

**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**

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**DECISION OF THE PANEL  
REVIEWING THE FINAL DETERMINATION OF  
THE U.S. INTERNATIONAL TRADE COMMISSION**

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**July 26, 1993**

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

**Appearances:**

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

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

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

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

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

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

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

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

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

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

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

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## ORDER

## **OPINION AND ORDER OF THE PANEL**

### **I. INTRODUCTION**

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

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

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<sup>1/</sup> 19 U.S.C. § 1516a(g)(2).

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

## **II. BACKGROUND**

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

### **A. Lumber I**

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

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

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

and ITC investigations.<sup>5/</sup> The 1982 investigations commonly are referred to as "Lumber I."

**B. Lumber II and the MOU**

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

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<sup>5/</sup> Certain Softwood Products from Canada, 48 Fed. Reg. 24,159 (May 31, 1983) (Neg. Final).

<sup>6/</sup> The petition filed by the Coalition for Fair Lumber Imports alleged that there was new evidence regarding Canadian subsidies, and that the applicable law had changed since Commerce's determination in Lumber I.

<sup>7/</sup> Softwood Lumber from Canada, Inv. No. 701-TA-274, USITC Pub. 1874 (July 1986) (Aff. Prelim.).

<sup>8/</sup> Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453 (Oct. 22, 1986) (Aff. Prelim.).

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

### **III. PROCEDURAL HISTORY**

#### **A. Lumber III-The Contested Determination**

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

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



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

1. The Commerce Department's Determination

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

2. The Commission's Determination

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

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

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

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

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

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

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

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

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

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

<sup>16/</sup> ITC Final, supra note 2.

<sup>17/</sup> Id. at 37, 55.

producing the like product\_mill operators.<sup>18/</sup> It noted that the domestic industry is comprised of almost 6,000 producers, most of whom are small, and that the production of softwood lumber is concentrated in the West and South.<sup>19/</sup>

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

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

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<sup>18/</sup> Id. at 10-11.

<sup>19/</sup> Id. at 14 n.41, 15.

<sup>20/</sup> Id. at 15.

<sup>21/</sup> Id. at 16.

<sup>22/</sup> Id. at 27.

<sup>23/</sup> Id.

<sup>24/</sup> Id. at 32.

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

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

While we are satisfied that our pricing information is accurate and reflects pricing trends in the market, its usefulness for reflecting comparative prices of domestic and imported lumber is limited. [footnote omitted]. The information reported in questionnaire responses is simply not sufficient to ensure that anomalies resulting from the volatility of the market are dampened so as to allow us to make a reasoned judgment concerning under- or over- selling. Nor is publicly available price information suitable for purposes of assessing comparative prices. Prices are reported in Random Lengths for purposes of reporting general trends and price levels for the information of producers and purchasers. Consequently, they are not reported with the degree of specificity and consistency necessary to enable us to rely on them for developing price comparisons. Similarly, while price indices inform us about trends in prices, they are not suitable for comparing price levels.

Softwood lumber is sold as a commodity and prices change daily, and even hourly. Producers quote prices to purchasers on a spot basis, relying on internal price lists or industry sources such as Random Lengths as a guide. The day-to-day volatility of the market, combined with the relative difficulty of obtaining specific price information from producers, importers, and purchasers, complicates the gathering and interpretation of price information. Moreover, while U.S. producers often quote prices on an f.o.b. mill basis, the practice in Canada has changed in the past few years, and Canadian mills now generally quote prices on a delivered basis. [footnote omitted]. The different bases used for quoting prices by Canadian and U.S. producers makes developing price comparisons particularly difficult.

Id. at 30-31.

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

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

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

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<sup>26/</sup> Id. at 31.

<sup>27/</sup> Id. at 32-33.

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

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

**B. Procedural History Before The Panel**

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

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

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

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

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

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

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

#### **IV. STANDARD OF REVIEW**

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

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

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

<sup>32/</sup> 19 U.S.C. § 1516a(b)(1)(B).

