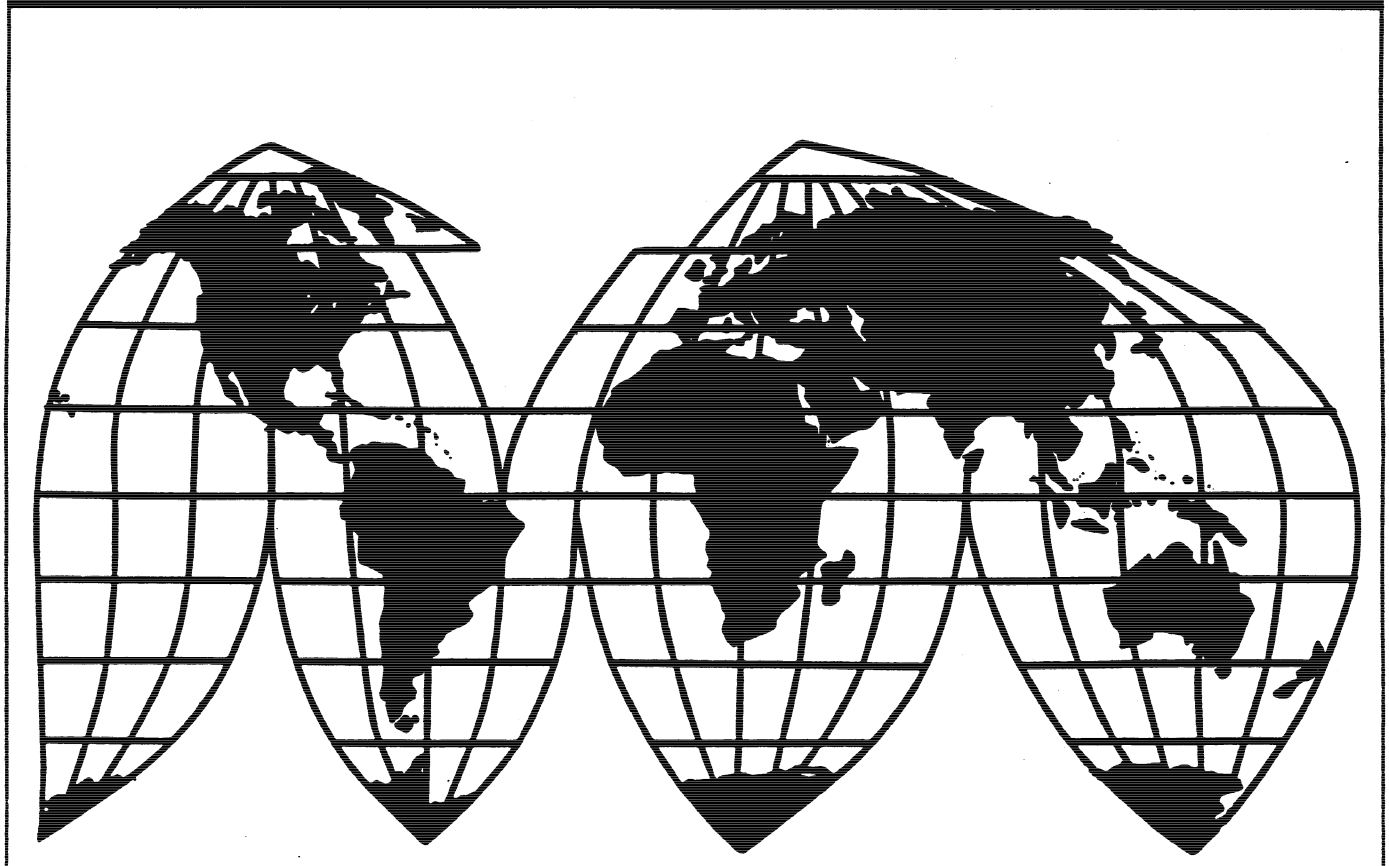
Softwood Lumber From Canada

Investigation No. 701-TA-312 (Second Remand)

Publication 2753 **March 1994**

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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Softwood Lumber From Canada

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In July 1992, the U.S. International Trade Commission (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). In October 1993, the Commission reaffirmed its original finding to the Binational Panel, (USITC Publication No. 2689 (October 1993)). On January 28, 1994, the Binational Panel remanded the Commission's determination for a second time (USA-92-1904-02). The attached views were submitted to the Binational Panel in response to the second remand.

