F.2d at 241, cert. denied, 492 U.S. 919. Thus, unlike the situation with other agencies, in determining whether the Commission has authority to undertake an action, the overall statutory scheme and the explicit grants of authority for two agencies must be kept in mind.

[105] Algoma Steel Corp., Ltd. v. United States, 688 F. Supp. 639, aff'd, 865 F.2d 240, cert. denied, 492 U.S. 919; Sony, 712 F. Supp. 978.

[106] In the investigation underlying Borlem, Commerce had, on reconsideration, excluded one of two foreign producers from its affirmative dumping determination, thus changing the volume of unfairly traded imports. Commission reconsideration did not affect in any way Commerce's re-determination; rather, it involved the Commission determining whether the domestic industry was materially injured by a different volume of unfairly traded imports than had originally been considered. Thus, Borlem represents the converse of the situation here, where Commerce specifically declined to exclude imports from Quebec from its final affirmative determination.

[107] Citrosuco Paulista S.A. v. United States, 704 F. Supp. 1075 (Ct. Int'l Trade 1988). In the investigation underlying Citrosuco, Commerce had made determinations concerning like product, domestic industry, and related parties in considering "standing," and the Commission had reached different conclusions on those issues in its injury determination. Both Commerce's and the Commission's determinations were affirmed by the Court.

conclusions.[108] By contrast, a determination by the Commission that imports from Quebec are not subsidized would clearly intrude on Commerce's final affirmative determination, which is within Commerce's exclusive authority to determine whether subsidies exist, and the rate of subsidization.[109]

There is simply no support for the proposition that the Commission may determine that imports Commerce has found to be subsidized are fairly traded for purposes of the Commission's injury determination in the very investigation in which Commerce issued an affirmative final determination.

Quebec also argued that the Commission has the authority to consider imports of lumber from Quebec separately, and find that they do not materially injure the domestic industry. Quebec based this argument on the assertion that as a political subdivision of Canada, Quebec is a "country" pursuant to 19 U.S.C. § 1677(3), that it is moreover a "country under the Agreement" for purposes of application of the injury test, and that it is consequently entitled to a separate injury determination. Nothing in the statute suggests, however, that the Commission may rely on this provision to vary the scope of imports considered in its injury analysis from the scope of imports subject to Commerce's affirmative determination.

Moreover, the statutory definition of "country" is intended to allow Commerce, the "administering authority," to define country in various ways in countervailing duty cases in recognition of the fact that the national government of a country need not be the authority which grants and administers a subsidy program.[110] In this case, Commerce specifically considered and rejected Quebec's argument that it is a country. That determination was affirmed on review.[111]

Foreign governments might seek to evade application of U.S. countervailing duty law by having some authority other than the national government administer subsidy programs. In the absence of authority to treat political subdivisions, such as provinces or states, as well as customs unions, such as the European Community, as "countries" for purposes of countervailing duty investigations, the United States would be unable to remedy such

---

[108] In applying this statute, ITC does not look behind ITA's determination, but accepts ITA's determination as to which merchandise is in the class of merchandise sold at LTFV. ITC, on the other hand, determines what domestic industry produces products like the ones in the class defined by ITA and whether that industry is injured by the relevant imports. This division of labor has been upheld even where it has resulted in decisions which are difficult to reconcile, as when the class of merchandises found by ITA to be sold at LTFV affects several industries, not all of which are found by ITC to be materially injured. The division of labor cannot be ignored.

Algoma Steel Corp. v. United States, 688 F. Supp. 639, 644 (Ct. Int'l Trade 1988) (citations omitted) (emphasis added).

[109] Even in threat of material injury cases, where the statute requires the Commission to consider the nature of the subsidy, the Commission is not authorized to conclude that imports within the scope of Commerce's affirmative determination do not benefit from a subsidy. 19 U.S.C. § 1677(7)(F)(i)(I) requires the Commission to consider "such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the subsidy is an export subsidy inconsistent with the Agreement)."

[110] This is consistent with Commerce's authority to define the scope of the investigation, that is, the imported articles with respect to which the Commission makes the injury determination. In making that determination, Commerce also defines the source of those imports, and may include within the scope of investigation imports that have a different "country of origin" for Customs marking purposes as imports subject to investigation. E.g. Initiation of Antidumping Duty investigation: Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea, 57 Fed. Reg. 21231 (1992)("Processed wafers produced in Korea but packaged in a third country are included in the scope; however, wafers produced in a third country and assembled or packaged in Korea are not included in the scope." The country of assembly or packaging is the "country of origin" of semiconductors for Customs country of origin marking purposes.)

[111] Softwood Lumber Products from Canada, USA 92-1904-1 (May 6, 1993) at 139-143.

practices by issuing countervailing duty orders.[112] However, the statute does not authorize the Commission to determine what constitutes a "country" for purposes of a countervailing duty investigation. In particular, the statute does not authorize the Commission to define "country" differently than Commerce in the same investigation. As discussed above, the Commission has no authority to revisit the determinations of Commerce.

Under 19 U.S.C. § 1677(3):

> The term "country" means a foreign country, a political subdivision, dependent territory, or possession of a foreign country, and, except for the purposes of antidumping proceedings, may include an association of 2 or more foreign countries, political subdivisions, dependent territories, or possessions of countries into a customs union outside the United States.

There is very little legislative history for this provision. However, what little there is suggests that the authority to define a "country" for purposes of any given title VII investigation rests with Commerce, and that the definition of "country" in countervailing duty cases to include a political subdivision, such as the province of Quebec, was intended to ensure that the countervailing duty law is not circumvented by foreign governments.

> The administering authority will determine, on the basis of the facts in each case, what entity or entities will be considered the "country" for the purposes of a title VII proceeding. . . . In countervailing duty proceedings, a subsidy granted by a political subdivision of a foreign country, such as a province or a development authority, or by an institution of a customs union, will be considered to be granted by a "country."[113]
>
> In a countervailing duty case the term 'country' means a foreign country or a political subdivision, dependent territory or possession thereof, and may include a customs union. (statute) Thus, a subsidy may be granted by a political subdivision of a foreign country, such as a province or a development authority, or by an institution of a customs union. (statute) The Authority would consult with such governmental bodies or institutions as are appropriate to the case. (practice).[114]

Quebec made most of the arguments it raised before the Commission during its presentations to Commerce. Commerce rejected Quebec's arguments.[115] Commerce did not treat the Province of Quebec as a "country" in this investigation. Republic Steel Corp. v. United States,[116] clearly indicates that the Commission is bound by Commerce's determination of country. In Republic, Commerce had initiated investigations on imports from member countries of the EC, and investigated subsidies granted by the EC in the context of those national investigations. On review, the CIT held that Commerce had erred by failing to initiate a separate investigation with regard to the EC, citing the legislative history provision which states that the EC is a country for purposes of the countervailing duty laws. The Court noted that "[b]y not treating the merchandise subsidized by the EC in separate investigations [Commerce] left the [Commission] with the understandable impression that the

---

[112] Quebec Complainants' suggestion that the Commission has made independent "country" determinations in according an injury test to the European Community, Brief at 52-53, is incorrect. In the cases cited by Quebec Complainants, Commerce had determined that imports from the EC were subsidized, effectively determining that the EC is a "country." Consequently, the Commission, as it must, based its injury determination on analysis of the effects of all the imports with respect to which Commerce made its affirmative determination. In no case has the Commission independently concluded that the EC is a "country."

[113] S. Rep. No. 249 at 81 (emphasis added).

[114] H. Doc. No. 153, Part II, Statements of Administrative Action, 96th Cong., 1st Sess. 431 (1979). Congress explicitly approved the Statements of Administrative Action in enacting the Trade Agreements Act of 1979, 19 U.S.C. § 2503(a), and they should be understood as part of Congress' understanding of the provisions of the Act.

[115] 57 Fed. Reg. at 22579.

[116] 544 F. Supp. 901 (Ct. Int'l Trade 1982).

[Commission] could only measure injury on the basis of the subsidized production from each country separately."[117] Thus, the Court clearly indicated that Commerce defines "country" for purposes of an investigation, and that the Commission is bound by Commerce's determination in that regard. It is clear that Commerce did not define Quebec as a country in this investigation. The Commission is precluded from reaching a different determination in this regard.

Even assuming for the sake of argument that the Commission had the authority to determine that Quebec is a "country" for purposes of this investigation, and determined that Quebec were a country, it would not qualify as a "country under the Agreement" and would not be entitled to an injury test.[118]

In the absence of an injury test, even though imports originating in Quebec are duty-free, they would be subject to countervailing duties based on Commerce's affirmative final determination,[119] unless Commerce notified the Commission that the international obligations of the United States require a determination of injury.[120] Commerce did not notify the Commission of the need to make an injury determination with respect to imports of softwood lumber from the Province of Quebec. Even if the Commission had a different view of the matter, this would have no bearing on Commerce's determination, or the issuance of a countervailing duty order based on that determination.