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

### **A. Substantial Evidence**

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

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

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

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

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

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

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

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



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

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

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

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

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

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

## **B. Deference**

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

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

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

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

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

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

### **C. Limitations On Deference**

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

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

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

<sup>49/</sup> Consolo, 383 U.S. at 620.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **V. SUMMARY OF ISSUES AND PANEL DECISION**

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

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

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

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

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

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

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

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<sup>60/</sup> See Republic Steel Corp. v. United States, 8 Ct. Int'l Trade 29, 31, 591 F. Supp. 640, 642 (1984).

<sup>61/</sup> Id. at 35, 591 F. Supp. at 646.

<sup>62/</sup> See Softwood Lumber From Canada, Inv. No. 701-TA-312, USITC Pub. 2468, at 14 (Dec. 1991) (Aff. Prelim.).

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

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

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



## **VI. DISCUSSION**

### **A. Introduction-The Statutory Scheme**

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

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

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

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

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

- a) the volume of the imported products subject to investigation;
- b) the effect of such imports on prices of the like products in the United States; and
- c) the impact of such imports on domestic producers of like products.<sup>64/</sup>

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

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

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

<sup>65/</sup> 19 U.S.C. § 1677(7)(C)(i).

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

## **B. The Analytical Framework**

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

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<sup>66/</sup> 19 U.S.C. § 1677(7)(C)(ii).

<sup>67/</sup> 19 U.S.C. § 1677(7)(C)(iii).

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

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

- a) the imports are significant in volume, whether absolutely or relative to total consumption;
- b) demand is inelastic (i.e., consumers are unwilling to purchase significantly more of the product as prices decrease); and
- c) the products are considered by consumers to be close substitutes.

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

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

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<sup>69/</sup> ITC Final, at 27.

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

1. Substitutability

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

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

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<sup>71/</sup> Id. at 28.

<sup>72/</sup> Id.

<sup>73/</sup> Id.

<sup>74/</sup> Id.

<sup>75/</sup> Id. at 28 n.98.

<sup>76/</sup> Id. at 28 n.101, A-89 n.73.

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

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

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

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<sup>77/</sup> Id. at 28-29.

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

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

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

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

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<sup>79/</sup> Panel Hearing Transcript, at 76; see also Canadian Complainants' Joint Brief, at IV-38, 39.

<sup>80/</sup> Panel Hearing Transcript, at 84.

<sup>81/</sup> Id. at 135-136.

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

## 2. The Analytical Framework Is Not Substantial Evidence

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

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

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<sup>82/</sup> Metallverken Nederland B.V. v. United States, 13 Ct. Int'l Trade 1013, 1017, 728 F. Supp. 730, 734 (1989).

<sup>83/</sup> Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

<sup>84/</sup> Id. at 477.

<sup>85/</sup> ITC Final, at 27; see also Commission Brief, at 25.



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

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

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

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

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

and verifiable events benefits all parties. It prevents preordained, formulated results of all types.<sup>87/</sup>

Other Court of International Trade decisions are to similar effect.<sup>88/</sup>

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

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<sup>87/</sup> Id. (Emphasis supplied).

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

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

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

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

### **C. Causation - The Statutory Factors**

#### **1. Volume**

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

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<sup>89/</sup> ITC Final, at 26.

<sup>90/</sup> Id. In 1986 Canadian market share stood at 29.5 percent by quantity, and 30.0 percent by volume. Id. at A-24.

<sup>91/</sup> ITC Final, at 26.

<sup>92/</sup> Id. at 27.

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

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

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

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<sup>93/</sup> Id.

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

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

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

relationship between the imports and the condition of the domestic industry in this investigation."<sup>97/</sup>

A Binational Panel in New Steel Rails from Canada also has affirmed that "the mere presence of imports is not sufficient to establish material injury."<sup>98/</sup>

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

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

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

sold on the domestic industry and the domestic prices, the domestic market, and the domestic producers."<sup>99/</sup>

## 2. Price Effects (Suppression)

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

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<sup>99/</sup> Panel Hearing Transcript, at 141-42; see also Panel Hearing Transcript, at 10, 178.

<sup>100/</sup> Cemex, S.A. v. United States, 790 F. Supp. 290, 299 (Ct. Int'l Trade 1992), aff'd mem., 989 F.2d 1202 (Fed. Cir. 1993).