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VIEWS OF CHAIRMAN NEWQUIST AND COMMISSIONER ROHR

Based on the record in this second remand investigation,[1] we determine 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.[2] We have carefully considered the instructions of the panel, established under the U.S./Canada Free Trade Arrangement, which reviewed our original determination and our first remand determination. In our view, the panel's second decision ***requires*** us to conclude that the information we have collected on the issue of the effects of the price of imports on prices in the U.S. softwood lumber market does not demonstrate whether subsidized Canadian imports are having any injurious effects on U.S. lumber prices. We therefore find the pricing of the Canadian imports to be a neutral factor in our determination. We base our decision on the other evidence on the record in this investigation, and make an affirmative determination.

I. *The Panel's Instructions*

The remand instructions issued by the panel in this investigation significantly impede our execution of our statutory obligations as Members of the United States International Trade Commission. We take those sworn obligations very seriously. Despite the difficulties imposed upon us by the panel, we believe we have fulfilled our obligations in the second remand investigation in a manner wholly consistent with both the laws of the United States and the U.S./Canada Free Trade Arrangement.

As we read the panel's decision on review of our original determination, it acknowledges that the volume of the subsidized Canadian imports supports a finding that the subsidized Canadian imports are a cause of the injured condition of the domestic industry.[3] Nevertheless, the panel remanded the investigation to us to reconsider our finding that the price effects of the Canadian imports also supported our affirmative determination.[4] On review of our remand determination, the panel paid lip service to our reconsideration of this factor, but it effectively decided that no reasonable person could conclude, based on the evidence in the record, that the price of the subsidized Canadian imports of softwood lumber was injuriously affecting the price of softwood lumber in the United States.[5]

Thus, the panel has effectively foreclosed demonstrating a causal link between the price of the Canadian imports and any injury to the domestic industry. It rejected our use of price trend data that relied on producer price indexes (PPIs).[6] It rejected our consideration of other price trend comparisons based on published price data and questionnaire price data.[7] It

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[1] We note that the Commission did not reopen the record for purposes of this second remand investigation.

[2] We recognize that the Department of Commerce, on second remand, and in accordance with the instructions of a separate U.S./Canada Free Trade Arrangement panel, recently issued a negative determination regarding subsidies. However, the Panel's decision accepting that determination is currently subject to challenge. Among the grounds for the challenge is the alleged bias and conflict of interest on the part of several of the panelists. Should the Commerce decision be affirmed following the extraordinary challenge proceeding, the Commission's proceedings would become moot. In any event, at the present juncture, we must issue a determination now, and, in so doing, must continue to rely on Commerce's earlier findings that imports of softwood lumber from Canada are subsidized.

[3] First Panel Decision at 19 ("substantial evidence supports the Commission's finding that the volume of Canadian imports during the period of investigation was 'significant'"). This is the legal conclusion which is drawn on the basis of the factual finding that such imports are significant.

[4] First Panel Decision at 36.

[5] Second Panel Decision at 12-13.

[6] *Id.* at 14-16.

[7] *Id.* at 16-20.

rejected the evidence that Canadian SPF is a significant factor in pricing decisions.[8] It rejected our consideration of competitive quotes in support of our findings regarding the significance of SPF prices.[9] It rejected our evaluation of questionnaire data on price leadership.[10] It rejected our comparative regional pricing analysis.[11]

In each instance, the panel found the factual evidence as well as the Commission's analysis defective. The panel rejected consideration of comparative trends in PPIs to demonstrate a causal linkage because the panel concluded that PPIs do not measure prices but only changes in prices,[12] and because the U.S. and Canadian PPIs available to us were based on slightly different baskets of types of lumber.[13] The panel rejected our reliance on other price trend analysis based on the conclusion that the data was insufficiently "robust" in a technical statistical sense.[14]

While we do not agree with these criticisms, we must accept the Panel decision.[15] In accepting that these data do not demonstrate that the price of the Canadian imports supports an affirmative finding, we also find that the data do not demonstrate that the price of the Canadian imports had no effect on the domestic industry. If the data are insufficient for one purpose, they must be insufficient for both. Thus, we find the price of the Canadian imports is neutral in our determination.