Finally, even if Quebec were entitled to a separate injury test, treatment of it as a separate country would not change our determination. Imports from Quebec are subject to the investigation, and as set forth above, the Commission is bound by Commerce's final determination that those imports are subsidized. The statute requires the Commission to cumulatively assess the volume and effect of imports from two or more countries subject to investigation if they compete with each other and the domestic like product.[121] There is nothing in the record to even suggest that imports from Quebec do not compete with the domestic like product and other Canadian imports.[122] Consequently, based on a cumulative analysis of the volume and price effects of imports of subsidized lumber from Quebec and the remainder of Canada,[123] we would make the same determination even if Quebec were

---

[117] Id. at 904.

[118] Section 701(b) of the 1979 Act (19 U.S.C. § 1671(b) defines "country under the Agreement" with reference to the provisions of 19 U.S.C. § 2503. The Province of Quebec does not meet the requirements of Section 2503 to qualify as a "country under the Agreement." Quebec has not accepted the obligations of the Agreement on Subsidies and Countervailing Measures (the Subsidies Code). 19 U.S.C. § 2503(2)(A). Nor has the President determined that Quebec should not otherwise be denied the benefits of the Subsidies Code, including provision of an injury test. Id. at § 2503(2)(B). Consequently, Quebec cannot be considered a "country under the Agreement," and would not be entitled to an injury test, even if the Commission had determined that it is a "country."

[119] 19 U.S.C. § 1303(a)(1).

[120] Id. at § 1303(a)(2). See, e.g, Initiation of Countervailing Duty Investigation: Ferrosilicon from Venezuela, 57 Fed. Reg. 27024 (1992)(Commerce notifies Commission of need to conduct injury investigation with respect to duty-free ferrosilicon imports from Venezuela because Venezuela is a GATT contracting party. With respect to dutiable ferrosilicon imports, because Venezuela is not a "country under the Agreement", the Commission is not required to make an injury determination.). Accord, Potassium Chloride from the German Democratic Republic: Initiation of Countervailing Duty Investigation, 49 Fed. Reg. 18000 (1984)(Commerce notes that no injury determination required despite fact that goods duty-free because the United States has no "international obligations" with respect to the German Democratic Republic within the meaning of section 1303(a)(2). Compare Potassium Chloride from Israel: Initiation of Countervailing Duty Investigation, 49 Fed. Reg. 18001 (1984)(Commerce notifies Commission of need to make injury determination despite fact that Israel is not a "country under the Agreement" because there is an international obligation within the meaning of section 1303(a)(2)).

[121] 19 U.S.C. § 1677(7)(C)(iv).

[122] As we have previously found, different species of softwood lumber compete with one another for the same uses. Nothing in the record suggests that lumber from Quebec is in any way different in this regard.

[123] This is, of course, the determination we have, in effect, made here.

treated as a separate country.

22

ADDITIONAL VIEWS OF VICE CHAIRMAN WATSON IN RESPONSE TO BINATIONAL PANEL REVIEW UNDER THE UNITED STATES-CANADA FREE TRADE AGREEMENT IN THE MATTER OF SOFTWOOD LUMBER FROM CANADA, USA-92-1904-02

Set forth herein are my additional views in response to the Binational Panel Review in Softwood Lumber from Canada, USA 92-1904-02 (July 26, 1993). In joining the majority views expressed above, I found that certain direct evidence supports a conclusion that the Canadian subsidized imports caused significant price suppression. Although I believe that the majority views of the Commission are sufficient to support an affirmative determination, I set forth herein additional direct evidence which I find also supports a finding of price suppression by the subject imports.[124]

The record evidence indicates that the price effects of the subject imports are the most pronounced in the Northern Region of the United States where domestic producers experience the most head-to-head competition from subsidized Canadian softwood lumber.[125] The vast majority of U.S. production of softwood lumber is concentrated in the West and in the South. These regions accounted for 58.3 percent and 37 percent, respectively, of U.S. softwood lumber production in 1991.[126] The North's share of U.S. softwood lumber consumption was substantial throughout the period of investigation, increasing irregularly from 32 percent to 34 percent.[127] As a result, the North purchases significant quantities of softwood lumber from domestic producers in the South or West and from Canadian producers.

The Northern Region generally has had the highest share of consumption accounted for by imports.[128] During the Commission's period of investigation, the ratio of imports to consumption in the North rose irregularly from 41.0 percent to 42.7 percent.[129] Moreover, from 1986 to 1991, the portion of all subject imports received by the North increased irregularly from 43.7 percent to 52 percent. These data clearly demonstrate significant and increasing market penetration by the subject imports in the Northern Region.

Despite the general increase in production of softwood lumber by the Northern Region, Northern producers fared worse than did their counterparts in the other U.S. regions. While aggregate net sales of those Northern producers increased over the period of investigation, operating income as a percent of net sales declined significantly and at a faster rate than for Western and Southern producers.[130] Although, the financial difficulties of Northern producers during the period of investigation may well have been partially related to

---

[124] In doing so, I am mindful of the Panel's directive to the Commission to "provide an adequate explanation of its findings in order to permit meaningful review". Opinion and Order of the Panel at 48.

[125] Although the Commission did not attempt to make a statutory regional industry analysis pursuant to 19 U.S.C. § 1677(4)(C), and I do not attempt to do such here, it is well recognized that the U.S. softwood lumber industry is comprised of three distinct Regions: the West, South and North. See generally, Softwood Lumber at A-16-21. The Commission's staff report, in fact, analyzes production, financial and pricing data separately for these Regions and several representative market areas therein. Although the subject imports compete in all U.S. regions and market areas with domestic softwood lumber, the Northern Region with a closer proximity to Canada and easy access to rail transportation, is most susceptible to the effects of the subject imports.

[126] Softwood Lumber at A-17. The Northern Region accounted for only 4.7% of domestic production of softwood lumber.

[127] Id.

[128] Softwood Lumber at A-28, Table 4. With the exception of 1986, the North was the leading market for imports of softwood lumber during 1986-1991.

[129] Id.

[130] Report at Tables 15, 17, 19 and 21. A comparison of the data in these tables indicates that while net sales of the Northern producers almost doubled over the period of investigation, net sales of Western producers declined and net sales of Southern producers remained essentially flat.

such factors as the recession and competition by producers from other regions, the impact of the subject imports exacerbated their woes.

Other direct evidence in the record indicates that the subsidized Canadian softwood lumber sold in the North significantly suppressed domestic lumber prices and enabled the subject imports to increase their market penetration in that region at the expense of all domestic producers. A review of the pricing data in the record supports a conclusion that domestic producers from all three U.S. regions faced intense head-to-head competition in Northern market areas from the subject imports. Moreover, the unfairly priced Canadian imports suppressed domestic prices.[131] In the Boston and Chicago markets, composite price comparisons indicate substantial competition between the subject imports and the domestic products.[132] In these markets, prices of Canadian lumber appear to have risen more slowly than prices of domestic lumber.[133] In the Baltimore market, where an individual importer admitted SPF to be the price leader,[134] composite price comparisons for all domestic and all Canadian products indicate that Canadian prices were generally lower than domestic prices.[135] Species-by-species comparisons in the Baltimore market also indicate that prices of the Canadian lumber appear to have risen more slowly than domestic prices.[136]

Based on all of the above, I find that the subject imports have had considerable price effects in the Northern Region and in Baltimore market area as well. The pricing data indicates that the strongest head-to-head competition between the subject imports and the domestic product is consistently present in these areas. The Northern regional markets have traditionally consumed the majority of the Canadian imports and a large share of the softwood lumber produced in the Southern and Western Regions of the United States. The weight of the evidence indicates that the competitive cost advantages provided to Canadian producers have enabled them to keep prices artificially low and gain market share in the Northern Region of the United States where the majority of the softwood lumber consumed is necessarily produced outside the region. As a result, the financial condition of domestic producers throughout the United States have been negatively impacted.

In conclusion, I find that the evidence discussed in these additional views supports the conclusion that an industry in the United States is materially injured by reason of the subject imports from Canada.

---

[131] The market areas examined by ITC staff in the Northern region are Chicago and Boston. Although the Commission has acknowledged that the pricing data is of limited use for making direct price comparisons, it is accurate and does reflect pricing trends in the market. See, Softwood Lumber, at 30. Moreover, the pricing data is useful for comparing the degree of competition in the various market areas between the subject imports and domestic softwood lumber.

[132] INV-Q-174, Attachment B at 5 and 7. The data indicates that the weighted average U.S. and Canadian composite prices (for all products sold) were extremely close in the Chicago and Boston markets in 1991 and followed similar trends. Moreover, the average U.S. and Canadian composite prices in the large Chicago market were lower than composite prices in all other U.S. market areas.

[133] Id.

[134] See, Questionnaire Response of [* * *]. Although the Baltimore Market area was considered by ITC staff to be in the Southern Region, competition with the subject imports in that market area was particularly intense.

[135] INV-Q-174, Attachment B, page 3. The composite data merely aggregates reported sales prices of domestic douglas fir, hem-fir and SYP and Canadian SPF, douglas fir, Hem-fir and SPF studs. Even if the Baltimore composite data is examined without the lower priced Canadian SPF studs, the constant price-shifting between the subject imports and the domestic product appears to demonstrate intense competition.

[136] Softwood Lumber at Table 40.