<sup>101/</sup> ITC Final, at 29.

<sup>102/</sup> Id.

<sup>103/</sup> Id. at 30.

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

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

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

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<sup>104/</sup> Id.

<sup>105/</sup> Id.

<sup>106/</sup> Id. at 31.

<sup>107/</sup> Id.

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

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

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

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<sup>108/</sup> Id. at 32.

<sup>109/</sup> ITC Final, at 33; see also Commission Brief, at 59.

<sup>110/</sup> Canadian Complainants' Joint Brief, at IV-26.

<sup>111/</sup> Id. at 133-38.



a) SPF as a "Bellwether"

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

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

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

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

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

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

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

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

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

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

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

<sup>117/</sup> Panel Hearing Transcript, at 140.

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

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

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

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<sup>118/</sup> ITC Final, at 31 n.107.

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

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

<sup>121/</sup> Id.

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

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

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<sup>122/</sup> Panel Hearing Transcript, at 168.

<sup>123/</sup> Id. at 169.

<sup>124/</sup> ITC Final, at 30.

<sup>125/</sup> Panel Hearing Transcript, at 169.

<sup>126/</sup> See Panel Hearing Transcript, at 140.

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

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

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

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<sup>127/</sup> ITC Final, at 31 n.107 (quoting Canada's Forest Industry; Markets 87-90, at 43 (1987) (Widman Management Limited, Vancouver, B.C.)) [hereinafter "Widman Report"].

<sup>128/</sup> Conditions Relating to the Importation of Softwood Lumber into the United States, Inv. No. 332-210, USITC Pub. 1765 (Oct. 1985).

<sup>129/</sup> ITC Final, at 31 n.107.

<sup>130/</sup> The 1985 Section 332 investigation utilized Random Lengths data for the period 1977-1984.

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

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

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

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

<sup>132/</sup> ITC Final, at A24, A31, A70.

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

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

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

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

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

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<sup>135/</sup> Chr. Bjelland Seafoods A/C v. United States, No. 91-05-00364, slip op. 92-196 at 17, 22 (Ct. Int'l Trade Oct. 23, 1992).

<sup>136/</sup> See Mitsubishi Materials Corp. v. United States, 820 F. Supp. 608 (Ct. Int'l Trade 1993).

<sup>137/</sup> ITC Final, at A-76.

<sup>138/</sup> Id. at 31 n.107. The Commission notes in its brief that the composite price "for 2x4s" in fact is based on prices for "framing lumber." Commission Brief, at 89 n.201.

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

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

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

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<sup>139/</sup> ITC Final, at 30.

<sup>140/</sup> CFIC Pre. Br., Ex. 18 (Pub. Doc. 7, List 2).

<sup>141/</sup> Canadian Complainants' Joint Brief, at IV-62.

<sup>142/</sup> Panel Hearing Transcript, at 242.



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

b) The Cost/Price Squeeze

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

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

<sup>144/</sup> ITC Final, at 32.

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

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

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

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<sup>145/</sup> Id.

<sup>146/</sup> Id. at 33.

<sup>147/</sup> Id. at 33. (Emphasis supplied).

<sup>148/</sup> Encon Industries Inc. v. United States, No. 92-01-00026, slip op. 92-164, at 4-5 (Ct. Int'l Trade Sept. 24, 1992).

<sup>149/</sup> Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962).

<sup>150/</sup> ITC Final, at 32 n.113. The ITC is neither required to examine, nor barred from examining, a subsidy. Copperweld Corp. v. United States, 12 Ct. Int'l Trade 148, 154, 682 F. Supp. 552, 559 (1988); Hyundai Pipe Co. v. U.S. Int'l Trade Comm'n, 11 Ct. Int'l Trade 117, 122, 670 F. Supp. 357, 359 (1987).

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Independent Evidence

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

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

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<sup>155/</sup> See Cemex, S.A., 790 F. Supp. at 298.

<sup>156/</sup> Panel Hearing Transcript, at 220, 222.