The panel rejected our conclusions about the role in the market of specific spruce-pine-fir (SPF) prices. SPF is, of course, the dominant species group imported from Canada. The panel did so by rejecting the Commission's interpretation of the questionnaire responses.[16] It also rejected the Commission's conclusion that the establishment of a particular species of lumber as a reference for prices demonstrates a causal link between the prices for that species and prices for other species.[17] They therefore found such evidence insufficient to support the finding of a link between the price of the imports and injury to the domestic industry. The panel concluded, based upon its own evaluation of the questionnaires, that, because the Commission relied on less than a majority of the questionnaire responses, its determination was not supported by substantial evidence.[18] We must accept that finding.[19] We cannot, however, find that the questionnaires on either side of this issue are more probative than any other responses.

The panel also rejected the Commission's consideration of regional price comparisons as evidence of a causal link between the price of the imports and the injury being experienced by the domestic industry. Among its reasons, the panel said average

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[8] *Id.* at 22.
[9] *Id.* at 29.
[10] *Id.* at 31.
[11] *Id.* at 33-36.
[12] *Id.* at 15.
[13] *Id.* at 16.
[14] *Id.* at 16.
[15] We were unaware, for example, that it is within a Panel's authority to decide whether any particular type of information is "probative" or not. *Id.* at 16.
[16] *Id.* at 20-29.
[17] *Id.* at 23.
[18] *Id.* at 23-27.
[19] We must point out that the panel's assertion about the superior probative value of purchaser's questionnaires, *id.* at 26 & n.55, is incredibly naive. Purchaser's questionnaires are no more probative as a class than any others. Purchasers have as much at stake in the outcome of a proceeding as producers or importers. This is particularly likely in this highly publicized investigation because they are more aware of the effect their responses to our questionnaires can have. In general, we have found one must be more careful in assessing purchaser questionnaires for the very reason that unlike producer and importer questionnaires, any biases in purchaser questionnaires may be more difficult to identify.

composite prices cannot be used to compare the prices of the Canadian imports and the U.S. product.[20] This being said, it is equally improper to use them to show that Canadian prices were either above or below U.S. prices.

The panel further imposed a statistical significance test on our use of the pricing data and said our findings were not statistically significant.[21] The lack of statistical significance would also perforce apply to any conclusion concerning regional price comparisons including those that would support a finding that the price of the Canadian imports is unrelated to injury being experienced by the domestic industry.

In short, our difficulty is that the panel appears to be requiring that we find that the price of Canadian imports be linked to the condition of the domestic industry, while saying at the same time that such price effects cannot be demonstrated by the only type of pricing evidence that can reasonably be obtained in a market such as the U.S. lumber market.

II. *Determination on Remand*

Although we disagree with the panel's conclusion, we accept, as we must, the panel's ruling that the information does not constitute probative evidence that the price of the subsidized Canadian imports was related to the injury being experienced by the domestic industry. However, in so doing, we must also accept the corollary conclusion that the information cannot constitute probative evidence that the price of the imports was unrelated to the injury being experienced by the domestic industry. There is no proof either way. We cannot find a way in which such proof could be obtained. This absence of proof is the heart of problem.

To correctly analyze the situation under the terms of U.S. law, we begin by examining what must be shown in a title VII proceeding under U.S. law. We then proceed to examine what is the evidence left in the record given the panel's rejection of the pricing evidence.

A. What Must Be Demonstrated in a Title VII Proceeding Under U.S. Law

The statute requires the Commission, in this case, to determine whether the softwood lumber industry in the United States is materially injured by reason of subsidized imports from Canada.[22] As has been approved by our reviewing courts on numerous occasions, we conduct this analysis in a bifurcated fashion. First, we determine whether the industry is currently experiencing material injury. Second, we determine whether imports are **a** cause, not the only cause, not an important cause, not even a material cause, merely **a** cause of that injury.

The next question is: what does the statute require for an affirmative determination that imports are **a** cause of the injury. The statute says we are to "**consider**" and explain in our analysis the volume, price, and the impact of the imports.[23] The statute further sets forth a list of factors the Commission is to "**consider**" in analyzing the volume, price and impact of the imports.[24] The statute also provides that we may **consider** other factors we deem relevant, and must explain their relevance to the determination.[25] While we may consider

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[20] *Id.* at 32.
[21] *Id.* at 36.
[22] 19 U.S.C. §1671d(1).
[23] 19 U.S.C. §1677(7)(B).
[24] 19 U.S.C. §1677(7)(C)(i)-(iii).
[25] 19 U.S.C. § 1677(7)(B).

alternative causes of injury, Congress made it clear that we are not to weigh causes.[26] So long as we determine that imports are a cause of injury, an affirmative determination is required under U.S. law.