Views of Commissioner Carol T. Crawford
in Response to Binational Panel Review
Under the United States-Canada Free Trade Agreement
In the Matter of Softwood Lumber from Canada,
USA-92-1904-02

I adopt by reference the like product and domestic industry determinations and discussions in the Commission's majority views in Softwood Lumber from Canada, Inv. No. 701-TA-312, Pub. No. 2530, July 1992. In response to the Binational Panel's remand, I set forth my separate views on evidence in the record[137] supporting my determination that the domestic industry producing softwood lumber is materially injured by reason of subsidized imports of softwood lumber from Canada.

While I reach the same result as my colleagues in the majority, the analytical framework within which I make my determination differs from their analysis. Therefore, my separate views are submitted to the Panel to permit a meaningful review of my determination and the rationale for my findings.

I. LEGAL STANDARD

In making a determination, the Act provides that the Commission:

(i) shall consider--

(I) the volume of imports of the merchandise which is the subject of the investigation,

(II) the effect of imports of that merchandise on prices in the United States for like products, and

(III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States; and

(ii) may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports.[138]

The statute also provides that the presence or absence of any factor pertaining to volume, price effects, or impact "shall not necessarily give decisive guidance" to the Commission's determination.[139] The Act requires the Commission to consider all relevant economic factors that have a bearing on the state of the industry and to consider these factors within the context of the business cycle and conditions of competition distinctive to the affected industry.[140] The statute defines material injury as "harm which is not inconsequential, immaterial or unimportant."[141]

II. ANALYTICAL FRAMEWORK

As stated above, in making my determination of material injury by reason of unfairly traded (e.g. subsidized) imports, the statute requires an analysis of the volume of subsidized imports, the effect of subsidized imports on domestic prices, and the impact of subsidized imports on the domestic industry. Because my analysis differs from the analyses used by some of my colleagues, I take this opportunity to describe the analytical framework I employ.

---

[137] My determination is based on the record of the original investigation. While I have reviewed the information sought and obtained by the Commission during the course of this remand proceeding, I have not relied on that information in my determination on remand.

[138] 19 U.S.C. §1677(7)(B).

[139] See 19 U.S.C. §1677(7)(E)(ii).

[140] See 19 U.S.C. §1677(7)(C).

[141] 19 U.S.C. §1677(7)(A).

Evaluating the effects of subsidized imports on domestic prices requires an understanding of the factors in the domestic market that influence or determine prices. It is necessary to understand how purchasers of the product react to an increase or decrease in the price of the product they purchase (i.e. the elasticity of demand). It is also necessary to understand how the imported and domestic products are differentiated from each other and how that affects purchasers' decisions to buy the products. When purchasers can choose between imports and domestic products, differences between those products will affect the price purchasers pay for each. The extent of those differences determines whether purchasers buy more of the domestic product when the price of the imported product increases (i.e. the elasticity of substitution). Similarly, when evaluating the impact of subsidized imports on the domestic industry, it is necessary to understand whether the industry could increase the volume of its production in response to an increase in the price of the domestic product (i.e. the elasticity of domestic supply).

Having developed an understanding of the market and the domestic industry through evidence on the record, I apply an analysis that evaluates the effects of the subsidy. To evaluate the effects of the subsidy on domestic prices, I compare domestic like product prices while the imports were subsidized with what domestic like product prices would have been if the imports had not been subsidized. Similarly, to evaluate the impact of the subsidy on the domestic industry, I compare the state of the industry when the imports were subsidized with what the state of the industry would have been if the imports had not been subsidized. In this regard, the impact on the domestic industry's production and revenues is critical, because the impact on other industry indicators (e.g. employment, wages, etc.) is derived from the impact on production and revenues.

I then determine whether the volume and price effects of the subsidy, either separately or together, demonstrate that the domestic industry would have been materially better off if the imports had not been subsidized.[142] If this is affirmative, I find that the domestic industry is materially injured by reason of subsidized imports.

III. MATERIAL INJURY BY REASON OF THE SUBSIDIZED IMPORTS

On remand, I reaffirm my original determination that the domestic industry is materially injured by reason of subsidized imports of softwood lumber from Canada. I begin by addressing the market characteristics that are essential elements of my analytical framework.

There is no dispute that the demand for lumber is price inelastic.[143] That is, if the price of lumber increases, purchasers will pay the higher price rather than significantly reduce their purchases.

The Panel has made a specific finding that Canadian lumber and domestic lumber are highly substitutable.[144] This means that lumber purchasers make their purchasing decisions primarily on the basis of price.

I find that the elasticity of domestic supply is low, but not inelastic.[145] Capacity utilization for the domestic industry was low during the period of investigation, and the industry can expand capacity relatively quickly in response to an increase in market prices. Therefore, the elasticity of domestic supply would be fairly elastic if the analysis is limited solely to the industry's production capabilities. However, the elasticity is reduced

---

[142] This method of analysis has been upheld upon judicial review (See, e.g., Torrington Co. v. United States, 790 F.Supp. 1161 (Ct. Int'l Trade 1992) and is consistent with Article VI, par. 4 of the GATT.

[143] I find the lower bound of the staff estimates of the demand elasticity to be reasonable. See EC-P-039 at 21.

[144] I find the upper bound of the staff estimates of the elasticity of substitution to be reasonable. See EC-P-039 at 18.

[145] I find the upper bound of the staff estimates of the elasticity of domestic supply to be reasonable. See EC-P-039 at 8-13.

considerably by constraints on the domestic supply of softwood logs used to make lumber. During the period of investigation, federal environmental policy had the effect of removing large amounts of acreage from the available harvest of logs from publicly-owned timberlands. As a result, the supply of logs from publicly-owned timberlands decreased, and hence the overall market supply of logs used to make softwood lumber decreased. This constraint on the supply of logs reduces the elasticity of domestic supply. For these reasons, I conclude that domestic lumber producers are limited in their ability to increase their lumber production in response to higher prices.

Having addressed the market characteristics essential to my analysis, I next analyze the volume of subsidized imports, the effect of subsidized imports on domestic prices, and the impact of subsidized imports on the domestic industry.

B. VOLUME OF SUBSIDIZED IMPORTS

There is no dispute that Canadian lumber imports were large in terms of both absolute volume and market share throughout the period of investigation. As directed by the statute, I examined the market share and absolute volume of subsidized imports and have determined that both are significant.[146] The market share held by the Canadian imports was large and at a level that had a significant effect on the domestic industry. The effects of large import volume and market share are greater when demand is inelastic, when consumers view the imported and like product as close substitutes, and when there are few alternative sources of supply. Under these conditions, Canadian imports and domestic lumber compete directly against each other for sales. In this investigation, demand is inelastic, the products are highly substitutable and there is no significant alternative source of supply, from either nonsubject imports[147] or substitute products.[148] For these reasons, I find the large volume of subject imports to be significant.

As the Panel stated, a significant volume of subsidized imports does not alone prove causation.[149] The Commission's Counsel correctly stated in the oral argument before the Panel that the majority's determination was not based on the volume of subsidized imports alone, but also on the effect of the significant volume and market share on the domestic industry. Subsidized imports have a greater impact on domestic sales and prices because of their significant volume and market share. Significant levels of subject import volumes and share of the market, therefore, increase the likelihood that the subject imports caused material injury.

C. PRICE EFFECTS

In the final investigation, the Commission did not find significant price underselling or price depression. I adopt the majority's views on these two pricing issues as stated in the Commission's final determination. Therefore, price suppression is the only pricing issue on remand that requires analysis.

---

[146] Neither increased imports nor increased market share are required for an affirmative determination. Under the statute:

> In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise or any increase in the volume, either in absolute terms or relative to production or consumption in the United States, is significant.

19 U.S.C. § 1677(7)(C)(i) (emphasis added). Thus, it is the significance of the volume or market share of imports for the particular industry that is critical. USX Corp. v. United States, 655 F. Supp. 487, 490 (Ct. Int'l Trade 1987); Iwatsu Electric Co. Ltd., 758 F. Supp. at 1513-14.

[147] Softwood Lumber at A-32, Table 2.

[148] EC-P-039 at 22.

[149] Panel decision at 32. I note that the Panel did not remand for explanation or justification the Commission's finding that the volume of subsidized imports is significant.

The Panel has specifically remanded the Commission's final determination on the issue of price suppression. The Panel concluded that it was "unable to discern any evidence (as distinguished from theory, argument, supposition, or assumption), factually demonstrating that imports of Canadian softwood lumber significantly suppressed U.S. softwood lumber prices during the period of investigation."[150] I address the Panel's conclusion by applying my analytic framework to the language of the statute.

The statute requires the Commission to consider whether the effect of subsidized imports "prevents price increases, which otherwise would have occurred, to a significant degree."[151] The statute thus directs the Commission to undertake an analysis that compares actual prices during the period of investigation with hypothetical or counterfactual pricing that would have occurred if the subject imports had been sold at fair prices, that is, if they had not been subsidized.

Because the statute requires an analysis of hypothetical market conditions (i.e. "... price increases, which otherwise would have occurred..." [without the subsidy]), record evidence of the sort used to document actual market conditions is not available. Because subject imports were subsidized, the record contains production, sales, price, capacity utilization, revenue and other data that reflect actual market conditions during the period of investigation. Similar data do not exist for the hypothetical, non-subsidized market conditions the statute requires us to consider.