<sup>157/</sup> Inv. No. 702-TA-257, USITC Pub. 1844 (May 1986) (Final).

<sup>158/</sup> Id. at 16.

<sup>159/</sup> Id. at 16. (Emphasis supplied). The three Commissioners casting negative votes mentioned the lack of "conclusive evidence ... presented to support, or conversely to disprove," price suppression. They also indicated that protecting market share, and keeping prices "affordable," "is not injurious, but rather desirable." Id. at 21 n.8.

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

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

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<sup>160/</sup> Inv. No. 731-TA-518, USITC Pub. 2498 (Apr. 1992) (Final).

<sup>161/</sup> Id. at 15.

<sup>162/</sup> Inv. No. 731-TA-50, USITC Pub. 1270 (July 1982) (Final).

<sup>163/</sup> Inv. No. 303-TA-13, USITC Pub. 1098 (Sept. 1980) (Final).

<sup>164/</sup> Inv. No. 731-TA-433, USITC Pub. 2198 (June 1989) (Prelim.).

<sup>165/</sup> Inv. No. 731-TA-288, USITC Pub. 1927 (Dec. 1986) (Final).

### 3. Causation Summary

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

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

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

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

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

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

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<sup>167/</sup> Inv. Nos. 731-TA-548 and 551, USITC Pub. 2602 (Feb. 1993) (Final).

<sup>168/</sup> Id. at 30.

<sup>169/</sup> Shop Towels from Bangladesh, Inv. No. 731-TA-514, USITC Pub. 2487 (Mar. 1992) (Final).

<sup>170/</sup> Certain Telephone Systems and Subassemblies Thereof from Korea, Inv. No. 731-TA-427, USITC Pub. 2254 (Jan. 1990) (Final); British Steel Corp. v. United States, 8 Ct. Int'l Trade 86, 593 F. Supp. 405 (1984); Sparklers from the People's Republic of China, Inv. No. 731-TA-464, USITC Pub. 2306 (Aug. 1990) (Prelim.).

<sup>171/</sup> Florex v. United States, 13 Ct. Int'l Trade 28, 39, 705 F. Supp. 582, 593 (1989).

<sup>172/</sup> Fresh and Chilled Atlantic Salmon from Norway, Inv. Nos. 701-TA-302 and 731-TA-454, USITC Pub. 2371 (Apr. 1991) (Final); Certain Personal Word Processors from Japan, Inv. No. 73-TA-483, USITC Pub. 2411 (Aug. 1991) (Final).

<sup>173/</sup> Certain Fresh Atlantic Groundfish from Canada, Inv. No. 701-TA-257, USITC Pub. 1844 (May 1986) (Final).



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

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

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

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<sup>174/</sup> Cemex S.A., 790 F. Supp. at 299.

<sup>175/</sup> Panel Hearing Transcript, at 46.

<sup>176/</sup> SCM Corp., 4 Ct. Int'l Trade at 13, 544 F. Supp. at 199; see also New Steel Rails from Canada, USA-89-1904-09 and USA-89-1904-10, at 59 (Aug. 13, 1990).

<sup>177/</sup> Mitsubishi Materials Corp. v. United States, 820 F. Supp. at 622.

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

**D. The Cross-Sectoral Comparison**

**1. Background**

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

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

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<sup>178/</sup> See Republic Steel Corp. v. United States, 8 Ct. Int'l Trade 29, 35, 591 F. Supp. 640, 646 (1984).

<sup>179/</sup> Commission Brief, at 42 n.83 (citing Matsushita Elec. Indus. Co. v. United States, 6 Ct. Int'l Trade 25, 29, 569 F. Supp. 853, 857-58 (1983), rev'd, 750 F.2d 927 (1984)).

<sup>180/</sup> ITC Final, at 33.

<sup>181/</sup> Id. (Emphasis supplied).

performing worse than the wood products and building materials operations of those same producers.<sup>182/</sup>

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

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

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

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

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

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

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

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<sup>184/</sup> Panel Hearing Transcript, at 55-60.

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

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

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

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

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

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

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<sup>187/</sup> Panel Hearing Transcript, at 48-49.