What is key to the application of the statute is that the statute says only that we are to consider and explain our consideration of the volume and price of the imports. **It does not require the Commission to make any specific findings either affirmative or negative with regard to any specific factor.** In fact, the statute goes even further by stating that the presence or absence of any factor "...shall not necessarily give decisive guidance with respect to the determination by the Commission...."[27] The statutory language is thus very explicit that a finding that the price of the imports is itself injurious is **not** an absolute requirement in a title VII proceeding.

Contrary to what is implicit in the panel's discussion, there is no "default" mode of a negative determination.[28] We conclude that a finding of a causal link between the price of the imports and the condition of the industry is not an absolute requirement for an affirmative determination. Where, as the panel here directs, the pricing evidence cannot prove the presence or absence of a causal linkage between the price of the imports and injury, we must look at all the remaining evidence and make our determination based on that information.

In its first opinion, the panel suggested, in dicta, that an affirmative determination could not be reached on the basis of the effects of the volume of imports alone.[29] Although our determination here is not based solely upon volume, we believe the panel's pronouncement in its first opinion is sorely flawed. In fact, the decisions cited by the panel are consistent with the position we have tried to make clear -- that no single consideration is determinative and that the absence of a finding of a causal link between the price of the imports and the condition of the domestic industry does not compel a negative determination by this Commission in any title VII investigation.

Whether any information or consideration alone, or in conjunction with any other information, may warrant an affirmative determination must be ascertained based on the record in a particular investigation. Here, the product being investigated is a commodity product and the industry characterized by a large numbers of buyers and sellers, and rapid dissemination of, and response to, frequent price changes. In such a market, the effects of the volume of imports are likely to be far more significant than in an industry where suppliers are not price takers. The lack of market share shifts is not unexpected when suppliers have very limited opportunities to withhold supplies in the hope of higher prices.[30]

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[26] S. Rep. No. 249, 96th Cong., 1st Sess. 57 (1979). Similar language is contained in the House Report. H.R. Rep. No. 317, 96th Cong., 1st Sess. 47 (1979). E.g., Citrosuco Paulista S.A. v. United States, 704 F. Supp. 1075, 1101 (Ct. Int'l Trade 1988).

[27] 19 U.S.C. §1677(7)(E)(ii).

[28] The panel seems to think that if an affirmative is not "proved" in some fashion, a negative determination is required. That is not the case at all. There is no burden of proof. *See* discussion *infra*. The only legitimate reading of our statute is that after considering all the evidence concerning the factors we are required by law to consider, the Commission decides what is probative and what is not. Whatever information remains, however limited for whatever reasons, is the basis on which the Commission is required to exercise its judgement.

[29] USA-92-1904-02, slip op. at 32-33 (July 26, 1993).

[30] In this regard, we are mystified by the panel's conclusion regarding the lack of a concerted decision by the domestic industry to fight on price rather than concede market share, and its statement that the notion of fighting on price is inconsistent with our finding that lumber producers are price takers. Panel Second decision at 19. It is precisely because lumber producers are price takers that the notion of fighting on price is valid. Lumber producers cannot decline to sell lumber in an effort to induce price increases, since no individual producer has sufficient market power to affect prices by limiting market supply. Thus, unless lumber producers can, as individuals, afford to hold lumber in

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The lack of observable price effects on the part of the imports, particularly when those sources of information on which we relied have been forbidden by the panel, is also not unexpected.

More importantly, the cases cited by the panel as support for its proposition that an affirmative determination cannot be based on the volume of imports alone, including even prior panel decisions, are inapposite to the issues presented in this investigation. The panel's interpretation of these cases also appears to reflect a misunderstanding of the questions asked in the bifurcated analysis that we employ.