The Complainants have argued that the price suppression evident in the record was caused entirely by the recession, which placed downward pressure on prices during the period of investigation. While the recession independently may have contributed to suppressed prices, the issue before the Commission is whether the subsidized imports caused price suppression to a significant degree.

My analysis begins with a determination of whether price suppression exists in the domestic lumber market (i.e. whether price increases would have occurred). I then determine whether any price suppression caused by the subsidy is significant.

As discussed above, the supply of logs used to make lumber was constrained during the period of investigation. There is no dispute that the constraints on the supply of logs increased the costs of producing lumber for the domestic lumber industry in all geographic regions, and for producers of all sizes.[152] During the period of investigation, the domestic industry's direct materials costs (of which logs are the principal component) increased 12.2 percent per thousand board feet. At the same time, lumber prices increased by only 0.5 percent per thousand board feet.[153] Even though demand is inelastic, the domestic industry was not able to increase its prices to cover its increased costs. Therefore, I find that price suppression exists.

The Panel acknowledges clearly that the Commission is not required to assess price effects or price suppression in any particular manner. However, the Panel apparently bases its remand on a lack of data that the Commission "typically" has used to establish price effects or a lack of actual evidence of "injurious shifts in market share, rising import volume, decreasing prices, underselling, lost sales, or even price leadership."[154]

As discussed above, my analysis differs from what the Panel refers to as the Commission's "typical" methodology. The analytical methodology I use to determine the effects of subsidies does not rely solely on "actual" evidence of the type referred to by the Panel. The Panel found that "the Commission merely inferred that, due to the existence of Canadian subsidies, imported Canadian lumber must have contributed to the significant

---

[150] Panel determination at 36.

[151] 19 U.S.C. 1677(7)(C)(ii)(II).

[152] Softwood Lumber at 22.

[153] Softwood Lumber at A-54, Table 24, A-53, Table 23. The industry's overall cost of goods sold increased 6.5 percent per thousand board feet during the period of investigation. Id. at A-53, Table 23.

[154] See Panel determination at 34 and 53.

suppression of U.S. softwood lumber prices."[155] (Emphasis added.) I find that the effect of the subsidies suppressed domestic lumber prices to a significant degree.

Commerce determined that imports of Canadian lumber are being subsidized at a rate of 6.51 percent.[156] The subsidies are production subsidies that reduce the production costs of Canadian lumber producers. Canadian lumber producers' lower costs enable them to price their products at lower prices. As a result, the subsidies provide Canadian producers a competitive price advantage over U.S. producers.

I concur in Complainants' conclusion that the domestic lumber market is "perfectly competitive."[157] I draw this conclusion based on the high degree of substitutability, the near perfect information market[158] for both Canadian and domestic lumber prices in the domestic market, and the large number of individual U.S. and Canadian buyers and sellers of lumber.

I also concur in Complainants' conclusion that no individual U.S. or Canadian seller can unilaterally establish prices.[159] However, the statute and my analysis require an assessment of the effect of all subsidized Canadian imports, not the effect of individual sellers. Therefore, the proper focus is on the availability of subsidized Canadian lumber for purchasers to choose as an alternative to domestic lumber.

Because the products are highly substitutable and there is a near perfect information market for prices, purchasers can and do choose between Canadian and domestic lumber on the basis of price. In other words, the price competition between Canadian and domestic lumber sets the market price for lumber sales. However, the market price for subsidized Canadian lumber was distorted by the subsidies during the period of investigation. As discussed above, because of their lower costs due to the subsidies, Canadian producers are able to sell their products at lower prices. Had Canadian lumber not been subsidized, it would have been sold at higher prices to recover the higher, nonsubsidized costs. If Canadian lumber had been sold at nonsubsidized prices, the market would not have been distorted, and Canadian lumber prices would have been up to 6.51 percent[160] higher.

If Canadian lumber had been priced at higher, nonsubsidized prices, domestic producers could have increased their prices to recover their increased costs. This difference in price represents the effect of the subsidy, and is the price increase that "otherwise would have occurred" if Canadian lumber had not been sold at subsidized prices.

The effect of subsidized imports on domestic prices is magnified by the large volume and market share of Canadian imports. Subsidized Canadian lumber accounted for over one-fourth of the market. Thus, purchasers had access to a large and readily available alternative source of supply, a supply that was not subject to the input constraints under which domestic mills operated. I find the upper bound of the staff estimates of the price suppression caused by subsidized Canadian lumber[161], due to the effect of the subsidy and the large volume of imports, to be reasonable. Therefore, I conclude that the price suppression caused by the subsidized imports is significant.

---

[155] Panel determination at 47.

[156] On remand, Commerce revised the rate of subsidy, increasing it to 11.54 percent. My analysis of the effect of the revised rate is presented below.

[157] See e.g. Panel determination at 47.

[158] Pricing information in the domestic market is spread almost instantaneously among purchasers and consumers, resulting in rapid price equilibrium at market clearing levels. Softwood Lumber at 29. This factual situation is often referred to as a perfect information market.

[159] See e.g. Panel determination at 48.

[160] My analysis considers the elasticity of import supply, which affects the portion of the subsidy that is passed through to the marketplace.

[161] EC-P-039 at 27.

D. IMPACT ON THE DOMESTIC INDUSTRY

After finding that the volume and price effects of the subsidized Canadian imports were significant, I evaluate whether the volume and price effects resulted in material injury to the domestic industry producing softwood lumber.

I evaluate whether the domestic industry producing softwood lumber would have been materially better off if the Canadian lumber imports had not been subsidized. Because demand in this industry is inelastic, a small increase in the price of softwood lumber would not result in a significant decrease in the quantity demanded of softwood lumber. Rather, the same amount of lumber would be sold at the higher prices. The price suppression caused by the subsidized imports prevented the domestic industry from increasing its prices significantly, as it would have if Canadian imports had been sold at nonsubsidized prices. Increased domestic prices would have increased the domestic industry's revenues significantly. In addition, the domestic industry would have increased somewhat the volume of its sales if Canadian imports had been sold at nonsubsidized prices,[162] because of the high degree of substitutability and the elasticity of domestic supply. I find the combination of these volume and price effects to have had a significant impact on the domestic industry's revenues, and ultimately, the profitability of the domestic industry.

The operating and financial performance of the domestic industry during the period of investigation, particularly in 1990 and 1991 was dismal. The domestic industry's financial statements as reported to the Commission clearly show that the industry's inability to raise prices commensurate with increased costs, due to the price suppression caused by subsidized Canadian imports, contributed to the substantial decline in the financial performance of the industry. I find the staff estimates of the revenue effect resulting from the volume and price effects (price suppression) caused by the subsidized imports to be reasonable. I also find that the revenue effect is not inconsequential.

Based on my analysis, I find that the domestic industry would have been materially better off if Canadian lumber had been sold at nonsubsidized prices. Therefore, I determine that the domestic industry is materially injured by reason of subsidized lumber imports from Canada.

IV. COMMERCE DEPARTMENT DETERMINATION ON REMAND

On remand, the Commerce Department revised its subsidy determination to increase the rate from 6.51 percent to 11.54 percent. I take administrative notice of the revised rate.

Because my analysis evaluates the effects of the subsidy, the higher subsidy rate magnifies the volume and price effects of the subsidized imports, and therefore the impact on domestic revenues. At this higher rate of subsidy, the cost benefit to Canadian producers is even greater. Had Canadian lumber not been subsidized, it would have been priced up to 11.54 percent higher to recover the Canadian producers' higher, nonsubsidized costs. I find the staff estimates[163] of the effects of the 11.54 percent subsidy rate to be reasonable. I also find that the revenue effect is not inconsequential. Indeed, the revenue effect is even greater than the effect of the 6.51 percent subsidy rate. Therefore, I determine that the domestic industry is materially injured by reason of Canadian lumber imports the Commerce Department has found to be subsidized at a rate of 11.54 percent.

---

[162] I find the upper bound of the staff estimates of volume suppression effects to be reasonable, although not as significant as the price suppression effects. See EC-P-039 at 27.

[163] INV-Q-174, Attachment C.

V. IMPORTS FROM THE PROVINCE OF QUEBEC

I concur in the portion of my colleagues' Views relating to the issue of whether lumber imports from the Province of Quebec are entitled to a separate injury determination in these proceedings. In these separate views, I incorporate by reference their analysis and conclusion that such imports are not entitled to a separate injury determination.

VIEWS OF COMMISSIONER ANNE E. BRUNSDALE ON REMAND
Softwood Lumber from Canada

Inv. No. 701-TA-312 (Final)

I reaffirm my original negative determination, and readopt my original dissent. Softwood Lumber from Canada, Inv. 701-TA-312 (Final) ("Orig. Op.") at 37.[164] I write separately to discuss at greater length two questions sure to figure in the binational panel's review of this redetermination on remand: whether we should have reopened the record to consider new evidence on pricing effects without authorization from the panel, and what weight (if any) we should give to the Commerce Department's recalculation of the subsidization rate.