<sup>188/</sup> Id. at 49-50. On the data collection issue, the Canadian Complainants comment further: With respect to the effect of increased timber costs, the Commission had detailed per unit manufacturing costs, including per unit log costs for all producers responding to ITC questionnaires. The Commission thus knew [ ] precisely how these companies log costs changed each year, both absolutely and relative to total costs on both a regional and national basis.

At the same time, the Commission collected detailed consumption data which, along with company and industry-wide production data and a wealth of other factors, permitted it to determine precisely to what extent the recession and the downturn in housing starts had affected both those lumber producers responding to the ITC questionnaire and the lumber industry as a whole over the period of investigation. What about the industries producing other building products? The contrast could not be more stark . . . . [T]he Commission collected no comparable data on either the cost or demand side of the equation. The Commission lacked any information on how wood raw material costs changed over the period of investigation for any of the other building products industries in the ITC sample.

The Commission was also completely in the dark with respect to demand. It collected no consumption data or production data for any of the other building products industries . . . .

(continued...)

b) The Preliminary and Final Investigations

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

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(...continued)

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

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

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

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

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

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

lockstep."<sup>191/</sup> The Canadian Complainants also offered data that showed the multifarious nature of the wood products and building materials industries.<sup>192/</sup>

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

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

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

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

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



clearly and convincingly demonstrate that the domestic industry is not materially injured.<sup>194/</sup>

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

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

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<sup>194/</sup> Id. at 14. (Emphasis in original).

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

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

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

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

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

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

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

## 2. The Legal Issues

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

### a) Statutory Authority

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

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

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

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

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

b) The Methodology Applied by the Commission

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>204/</sup> Panel Hearing Transcript, at 150, 231.

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

<sup>206/</sup> ITC Final, at 14 n.41.

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

The producers' questionnaires solicited information on the following subjects:

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

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



However, since the wood products and building materials industries were never formally investigated by the Commission-nor indeed were these other industries ever even precisely defined by the Commission\_it is obvious that they were not investigated in similar detail.<sup>207/</sup>

Limited information on the non-lumber operations of a select number of softwood lumber producers was obtained only as a tangential matter to discern their overall financial results.<sup>208/</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **E. The Commission's Quebec Finding**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>221/</sup> ITC Final, at 26 n.90.

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



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

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

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

## **VII. REMAND**

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

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

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

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

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

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

## **APPENDIX A**

**IN THE MATTER OF SOFTWOOD LUMBER FROM CANADA**

**USA-92-1904-02**

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

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

Procedural History

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

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

### Issues Raised in the Motion to Dismiss

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

Article 2009 of the FTA states in pertinent part:

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

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

### FTA Chapter 19 Grants the Panel Exclusive Jurisdiction

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

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

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

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

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

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

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<sup>223/</sup> FTA art. 1901; 19 U.S.C. § 1516a(g)(1).

<sup>224/</sup> FTA art. 1904(2), (4), (5), (11).

<sup>225/</sup> FTA art. 1904, para. 12.

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

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

#### FTA Article 2009 Does Not Preclude Jurisdiction

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

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

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<sup>226/</sup> 19 U.S.C. §§ 1516a(g)(3)(A)(iv), 1516a(g)(2)(A), 1516a(a)(2)(A)(B), 1516a(d).

<sup>227/</sup> See, for example, Article 2005 regarding cultural industries.

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

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

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

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

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

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



### Conclusion

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

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

**In the Matter of:**

**SOFTWOOD LUMBER  
FROM CANADA**

**USA-92-1904-02**

**ORDER**

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

The results of the remand shall be provided to the Panel by the International Trade Commission within 90 days of the date of the Opinion.

SIGNED IN THE ORIGINAL BY:

July 26, 1993

Date

Joseph F. Dennin, Chairman

Joseph F. Dennin,  
Chairman

July 26, 1993

Date

Steven W. Baker

Steven W. Baker

July 26, 1993

Date

Harry B. Endsley

Harry B. Endsley

July 26, 1993

Date

James F. Grandy

James F. Grandy

July 26, 1993

Date

Donald M. McRae

Donald M. McRae