In its first decision, the panel stated that an earlier binational panel, in the *New Steel Rails* case, "has affirmed that 'the mere presence of imports is not sufficient to establish material injury.'"[31] The panel has apparently ignored the context in which that statement was made by that panel. The *New Steel Rails* panel was reviewing a Commission finding, based on separate analyses by individual Commissioners, that there was no present causal link between the imports and the injury being experienced by the industry **and** that there was a threat to the industry posed by those imports.

The panel affirmed both the ***negative*** present causation finding and the ***affirmative*** threat finding. The panel's statement was not therefore made in connection with a Commission decision that the presence of imports alone established injury. The plurality decision in which Commissioners Rohr and Newquist participated in fact relied on the low import penetration, and the contract nature of sales in the market to support their negative present causation finding, as well as the lack of any discernible price effects. The *New Steel Rails* panel's statement was based on a single, unsupported comment by one Commissioner in his separate views. There has never been any discussion, legal or otherwise, which explains how this interpretation of U.S. law could be made.

In fact, in *New Steel Rails*, Commissioner Rohr noted that he found that pricing was "essentially neutral" in his threat determination, which was affirmed.[32] His *New Steel Rails* decision was thus made on the basis of the other evidence on the record, where no affirmative finding of injurious price effects was made. The panel's affirmance of the 3 to 3 affirmative Commission determination on threat was thus an affirmance of this position, not of the contrary position espoused by the current panel.

Assuming *arguendo*, however, that the *New Steel Rails* panel's statement concerning effects of the volume of imports alone was not dicta, the present panel also fails to understand the implications of our bifurcated analysis. Before we consider the effect of imports on the domestic industry in question, we first determine whether that industry is materially injured. Only if we have determined that the industry is presently experiencing material injury do we then consider whether the injury "is by reason of" the subject imports.

Thus, in our analytical framework, the statement that "the mere presence of imports is not enough to establish material injury" is obviously true in the context of the first question we answer: that is, is the industry experiencing material injury? And we agree

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[30] (...continued)
inventory, they must sell it at whatever price prevails in the market. The record indicates that lumber inventories declined during the period of investigation, both absolutely and as a share of shipments. Report at A-37, Table 11. This supports the conclusion that individual lumber producers, acting in their own interests, sought to sell their lumber at whatever price they could obtain in the market, rather than hold it in inventory. There is certainly no requirement under U.S. law that there be a concerted decision by producers to this effect, even assuming such concerted action were possible among the thousands of mostly small lumber producers.

[31] USA-92-1904-02 at 33 (quoting New Steel Rails from Canada, USA-89-1904-09 and 10, at 87 (Aug. 13, 1990)).

[32] USITC Pub. 2217 at 23 n. 61.

with both panels -- the presence of unfair imports in the marketplace does not, by itself, establish that an industry is injured. And, we cannot foresee making such a determination. That, however, is a different question than whether the volume of unfair imports may be sufficient to establish that the imports are a cause of injury. In our view, in a commodity industry, such as that here, where no other causes have been established as the cause of the injury, the volume of imports may in fact be a cause of injury.

The other cases cited by the instant panel also appear to have been misread or taken out of context. The panel erroneously suggests that the Commission's negative preliminary determination in *Animal Feed Grade DL-Methionine from France*[33] was based upon the Commission's rejection of an analysis that relied on the volume of imports alone.[34] This is an incomprehensible reading of that decision. In that investigation, unlike the case before us, the market share of the imports declined throughout the period of investigation; the U.S. industry had recently been established and had continually been gaining market share; and there was specific evidence that the aggressive pricing tactics of a particular U.S. producer were the cause of the price declines that were observed.[35] Thus, the negative determination was based on specific findings which demonstrated a lack of connection between either the volume or the price of the imports and the current condition of the industry. Unlike that investigation, here, there is probative evidence that the volume of imports is a cause of the injury.

So too, the panel's reliance on *Iwatsu Electric Co. v. United States*[36] is misplaced. There, the court noted, in passing, that it could not envision a case in which volume alone could establish causation.[37] *Iwatsu*, however, involved imports of telephone systems and subassemblies from Japan, Korea and Taiwan -- products which, whatever else they may be, cannot be characterized as commodity products, sold in a price sensitive market. Thus, the court's comment, although dicta, may have been appropriate in the context of that particular non-commodity, specialized product. It does not hold here, however, in light of the nature of the softwood lumber market and industry.