I. REOPENING THE RECORD ON PRICING EFFECTS

The Commission has in the past asserted both that it cannot reopen the record on remand[165], and that it can.[166] Support for the proposition that the Commission may reopen the record on remand is usually sought in statements of general principles of administrative law, with citations to FCC v. Pottsville Broadcasting Co., 309 US 134 (1940) or later cases like National Grain & Feed Ass'n v. OSHA, 903 F2d 308 (5th Cir. 1990). There is in fact a line of cases that stand for the existence of a "usual rule that a reviewing court should leave the agency free on remand to determine whether supplemental fact-gathering is necessary for correction of the perceived error or deficiency." Id. at 310-311.

The problem with relying on this general rule is that there is another seemingly applicable general rule directly to the contrary. Cases like Mefford v. Gardner, 383 F2d 748 (6th Cir. 1957) and Cleveland v. FPC, 561 F2d 344 (DC Cir. 1967) contain equally sweeping statements. In Cleveland, the D.C. Circuit held that

> [t]he decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority. The latter "is without power to do anything which is contrary to either the letter or spirit or the mandate construed in light of the opinion of [the] court deciding the case[.]" . . . These principles . . . indulge no exception for reviews of administrative agencies.

Id. at 346 (citations and notes omitted).

The Sixth Circuit in Mefford ruled similarly:

> [I]f the cause is remanded for a specified purpose, any proceedings inconsistent therewith is error; "nor will a court remand to permit new proofs where it would merely be giving the party an opportunity to reopen the case to make his proofs stronger."

Mefford, 383 F2d at 758 (citations omitted).

The only sensible conclusion to draw is that duelling principles are no substitute for reasoned analysis in administrative law. I begin my analysis of the question of our power to reopen the record more humbly, with the statute that defines the record for review as "all information presented to or obtained by the . . . Commission during the course of the

---

[164] I also join in the basic reasoning (if not the rhetoric) of my colleagues on why Quebec is not entitled to a separate injury test. The set of articles through which the effects of any subsidization will be felt, the definition of "country" and the definition of "country under the Agreement" are all determinations for the Commerce Department to make.

[165] Tubeless Steel Disc Wheels from Brazil, Inv. No. 731-TA-335 (Final) (Views on Remand), USITC Pub. 2179, at 3 (holding that Congress did not intend the Commission to reopen the record to consider changes in the Commerce Department's determination).

[166] Id. at 16 n.37 (asserting that the decision to reopen the record on remand "involves the discretion of each individual Commissioner.")

administrative proceeding[.]" 19 USC § 1516a(b)(2)(A).[167] This is the set of information on which my colleagues and I make our determinations. The record is closed as of the time of our vote, and remains closed unless we act to reopen it.

Where can we find authority to do so? There is none in the statute -- indeed, reopening the record and making a new determination after the time for an investigation is over may well be illegal. See Babcock & Wilcox Co. v. US, 521 FS 479, 487 (CIT 1981), vacated as moot, 4 CIT 3 (1982). Nowhere in the statute is there any authority for us, on our own initiative, to reopen the record.

Similarly, there is nothing in our own regulations. We used to have a regulation, 19 CFR § 207.46 (1989), that claimed an inherent authority "to issue an appropriate modification, clarification, or correction of a determination within a reasonable time of its issuance." But that regulation has since been repealed, and was only used to correct small errors, like typographical errors.

Moreover, our original final determination has been appealed. This further reduces whatever authority we have to tinker with the record. In Zenith Electronics Corp. v. United States, 699 F. Supp. 296 (CIT 1988), a Commerce determination was appealed to the CIT. While the appeal was pending, Commerce attempted to correct ministerial errors under a specific statute granting it authority to do so. The CIT held that its appellate jurisdiction over the final determination required Commerce to obtain the Court's permission to amend the final determination. The CIT stated that, "once the final determination becomes the subject of an action in court, one way or another, allowing Commerce to take independent steps to alter the determination is in conflict with the authority of the Court."[168] In short, the CIT ruled that its jurisdiction over the matter prevented Commerce from exercising its express statutory authority. In the absence of even an express statutory authority, our own power to alter the record (and thus possibly our determination) can only be weaker.

Nor do I think that appeals to "inherent authority" carry much weight. The International Trade Commission does not have a lot of inherent authority. We cannot initiate investigations, see 19 USC § 1671a, and we do not have a general authority to regulate any particular field of commerce. In contrast, as the Supreme Court noted in Pottsville, agencies like the FCC or ICC have

> power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services.

Pottsville, 309 US at 142-143.[169]

Indeed, one obvious way to reconcile the duelling citations I quoted above is to recognize that remands from a reviewing body will go to different types of agencies under the authority of different statutes, and thus have different effects. Again, as the Supreme Court noted in Pottsville, the equivalent of a remand with an order to enter judgment to the appellant in that case would trample on the rights of third parties -- i.e., other applicants for the license at issue who were entitled to a comparative hearing. See Pottsville, 309 US at 145. Similarly, a remand to an agency that has general rulemaking power over workplaces should be tailored so as not to preclude entirely legitimate use of that power in the future by requiring a particular rule to be enacted or repealed once and for all.

---

[167] The Commission's own rules use the word "investigation" instead of "administrative proceeding." 19 CFR § 207.2(f)(1). There appears to be no difference in intended meaning.

[168] 699 F. Supp. 296 (1988)

[169] The Fifth Circuit similarly noted, in National Grain & Feed Ass'n, that "[t]he administrative scheme is such that we accord great deference to the agency in its rulemaking determinations." Nat'l Grain, 903 F2d at 310 (emphasis added).

In contrast, the Commission's job is just to decide on the basis of the record it compiles in the time it has to compile it. The solution to the problem of gaps in the evidence or the development of new facts that could not be known to us (such as a change in the Commerce Department's determinations subsequent to our own) is for the reviewing body to remand our determination to us for our reconsideration. That is the precise holding in Borlem S.A. v. United States, 913 F.2d 933, 939 (Fed. Cir. 1990).[170]

In this case, the binational panel identified one, and only one, such gap in the record: the absence of an adequate cross-sectoral comparison. It did not identify pricing effects as something about which we should reopen the record, and it did not ask us to consider the effects of the Commerce Department's recalculation of the subsidization rate. In the absence of such orders, I do not think we should have ourselves.

II. CONSIDERATION OF THE COMMERCE DEPARTMENT'S RECALCULATION

Although I think the cases routinely cited on both sides of the debate on whether an agency may reopen a record on remand may usually be reconciled by distinguishing proceedings that involve continuing oversight or the rights of third parties from those that do not, this particular type of investigation is very unusual. The panel in this case can hardly be faulted for failing to tell us what to do with the Commerce Department's recalculated subsidization rate -- because Commerce's recalculation (at the instance of a different binational panel) came after the panel in this case had issued its opinion.

If this were a case before the CIT, the solution would be easy. The CIT can order multiple remands, and the Commission could just wait to see if the Court wanted us to reconsider our original final determination in light of any changes that occurred as a result of the challenge to Commerce's original final determination. However, as one binational panel has already held, "a Panel is clearly not on the same footing as the CIT, which is not constrained to issue a 'final decision' on a second review." Pork from Canada, USA-89-1904-11 (Jan. 22, 1991) at 6.

Since the Panel will not have an opportunity to await the outcome on review of the issue of the proper margin, I think it a good idea to state my views of the effect of the Commerce Department's calculation as an alternative redetermination on remand. The most important thing to note is that the Department's redetermination changed only the subsidization rate. All the other important facts -- that Canadian lumber is not a perfect substitute for U.S. lumber, that the demand for lumber is less than perfectly inelastic, and that the U.S. industry accounts for 70 percent of the market -- are unchanged.

Moreover, although the subsidization rate is now almost doubled, it still reflects a much lower effective rate of subsidization, for the reasons I stated in my original opinion. Orig. Op. at 41-42. See also Staff Rep. at C-3 (estimating range of equivalent export subsidies). I therefore continue to conclude that the unfair subsidization of softwood lumber from Canada, acting through softwood lumber imports to this country, is not materially injuring, or threatening to injure, the U.S. softwood lumber industry.

---

[170] For a fuller discussion of my views on that case, see High-Information Content Flat Panel Displays and Display Glass Therefor from Japan, Inv. No. 731-TA-469 (Views on Remand), USITC Pub. 2610 at V-2 to V-4 (and IV-1 at n.1).

DISSENTING VIEWS OF COMMISSIONER JANET A. NUZUM

On the basis of the record[171] and pursuant to the remand order of the U.S.-Canada Binational Panel ("Panel"),[172] I determine that the industry producing softwood lumber in the United States is neither materially injured nor threatened with material injury by reason of subsidized imports of softwood lumber from Canada.[173]

At the outset, I note that the Panel's remand focuses on the Commission majority's final affirmative determination and views. In light of the fact that I originally made a negative determination, much of the Panel's remand arguably does not apply to my analysis. Nevertheless, I have reviewed the record evidence, including the additional information obtained by the Commission during the remand investigation, pursuant to the panel's findings and instructions. In doing so, I reaffirm my negative determination, and herein set forth my additional reasons therefor.

My analysis remains fundamentally unchanged from that expressed in my original dissenting views.[174] These views will focus on those issues remanded by the Panel -- namely, price suppression, cross-sectoral comparisons, and the treatment of imports from Quebec. I readopt in whole and without further expansion my original discussions of like product, domestic industry, legal standard, and conditions of competition. I readopt with further clarification and/or expansion as presented below my original discussions of volume effects, price effects, impact on the domestic industry, and threat.