Finally, we note that the panel's discussion of pricing seems to imply that there is a specific burden of proof in a title VII proceeding. We again must disagree with any such interpretation of U.S. law. If the Commission's investigation were an adjudication in court, or even an agency action under the U.S. Administrative Procedure Act, the imposition of such a burden might be appropriate. However, the Commission's investigation is not a court adjudication or an agency action under the Administrative Procedure Act. Petitioners do not bear a burden of proof or even a burden of coming forward with evidence in support of their arguments. The U.S. Congress requires the Commission to investigate facts, evaluate the data, make choices between conflicting data and make a determination.[38] It has not made any particular findings indispensable nor imposed any burden of proof. Moreover, the Commission's decision does not depend on the weight of the evidence but rather on the expert judgment of the Commission based upon the information of record.[39] No single factor is ever necessarily determinative. Therefore, the fact that the effects of the price of the Canadian imports cannot be determined does not compel a negative determination.

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[33] Inv. No. 731-TA-255 (Preliminary), USITC Pub. 1699 (May 1985).
[34] USA-92-1904-02 at 32-33 (quoting USITC Pub. 1699 at 76 n.17).
[35] USITC Pub. 1699 at 7.
[36] 758 F. Supp. 1506 (Ct. Int'l Trade 1991).
[37] Id. at 1512-13.
[38] *Copperweld Corp. v. United States*, 682 F. Supp. 552, 562 (Ct. Int'l Trade 1988).
[39] *Matsushita Electric Industrial Corp. v. United States*, 750 F2d. 927, 933 (Fed. Cir. 1984).

B. **Our Findings**

Therefore, as we view the record, our findings and judgments are as follows:

1. The domestic industry is currently experiencing material injury.

This conclusion, made in the context of our bifurcated mode of analysis was affirmed by the panel. There is no information which causes us to change that conclusion.

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

These facts were found by the Commission and our findings about them were not remanded. In our expert judgment, these findings have certain consequences, including that price is the most important factor in making sales; that no single buyer or seller has sufficient market power to influence the quantity demanded or the quantity supplied; that lower prices will determine who makes a sale but have little effect on the overall quantity sold; and that individual sellers are price takers.

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

This is also a fact determined by the Commission and not remanded by the panel.

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

This conclusion was made by the Commission in its original determination, and it was not remanded to the Commission for reconsideration.[40] The finding that the volume of imports is significant is a finding under the Commission's statute that the volume of imports is causally linked under the conditions in the market to the condition of the domestic industry.

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

This is the conclusion required by the panel's second decision. This conclusion is compelled by the panel's decision with regard to the evidence on which the Commission based its findings of an affirmative effect of the price of the Canadian imports. If they are insufficient to support one conclusion they are insufficient to prove the other.

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

The Commission found, and the panel did not remand its conclusion, that the decline in demand for lumber during the period does not fully explain the injury being suffered by the domestic industry. The Commission found, and the panel did not remand its conclusion, that timber supply restrictions, and the resultant higher log prices, do not fully explain the injury being experienced by the industry. No other explanations were offered and none

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[40] *See* note 3, *supra*.

discovered by the Commission which explain the injury being experienced by the domestic industry.

This is the evidence before us on which we must make a determination. We conclude that, in a commodity market, where the domestic industry is experiencing material injury; where it has been demonstrated that the volume of the imports supports a finding that there is a causal connection between the imports and the material injury being experienced by the domestic industry; where it is not possible to determine whether the price of the imports supports the finding of a causal link between the imports and the injury being experienced by the domestic industry; and where no other causes fully explain the injury being experienced by the domestic industry, an affirmative determination is required by U.S. law.

We therefore make an affirmative determination in this second remand investigation.

Views of Commissioner Carol T. Crawford
In Response to
The Decision of the Panel on Review of
The Remand Determination of
The U.S. International Trade Commission,
Under the United States-Canada Free Trade Agreement
In the Matter of Softwood Lumber from Canada,
USA-92-1904-02

In response to the Binational Panel's second remand of the Commission's affirmative final determination in this investigation, I reaffirm my determination that the domestic industry producing softwood lumber is materially injured by reason of subsidized imports of softwood lumber from Canada.

In response to the Panel's first remand, I submitted separate views to explain specifically the factual, legal and economic analysis that formed the basis for my affirmative determination.[41] In this second remand, the Panel reviewed and remanded the joint views of Chairman Newquist, Vice Chairman Watson and Commissioner Rohr. The Panel did not challenge or remand my separate determination, which is based on an analytical framework that differs from my colleagues, and thus the Panel's analysis in this second remand does not apply to the analysis and reasoning I employed in my separate determination. As a consequence, the Panel's decision in this second remand presents no basis to warrant my reconsideration of my separate views.[42] Therefore, I reaffirm my determination that the domestic industry is materially injured by reason of subsidized imports of softwood lumber from Canada.

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[41] See Views of Commissioner Carol T. Crawford, Softwood Lumber from Canada, Inv. No. 701-TA-312 (Remand), USITC Pub. 2689 (October 1993) at 25.

[42] I note that the record has not been reopened in response to the second remand, and therefore there is no new evidence to consider.

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 (Second Remand)

Pursuant to the decision of the Binational Panel in Softwood Lumber from Canada, USA 92-1904-02, (January 28, 1994), I determine in this second remand determination that an industry in the United States is not materially injured or threatened with material injury by reason of imports of softwood lumber from Canada that the Department of Commerce has determined are subsidized.

In reaching my determination herein, I note that U.S. law expressly provides that if a Commission determination is remanded by a binational panel, the Commission shall "take action not inconsistent with the decision of the panel or committee".[43] This statutory pronouncement is absolute and requires me to accept without question the panel's findings.

In its first remand determination, the Commission found that the significant volume of subsidized Canadian imports had significant price suppressing effects on the domestic industry, and, accordingly, the Commission made an affirmative determination.[44] Upon its review of that first remand determination, however, the Panel found that the Commission's evidentiary findings on the issue of price suppression were either unsupported by substantial evidence or insufficient and concluded that the Commission's causation analysis was fundamentally flawed.[45]

Specifically, the Panel found that price trends data and analysis used by the Commission to support its conclusion that significant price suppression was caused by the Canadian imports of softwood lumber "do not constitute substantial evidence of causation and are otherwise not in accordance with law."[46] [47] The panel remanded this issue to the Commission for further consideration. In addition, the Panel held that the "Commission's findings with respect to the dominant impact of Canadian SPF on the domestic softwood lumber industry, and the comparison of regional prices and import penetration are not supported by substantial evidence on the record or are otherwise not in accordance with law."[48]

Having accepted the findings of the Panel on the issue of price suppression, I again reviewed the entire record in this investigation and conclude that the evidence does not support a finding that subsidized imports of softwood lumber from Canada are a cause of price suppression suffered by the domestic industry. Although it may appear that the significant volume of subsidized imports had a significant and deleterious effect on U.S.

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[43] 19 U.S.C. Section 1516a (7)(A). This provision further provides that any action taken by the Commission in response to a panel remand is not subject to judicial review.

[44] Softwood Lumber from Canada, Inv. No. 701-TA-312 (Remand), USITC Pub. 2689 (October 1993) at 4.

[45] Softwood Lumber from Canada, USA 92-1904-02, (January 28, 1994) at 36.

[46] Id. at 13. Although the Panel criticized the Commission's conclusion that domestic industry price increases should have occurred as a result of increased costs over the period of investigation, the Panel determined that it need not pursue the issue at this time.

[47] As the panel noted in its Decision of the Panel, July 26, 1993 at page 11, Article 1904(3) of the FTA requires binational panels to apply the standard of review that a U.S. court would apply in its review of a Commission determination. That standard of review is set forth in 19 U.S.C. Section 1516a(b)(1)(B) and requires the panel to hold unlawful any determination found to be unsupported by substantial evidence on the record. While the Panel's remand decisions in the instant matter demonstrate that the Panel carefully considered the substantial evidence standard, I am disappointed with the lack of deference the Panel has accorded to the Commission's determinations in this case.