I. BINATIONAL PANEL DECISION AND REMAND INSTRUCTIONS

The Commission majority's final affirmative determination in Softwood Lumber was affirmed in part and remanded in part. The Panel found substantial evidence on the record to support certain findings of the majority, including the findings that the volume of the subject imports was "significant,"[175] and that the domestic and imported products were "highly substitutable."[176] The Panel remanded the majority's findings, however, with respect to price effects. The Panel addressed two different aspects of the majority's price suppression findings: 1) spruce-pine-fir ("SPF") as a "bellwether;"[177] and 2) the role of Canadian lumber in the cost/price squeeze that faced U.S. producers.[178] The Panel found that the evidence cited by the Commission majority did not rise to the level of substantial evidence needed to support its findings.

With respect to the role of SPF as a "bellwether," the Panel found that the record evidence did not support the conclusion that SPF has a current price-suppressing effect or that SPF significantly influences the U.S. softwood lumber market. The Panel focused its examination on "current" and "actual" effects. With respect to the role of imports from Canada on domestic producers' cost/price squeeze, the Panel found that the Commission

---

[171] The record developed in this remand investigation includes the record developed in the original final investigation and additional information collected as a result of the Commission's reopening of the record. See 58 F.R. 50051, Sept. 24, 1993.

[172] See Article 1904 Binational Panel Review under the United States-Canada Free Trade Agreement in the Matter of: Softwood Lumber from Canada, USA-92-1904-02 ("Panel decision").

[173] Material retardation of the establishment of an industry is not an issue in this investigation.

[174] See Softwood Lumber from Canada, Inv. No. 701-TA-312 (Final) USITC Pub. 2530 (July 1992) ("Softwood Lumber") at 55-87.

[175] My findings with respect to the significance of the volume of imports differed from those of my colleagues. I noted that, viewed in isolation, the subject import market share could be considered significant. My analysis concentrated, however, on the fact that both the volume of imports as well as import market share decreased during the period examined. In my view, the declining volume trends and the lack of any significant adverse volume effect on the domestic industry led me to conclude that import volume was not a significant indicator of material injury. Softwood Lumber at 63-65.

[176] Panel decision at 19; 28.

[177] Id. at 37-45.

[178] Id. at 45-50.

majority did not adequately articulate a causal link, but "merely inferred that, due to the existence of Canadian subsidies, imported Canadian lumber must have contributed to the significant suppression of U.S. softwood lumber prices."[179] Absent substantial evidence on the record to support a finding of significant price-suppressing effects by the subject imports, the Commission majority's final affirmative determination was likewise held not to be supported by substantial evidence.[180]

The Panel also examined the majority's analysis of certain evidence, which the Panel characterized as "cross-sectoral comparisons," and found that the methodology applied in such comparisons was "seriously flawed."[181] Thus, the cross-sectoral comparisons were held not to confirm reliably the majority's finding of significant price suppression by the subject imports.[182]

Finally, the Panel found that the Commission had failed to provide an adequate explanation of its rejection of arguments raised by Quebec Parties. The Panel therefore also remanded this aspect of the determination for further explanation.[183]

II. FINDING ON PRICE-SUPPRESSING EFFECTS

The statute requires the Commission to consider the effect of the subject imports on prices in the United States for the like product. Specifically, we consider whether there has been significant price underselling by the subject imports, and whether the subject imports either depress prices to a significant degree, or prevent price increases which otherwise would have occurred to a significant degree.[184] The instructions of the Panel focus our attention in this remand investigation on the price-suppressing effects, if any, of the imports from Canada.

My original analysis of the possible price effects of the subject imports was based on data on actual pricing obtained from questionnaires and published sources. I found -- and the majority agreed -- that the pricing data gathered in the original final investigation were reliable for purposes of considering price trends. My analysis of those data was presented in my original dissenting views.[185] In sum, I observed that U.S. prices of domestic and Canadian products fluctuated similarly during the period examined, with Canadian product prices neither tending to fall more steeply[186] nor rise more slowly[187] than U.S. product prices.

---

[179] Id. at 47.
[180] Id. at 20.
[181] Id. at 20.
[182] Id. at 20; 54-73.
[183] Id. at 73-77.
[184] 19 U.S.C. 1677(7)(C)(ii).
[185] See Softwood Lumber at 71-72.
[186] Based on publicly available data, price trends for four U.S. products from January to December 1990 declined by an average of 7.8 percent. Prices for five Canadian products over the same period, in comparison, declined by an average of 7.3 percent. From June to October 1991, the U.S. prices fell by an average 21.5 percent while Canadian prices fell by 20.8 percent. Id. at A-100, Table 37. Similarly, weighted-average composite net delivered price trends based on questionnaire data show that U.S. prices fell by 10.8 percent over 1990, compared with 7.9 percent for the Canadian product. The June to October 1991 declines were 10.5 percent and 9.8 percent, respectively. Id. at A-107, Table 39; and A-108, Figure 6. The overall U.S. and Canadian trends were also similar to the framing lumber composite f.o.b. price trend reported in Random Lengths. Id. at A-106.
[187] The Canadian lumber composite price hit a low point for the period in November 1990 whereas the domestic lumber composite price reached a low in February 1991. Id. at A-106. Thus, Canadian prices started to rebound before U.S. prices did. Prices for four U.S. products increased by an average of 36.3 percent from December 1990 through June 1991, while prices for five Canadian products increased 37.5 percent. Id. at A-100, Table 37.

I concluded that the evidence with regard to price trends did not support findings of either significant price depression or suppression by imports of softwood lumber from Canada.[188]

SPF as a Bellwether. The Panel decision refers to certain documents and facts cited by the Commission majority in support of its view that SPF is a "bellwether" for the softwood lumber industry.[189] The Panel found, however, shortcomings with this evidence, stating that the "evidence cited by the Commission does not constitute substantial evidence of the 'significant influence' and price limiting role of SPF." In response to the concerns expressed by the Panel, I wish to clarify that I did not consider the 1987 Widman study[190] or place any weight on the 1985 findings of the Commission in its 332 study. Although I considered data published by Random Lengths, I did not attach any significance to either the fact that SPF prices are presented first in certain published reports, or that SPF makes up 20 percent of the Random Lengths' composite 2 x 4 price. Furthermore, I made no finding that SPF was a price "bellwether," nor did I consider SPF either to be a price leader or otherwise to have exerted particular influence on U.S. price levels.

In this remand investigation, additional information was sought from producers,[191] importers,[192] and purchasers[193] regarding price leadership and the role of SPF, if any, on U.S. prices. The questionnaires asked: 1) whether certain mills, distributors, etc. have a particular impact on prices; 2) whether any species serves as a reference for setting prices; and 3) the relative importance of specified factors in establishing transaction prices. The information provided in the responses was mixed -- domestic producers' responses tended to support Coalition arguments, and importers' and purchasers' responses tended to support respondent arguments.

Slightly more than half of the responses from domestic producers identified Canadian spruce or SPF as a reference species for establishing softwood lumber prices. Only one-third of the importer responses identified Canadian species (predominantly SPF) as price reference species. Purchasers almost uniformly reported that no species serves as a reference for setting prices. My interpretation of these responses is that, as a species group traded in substantial quantities, information on SPF price levels is considered by some suppliers in establishing transaction prices for softwood lumber in some domestic market areas. I do not interpret the evidence as establishing, however, that SPF prices are suppressing domestic prices. Rather, it is at least as likely that SPF prices are simply a measure of where "the

---

[188] Given the relative closeness of U.S. and Canadian price movements, however, I also considered other price-related indicators before drawing my conclusions on either price depression or suppression. For example, I noted that the unit values of imports from Canada increased by 12.0 percent during the period examined while the unit values of domestic shipments by U.S. producers showed an overall increase of only 1.3 percent. Id. at A-86, Table 35; A-46, Table 11. Furthermore, compared with the unit values of apparent consumption, the unit values of the subject imports rose, while those of domestic production declined. Id. at A-32, Table 2.

[189] The Panel decision made particular mention of: 1) Canada's Forest Industry: Markets 87-90 (1987) (Widman Management Limited, Vancouver, BC) (Widman study); 2) Conditions Relating to the Importation of Softwood Lumber into the United States, Inv. No. 332-210, USITC Pub. 1765 (Oct. 1985); 3) the prominent use of SPF prices by Random Lengths Publications; and 4) the role of SPF in the softwood lumber futures market. See Panel decision at 41-45.

[190] Indeed, I was not even aware of the Widman study until I read the majority's original views.

[191] Firms accounting for an estimated 40 to 50 percent of U.S. production of softwood lumbers supplied information. I have reviewed the actual questionnaires submitted.

[192] Firms accounting for an estimated 40 to 50 percent of U.S. imports of softwood lumber supplied information. I have reviewed the actual questionnaires submitted.