[48] Id. at 13. I note that although the Panel found the Commission's regional analysis to be insufficient and lacking a full explanation, the Panel did not address my Additional Views which elaborated on this same issue.

prices, the evidence of record, given the constraints imposed by the Panel, does not support such a conclusion. As a result, I must conclude that although the domestic softwood lumber industry may well have been materially injured, I am precluded from determining that it was materially injured by reason of the subsidized imports from Canada.[49]

Having found no present material injury by reason of the subsidized Canadian imports, the statute requires that I consider the question of threat of material injury. In that regard, I have considered both the record as it existed on July 15, 1992, when the Commission reached its final affirmative determination, and the information gathered by the Commission for purposes of its first remand investigation.[50] I find that the record does not support a conclusion that the U.S. softwood lumber industry is threatened with real and imminent material injury. In doing so I concur with and adopt the reasoning and findings of Commissioner Nuzum on the issue of threat of material injury in her dissenting views to the Commission's final determination.[51]

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[49] I have considered whether the impact of the significant volume of the subsidized imports, was by itself, sufficient to support an affirmative determination. In this case, the record certainly does not support such a conclusion. The volume of subsidized Canadian imports declined in terms of quantity and value over the period of investigation, although the market share of those imports increased slightly. See, Final Staff Report at A-24, Table 2.

[50] Although the Commission did reopen the record in making its first remand determination, neither the additional data gathered nor the reorganization of certain existing data are relevant to my threat determination herein. See, INV-Q-174.

[51] See, Softwood Lumber From Canada, Investigation No. 701-TA-312 (Final), USITC Pub. 2530, Dissenting Views of Commissioner Janet A. Nuzum at 80-87.

DISSENTING VIEWS OF COMMISSIONER JANET A. NUZUM

In response to the second decision of the U.S.-Canada Binational Panel ("Panel"),[52] I reaffirm my earlier determination[53] 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.[54]

The Panel's second decision on review of the Commission's affirmative determination in this investigation remands the Commission's determination of October 25, 1993 for reconsideration and further explanation.[55] The Panel's second decision specifically challenges the views of Chairman Newquist, Vice Chairman Watson, and Commissioner Rohr,[56] although the remand is to the Commission as a whole.[57] I have carefully considered the Panel's second decision and find that my original views in this investigation, as supplemented by my views in the first remand investigation, are neither challenged by nor inconsistent with the Panel's second decision.

The record in this second Commission remand investigation was not re-opened to the parties for introduction of new evidence. Pursuant to a separate U.S.-Canada Binational Panel review of the U.S. Department of Commerce ("Commerce") determination in this investigation, however, Commerce recently issued a remand determination revising its softwood lumber subsidy finding for this investigation to zero.[58] The relevant subsidy finding at the time of the Commission's original final determination was 6.51 percent and the subsidy finding that existed at the time of the Commission's first remand determination was 11.54 percent.[59] As I noted in my views in the first remand investigation,[60] I considered the size of the subsidy margin, although it was not dispositive to my negative determination. In this investigation, my negative determination is primarily based on the lack of substantial evidence in the record of a causal link between the imports of Canadian softwood lumber and the suppression of U.S. softwood lumber prices coupled with the lack of any significant adverse volume effect. The change in the subsidy finding from a rate of 6.51 percent to a rate of 11.54 percent did not alter my conclusion; the subsequent revision to a rate of zero merely lends further support to my negative determination.

I therefore reaffirm my negative determination, as explained in my original views and my views in the first remand investigation.[61]

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[52] 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, Decision of the Panel on Review of the Remand Determination of the U.S. International Trade Commission, dated Jan. 28, 1994 ("Panel Decision II"). See also 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, dated July 26, 1993 ("Panel Decision I").

[53] See Dissenting Views of Commissioner Janet A. Nuzum, Softwood Lumber from Canada, Inv. No. 701-TA-312 (Remand), USITC Pub. 2689 (Oct. 1993) ("Remand Views") at 37-45; and Dissenting Views of Commissioner Janet A. Nuzum, Softwood Lumber from Canada, Inv. No. 701-TA-312 (Final), USITC Pub. 2530 (July 1992) ("Original Views") at 55-87.

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

[55] See Panel Decision II at 13, 20, 33, 36.

[56] Id. at 2, n.4.

[57] It is my understanding that, since the remand is to the Commission as a whole, even dissenting Commissioners are obligated to participate in the remand investigation and determination.

[58] Commerce's Final Results Of Redetermination Pursuant To Binational Panel Remand, dated Jan. 6, 1994. See also Memorandum GC-R-046 at 3, n.5 (privileged memorandum).

[59] Commerce's Redetermination Pursuant To Binational Panel Remand, dated Sept. 17, 1993 at 191.

[60] Remand Views at 44-45.

[61] See Remand Views at 37-45 and Original Views at 55-87.