[193] Purchasers in 7 "representative" metropolitan markets -- Atlanta, GA; Baltimore, MD; Boston, MA; Chicago, IL; Dallas, TX; Los Angeles, CA; and Seattle, WA -- supplied information. I have reviewed the actual questionnaires submitted. I note that the discussion of purchaser responses presented in memorandum INV-Q-174 does not include the response discussed at length in the Brief on Price Effects of Subsidized Canadian Lumber on behalf of the U.S. Coalition for Fair Lumber Imports ("Coalition Remand Br.") at 5 and n.11. I have considered this purchaser questionnaire; however, I note that the firm is predominantly a domestic producer and importer.

market" is -- which is what other evidence supports. This interpretation is consistent with the characterization of SPF as a "barometer" of the softwood lumber market;[194] a barometer shows the level of atmospheric pressure but does not influence that level.

Also in response to remand questionnaires, a majority of U.S. producers, a minority of U.S. importers, and a minority of purchasers reported that any particular firm (e.g., mills, distributors, etc.) is either a price leader or otherwise has a significant impact on price levels in their market areas. A variety of large U.S. and Canadian firms were named. U.S. producers most frequently identified Canadian sources. Numerous importers and purchasers reported that no one supplier could lead or otherwise affect market prices.

Finally, the remand questionnaires also asked about the relative importance of seven different factors in establishing transaction prices. The responses were consistent with information previously on the record: 1) availability and competitive conditions were the most important; 2) leadtimes, weather conditions, order size, and Random Lengths were of declining relative importance; and 3) the futures market was not important.[195] In sum, the additional information obtained from the remand questionnaires generally corroborates other evidence in the record, and fails to provide sufficient evidence that Canadian lumber imports are price leaders or are otherwise having a price-suppressing effect on U.S. prices.[196]

Inability of U.S. Producers to Increase Prices. In my original dissenting views, I observed the "[t]he industry was, indeed, caught in a squeeze between rising costs and prices that did not keep up with those costs."[197] I noted that costs increased in both periods of price declines.[198] However, cost of goods sold as a percent of net sales declined from 1990 to 1991,[199] indicating that price increases overtook cost increases.

Notwithstanding the evidence of a cost/price squeeze, I did not find strong support for a finding of significant price suppression by the subject imports. The fact that an industry is unable to pass on significant cost increases and maintain profit levels may be indicative of price suppression; it is not indicative, in and of itself, however, of price suppression by reason of imported products. In this investigation, the decline in apparent consumption of softwood lumber provided ample explanation for the suppression of domestic prices during the period examined. Indeed, the only pattern I observed with respect to price

---

[194] See Coalition Remand Br. at Attachment B. I note that, subsequent to the Commission's public meeting and vote in this remand investigation, it was brought to my attention that Canadian respondents had requested that the Commission strike this attachment from the record on the grounds that it exceeded the scope of information for which the record was reopened. I did consider the information contained in Attachment B, and found that the characterization of Western SPF 2 x 4 as a "barometer" supported my analysis. Nevertheless, my determination in this remand investigation would not have changed had the information in Attachment B of the Coalition Remand Brief not been included in the record.

[195] "Demand" was not among the indicated alternatives but a number of questionnaire respondents noted that demand was also a consideration affecting transaction prices.

[196] I also have some reservations about the credibility of the information obtained from the remand questionnaires, in light of the vast publicity this case has received and the possibility that, at this stage of the proceeding, the responses may reflect some bias. I have placed slightly more weight on purchaser responses in view of the fact that purchasers are less likely to have a vested interest in the outcome of this investigation.

[197] Softwood Lumber at 77. Cost of goods sold as a share of net sales increased from 87.6 percent in 1988 to 88.9 percent in 1989, peaked at 95.8 percent in 1990, and then declined to 92.9 percent in 1991. Since selling, general, and administrative expenses remained relatively stable as a percent of net sales, the increase in costs of goods sold as a percent of net sales accounts for the decline in operating income and was the primary factor in the decline in net income. The largest (and an increasing) portion of costs was the cost of direct materials, i.e. softwood logs. Id. at A-53, Table 23; A-55, Table 24.

[198] Id. at A-98, Fig. 5.

[199] Id. at A-66, Table 23.

suppression was that "the condition of the domestic industry declined when depressed demand kept market prices from meeting cost increases."[200]

The Coalition has submitted, in its remand brief, additional pricing graphs and arguments concerning evidence of price suppression by imports from Canada. I have considered these arguments carefully to see whether my interpretation of the original record was misguided or whether the additional remand record is sufficiently compelling to lead me to a different conclusion from my original determination. The additional information and arguments, however, do not persuade me to change my findings.

Although certain of the graphs appear at first glance to support the Coalition's arguments on U.S. versus Canadian pricing trends,[201] as a whole the record fails in my view to establish substantial evidence of a causal link between subsidized imports from Canada and U.S. price suppression. I base my determination not on "the existence of individual [bits] of data that agree with a factual conclusion,"[202] but on the evidence on the record as a whole.

III. CROSS-SECTORAL COMPARISONS

Both the original majority views and my own dissenting views contained some reference to data of products other than softwood lumber. The Panel considered the majority's observations with regard to these data (which the Panel characterized as cross-sectoral comparisons) to be "methodologically unsound and, therefore, not in accordance with law."[203] The Panel further stated that the cross-sectoral comparison did not produce substantial evidence on the record in support of the affirmative determination.[204] I leave it to my colleagues in the majority to respond with respect to their own analysis. However, since my original dissenting views contained references to two other industries -- the plywood industry and the medium-voltage underground residential distribution cable ("URD") industry -- I feel obligated to explain the significance of these references to my analysis.

My discussion of operating income for the plywood industry was presented specifically in response to arguments raised by the Coalition, as is indicated in my views.[205] The specific comparison was based on comparable data for both softwood lumber and plywood. While I observed that the plywood industry had experienced higher operating income margins than had the softwood lumber industry, I also noted that the former benefited from a substantial tariff rate. In view of this additional "condition of competition" in the plywood market, I declined to find the higher plywood levels of profitability provided

---

[200] Softwood Lumber at 79. The generally price-insensitive nature of demand for softwood lumber suggests that declines in consumption, even of the magnitude observed during the period examined, may not have had a substantial price-depressing effect. In the face of declining demand, however, suppliers could not easily pass on cost increases in the form of higher prices. Id. at 58.

[201] The usefulness of the graphs is in some cases limited by the assumptions made. Graph 1, for example, 1) was not adjusted to account for the differing rates of inflation in the United States and Canada, and 2) represents "baskets of different products." The Coalition indicates that the differential between U.S. and Canadian producer price indices averaged 4 percent during the period. This gives no indication of the inflation-adjusted trend, however. Id. at 10, nn.30, 31.

In interpreting any indexed graph, moreover, it is important to keep in mind the data for the base year. Graphs 5 and 6, for example, show Canadian price trends below U.S. price trends. This pattern results essentially from the fact that the trends are indexed from a starting point where the Canadian product was priced above the U.S. product. The nonindexed source tables show, in fact, generally similar price fluctuations over time for both Canadian and U.S. softwood lumber. Softwood Lumber at A-84, Table 39 (graph 5) and A-111, Table 46; A-112, Table 47; A-114, Table 48; A-115, Table 49; A-116, Table 50; and A-117, Table 51 (graph 6).

[202] Panel decision at 12, citing New Steel Rails from Canada, USA-89-1904-09 at 8 (Aug. 13, 1990).

[203] Panel decision at 72.

[204] Id.

[205] Softwood Lumber at 78; n.106.

support for the conclusion that unfair import competition contributed to the lower softwood lumber operating income rates.

I also note my reference at footnote 105 to a previous Commission determination involving the URD industry. This statement was made merely to provide support for the proposition that even a sharp decline in profit levels does not preclude a negative determination. The observation with respect to URD did not affect my final determination with respect to softwood lumber imports.

IV. TREATMENT OF IMPORTS FROM QUEBEC

The Binational Panel's instructions also directed the Commission to "articulate a satisfactory explanation of its finding with respect to the treatment of imports from Quebec."[206] Quebec respondents in the original investigation had argued that imports of the subject merchandise from Quebec are entitled to a separate injury determination.[207] The Panel found that the Commission "failed to provide an adequate explanation of this aspect of its determination so as to permit meaningful review by the Panel."[208]

In the original final investigation, I made a negative determination with respect to subject imports from Canada. I did not make any separate finding with respect to any particular subset of those subject imports. I note that Quebec respondents stated their view that this issue of a separate injury finding was not ripe for consideration if the Commission "properly finds that . . . allegedly subsidized imports from Canada cause no injury."[209] Having again made a negative determination in this remand investigation with respect to all subject imports from Canada, it is not clear whether it is necessary for me to address this issue. Nevertheless, I am mindful of the Commission's responsibility to respond fully to the Panel's remand instructions. I generally concur with the discussion of this issue presented in the majority's remand views, and set forth my additional views on this issue below.

Quebec respondents' argument in the final investigation can be summarized as follows: The U.S. Department of Commerce ("Commerce") determined that the Government of Quebec does not subsidize softwood lumber.[210] Yet, in its final affirmative determination, Commerce applied a "country-wide" countervailing duty rate to imports from Quebec as well as imports from other provinces. Quebec respondents contended that application of a country-wide rate was improper and erroneous, that Quebec's exports of softwood lumber were "fairly-traded" and that the Commission could and should "correct" Commerce's "error" by treating Quebec as a separate "country."[211]

Section 705(b) of the Act states that the Commission must determine whether a domestic industry is materially injured or threatened with material injury "by reason of imports . . . of the merchandise with respect to which the administering authority has made an affirmative determination."[212] Commerce's final affirmative countervailing duty determination applies to all softwood lumber imports from Canada.[213] Hence, the

---

[206] Panel decision at 77.

[207] See Supplemental Prehearing Brief of the Gouvernement du Quebec and the Government of Canada, ("Quebec's Prehearing Br.") at 4.

[208] Panel decision at 74.

[209] Quebec's Prehearing Br. at 2.

[210] As Quebec respondents acknowledge, Commerce did find in its original final subsidy investigation a benefit conferred on softwood lumber in Quebec of 0.01 percent ad valorem. The Quebec respondents contend, however, that this margin is de minimis and therefore the imports should be considered "fairly traded." Quebec's Prehearing Br. at 1, n.1; 4.

[211] Posthearing Brief of the Gouvernement du Quebec ("Quebec's Posthearing Br.") at 15.

[212] 19 U.S.C. §1671d(B)(1) (emphasis added).

[213] Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22570 (May 28, 1992). See also Commerce's Redetermination Pursuant to Binational Panel Remand.

Commission's final determination properly examined whether there was material injury (or threat) by reason of softwood lumber imports from Canada.

Quebec respondents argued that the Commission had "inherent authority" to determine the definition of "country" for purposes of material injury investigations.[214] Quebec respondents cited as support for this proposition Certain Fish and Certain Shellfish from Canada in which Quebec contended the Commission "made distinct injury determinations designating different regions of Canada."[215] A careful reading of that determination, however, does not indicate that the Commission took the kind of action that Quebec urged us to take in this investigation. In that case, the Treasury Department determined that imports of groundfish and shellfish "originating in the Atlantic regions of Canada" received certain countervailable bounties or grants, while imports of groundfish and shellfish "originating in the rest of Canada receive benefits that are legally de minimis."[216] The Commission stated that it "did not address" any alleged injury due to imports from regions other than the Atlantic regions of Canada.[217] In other words, the Commission's analysis corresponded to the imports for which the Treasury Department made an affirmative countervailing duty determination.[218]

In this investigation, Commerce's countervailing duty determination applied to "certain softwood lumber products from Canada."[219] The decision to apply a "country-wide" rate is within the parameters of Commerce's statutory authority, not the Commission's authority.[220] I am unable to find any provision in the statute that authorizes the Commission

---

[214] Quebec's Posthearing Br. at 7.

[215] Quebec's Posthearing Br. at 7-9.

[216] Certain Fish and Certain Shellfish from Canada, Inv. No. 303-TA-9 (Final) USITC Pub. 966 (April 1979) at A-1.

[217] Id. at 4. Specifically, the Commission stated, "Treasury has . . . determined that the shellfish and groundfish originating in the rest of Canada receive benefits that are legally de minimis; therefore the Commission has not addressed alleged injury due to imports of such merchandise from areas other than the Atlantic regions of Canada." Id. at 4 (emphasis added). Thus, the Commission did not make distinct injury determinations for imports that were found to have benefitted from de minimis subsidies.

[218] Quebec respondents also cited Dextrines and Soluble or Chemically treated Starches Derived from Corn or Potato Starch from Belgium, Denmark, The Federal Republic of Germany, France, Ireland, Italy, Luxembourg, The Netherlands and the United Kingdom, Inv. Nos. 701-TA-11-19 (Final) and 701-TA-22-30 (Final), USITC Pub. 1061 (May 1980) as an example of the Commission's purported "inherent authority" to define political subdivisions as "countries" even where Commerce has not. See Quebec's Posthearing Br. at 8, n.17. This citation is similarly unpersuasive. In that investigation, the Commission stated that it decided to "deal with imports from all members of the European Community." USITC Pub. 1061 at 8, n.5. However, Commerce's affirmative countervailing duty determination applied to the European Community as a whole. See Dextrines and Soluble or Chemically treated Starches Derived from Corn or Potato Starch from the European Community; Final Countervailing Duty Determination, 45 F.R. 18414 (Mar. 21, 1980). Moreover, Commerce also made a separate countervailing duty finding for imports from the Netherlands and the Commission "gave this matter separate consideration as well." USITC Pub. 1061 at 8, n.5. Thus, the Commission's investigation corresponded to the separate affirmative determinations made by Commerce. In the investigation concerning softwood lumber, by contrast, Commerce did not make a separate determination for Quebec.

[219] 57 F.R. 22570.

[220] See 19 U.S.C. §1671e(2) ("[T]he administering authority shall publish a countervailing duty order which . . . shall presumptively apply to all merchandise of such class or kind exported from the country investigated. . .") The statute permits Commerce to provide differing countervailing duties if it determines "there is a significant differential between companies. . . ." Id. In the notice of its final affirmative countervailing duty determination, Commerce expressly stated that because of the manner in which data were collected, it was not able to calculate company-specific rates. See 57 F.R. at

(continued...)

to review Commerce's subsidy determination in this regard, or to make separate injury determinations for different provinces where Commerce has not issued province-specific countervailing duty rates.

I also do not agree that the Commission has authority to correct an error committed by Commerce in its countervailing duty determination. In this regard, Quebec respondents cited Borlem S.A.-Empreedimentos Industriais v. United States[221] as an example of the Commission correcting an error made by Commerce.[222] Once again, the citation does not support the proposition. The issue in Borlem was whether the Commission could reconsider its own determination to take into account Commerce's correction of a ministerial error that resulted in a change in the merchandise found to be sold at less than fair value.[223] The case did not concern the Commission scrutinizing Commerce's determination for errors and "correcting" them on its own initiative by, in effect, changing the scope of Commerce's affirmative determination. In fact, our reviewing courts have said precisely the opposite. "In applying this statute, ITC does not look behind ITA's determination as to which merchandise is in the class of merchandise sold at LTFV."[224]

In sum, I do not believe that imports of softwood lumber from Quebec are legally entitled to a separate injury determination where those imports are included within the scope of Commerce's affirmative countervailing duty determination. I have accordingly included imports from Quebec in my overall consideration of imports from Canada.

V. RECENT COMMERCE REMAND DETERMINATION

I also note that, pursuant to a separate remand order of a U.S.-Canada Binational Panel reviewing the Commerce determination in this investigation, Commerce recently issued a remand determination that revised the softwood lumber subsidy finding to 11.54 percent.[225] The subsidy finding that existed at the time of the Commission's original final determination was 6.51 percent.

Although the size of a subsidy or dumping margin is not a dispositive factor in my analysis, I do not ignore the margin. Rather, it is one of many factors I consider in my causation analysis. In particular, I take the subsidy or dumping margin into account in analyzing the price effects of the unfair imports. I do not, however, place great weight on the precision of the number itself. Instead, I tend to take into account the relative size of the margin in conjunction with other factors, such as the degree of substitutability of the imported and domestic products, the degree of underselling by the imports, and the volume of the imports. For example, I would expect to find adverse price effects the larger the subsidy or dumping margin and the greater the substitutability of the products; the larger the subsidy or dumping margin vis-a-vis the margin of underselling; the larger the subsidy or dumping margin and the larger the import volume. Of course, my conclusion in any investigation depends on the particular evidence in that record.

In this investigation, I find that the change in the subsidy finding from a rate of 6.51 percent to a revised rate of 11.54 percent did not affect the conclusions I drew from the overall record evidence. The lack of substantial evidence in the record of a causal link

---

[220] (...continued)
22579. Commerce also expressly rejected the argument that provinces should be considered "firms" for purposes of § 1671e(2).

[221] 718 F. Supp. 41 (Ct. Int'l Trade 1989), affirmed 913 F.2d 933 (Fed. Cir. 1990).

[222] Quebec's Posthearing Br. at 16-17.

[223] 718 F. Supp. 41, 43-45.

[224] Algoma Steel Corporation v. United States, 688 F. Supp. 639, 644 (Ct. Int'l Trade 1988).

[225] Commerce's Redetermination Pursuant to Binational Panel Remand at 191.

between the Canadian lumber imports and suppression of U.S. prices is not changed by a change in the size of the subsidy margin.

VII. CONCLUSION

A final determination under our antidumping and countervailing duty law must be based on positive evidence in the record; it may not be based on speculation or supposition. The Coalition argues that significant quantities of subsidized lumber imports have suppressed U.S. prices, thereby causing material injury to the U.S. industry. Given the nature of the products involved and the conditions of competition in the softwood lumber market, the theory sounds plausible. The problem is, in my view, the record fails to provide substantial positive evidence supporting this theory.

Many of the factors the Commission, and this Commissioner, relies on to support an affirmative determination are simply not present in this record. The quantity of imports has not increased, either absolutely or relative to consumption. In the face of declining consumption, domestic producers held on to their market share, and even increased their market share marginally. Data on pricing comparisons fail to present a clear picture of significant underselling. Although there is evidence that domestic producers were facing a cost/price squeeze, there is not convincing evidence establishing a causal link between the subject imports and the inability of domestic producers to raise prices commensurate with increased costs in a declining market.

If some of the above factors were different (e.g., if lumber imports had actually increased significantly during the period examined), I might have come to a different conclusion in this investigation. I find the preponderance of the evidence in this record, however, supports a negative determination and thus reaffirm my negative determination.