

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

In the Matter of:

**SOFTWOOD LUMBER
FROM CANADA**

USA-92-1904-02

DECISION OF THE PANEL

**ON REVIEW OF THE REMAND DETERMINATION OF
THE U.S. INTERNATIONAL TRADE COMMISSION**

January 28, 1994

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

Appearances:

John A. Ragosta and Harry L. Clark on behalf of the Coalition for Fair Lumber Imports. With them on brief were Robert H. Griffen, William A. Noellert, Susan B. Hester, Gregory I. Hume, David R. Goldberg and Evan Y. Chuck.

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

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

W. George Grandison and Mark A. Moran on behalf of the Canadian Forest Industries Council and affiliated companies. With them on brief were Gracia M. Berg and Robert J. Sokota.

Spencer S. Griffith on behalf of the Gouvernement du Québec. Submitting briefs were Elliot J. Feldman, Michael A. Hertzberg, Matthew J. Clark, and Jonathan D. Cahn on behalf of the Gouvernement du Québec; and Randolph J. Stayin on behalf of the Quebec Lumber Manufacturers' Association and members of the Canadian Lumbermen's Association located in Quebec.

Joining in the arguments of the Government of Canada, and the Canadian Forest Industries Council and affiliated companies were: Lawrence A. Schneider, Claire E. Reade, Michael T. Shor, and Matthew Frumin on behalf of the Government of the Province of Alberta; Homer E. Moyer, Stuart E. Benson and Paul Maguffee on behalf of the Government of British Columbia; and Mark S. McConnell, Lynn G. Kamarck, Deanna Tanner Okun, Leslie A. Delagran on behalf of the Government of Ontario.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STANDARD OF REVIEW 3

III. THE COMMISSION'S QUEBEC FINDING 5

IV. CAUSATION-EVIDENCE OF SIGNIFICANT PRICE SUPPRESSION BY REASON OF SUBJECT IMPORTS 8

 A. Price Suppression 8

 B. Causation 12

 1. Reliance on Price Trend Data 13

 2. The Role of Spruce-Pine-Fir in the U.S. Market 21

 a) SPF as a Reference Point for Pricing 25

 b) Competitive Price Quotations 30

 c) Canadian Mills as Price Leaders 32

 3. Regional Comparison 33

V. CONCLUSION 38

ORDER

OPINION AND ORDER OF THE PANEL

INTRODUCTION

This Binational Panel was convened pursuant to 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.^{1/} The Panel was constituted in response to a request for 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.^{2/} Details on the trade dispute leading to the Panel's review of the Commission's determination, as well as the procedural history before the Panel, are provided in the Panel's opinion of July 26, 1993.^{3/} The Panel in that opinion affirmed certain aspects of the Commission's determination, and remanded for a new determination the Commission's finding with respect to causation. The Panel also remanded for additional explanation the Commission's finding that imports of softwood lumber from Quebec are not entitled to a separate injury determination.

Pursuant to the Panel's instructions, the Commission on October 25, 1993, issued its determination on remand. In that determination a majority of the Commission again found material

^{1/} 19 U.S.C. § 1516a(g)(2). With regard to the passage of the North American Free Trade Agreement ("NAFTA") and the potential implications for this Panel's review, the Panel notes that effective January 1, 1994 the governments of the United States and Canada agreed not to suspend application of Chapter 19 of the FTA with respect to all on-going proceedings under that Chapter. Provision for transitional arrangements are authorized in the NAFTA implementing legislation and envisioned in the accompanying Statement of Administrative Action.

^{2/} 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].

^{3/} Softwood Lumber from Canada, USA-92-1904-02, at 2-11 (July 26, 1993) [hereinafter Panel Opinion].

injury by reason of imports of softwood lumber from Canada.^{4/} This Opinion, and the Panel's second review, are concerned with that determination.^{5/}

Briefs in opposition to the Remand Determination were filed on November 22, 1993 on behalf of the Government of Canada, the Governments of Alberta, British Columbia and Ontario, the Gouvernement du Québec, the Canadian Forest Industries Council and affiliated companies, the Quebec Lumber Manufacturers' Association, and members of the Canadian Lumbermen's Association located in Quebec (collectively, "Canadian Complainants" or "Complainants").^{6/} In response to these briefs, and in support of the Commission's decision on remand, briefs were filed on December 12, 1993 by the Commission and by the Coalition for Fair Lumber Imports ("Coalition").

By Order dated December 30, 1993, the Panel established January 10, 1994 as the date for oral argument on the direct evidence relied on by the Commission to support its finding of causation. Pursuant to that Order, a hearing was convened in Washington, D.C. on January 10, 1994.

4/ Softwood Lumber from Canada, Inv. No. 701-TA-312 (Remand), USITC Pub. 2689 (Oct. 1993) [hereinafter Remand Determination]. Chairman Newquist, Vice Chairman Watson, and Commissioner Rohr together issued an affirmative determination on remand. Commissioner Crawford, writing separately, also found the evidence to support an affirmative remand determination. Commissioners Brunsdale and Nuzum issued negative remand determinations.

Unless the context otherwise requires, the term "Commission" as used in this Opinion refers to the views of Chairman Newquist, Vice Chairman Watson, and Commissioner Rohr.

5/ The Commerce Department's final determination and determination on remand in the softwood lumber case have been reviewed by a separate Binational Panel. That Panel's first opinion was issued on May 6, 1993, and its opinion on review of Commerce's remand determination was issued on December 17, 1993. On January 6, 1994, the Commerce Department issued its Final Results of Redetermination Pursuant to Binational Panel Remand, in which it found the subsidy rates in the softwood lumber case to be zero percent ad valorem.

6/ The Gouvernement du Québec, the Quebec Lumber Manufacturers' Association and members of the Canadian Lumbermen's Association located in Quebec, while joining in the arguments made by the other Canadian Complainants, also filed a separate brief challenging the Commission's decision on remand with respect to imports of softwood lumber from Quebec.

Arguments were made on behalf of the Canadian Complainants, the Commission, and the Coalition. Oral argument addressing aspects of the Commission's remand determination unique to Quebec was made on behalf of the Gouvernement du Québec, the Quebec Lumber Manufacturers' Association, and members of the Canadian Lumbermen's Association located in Quebec.

STANDARD OF REVIEW

This Panel is obligated under Article 1904(3) of the FTA to apply the standard of review and general legal principles that a U.S. court would apply in reviewing a Commission determination. The Panel in this second review and opinion has applied that standard, which is set forth on pages 11 through 17 of the Panel's first opinion and incorporated in this Opinion by reference.

In addition, the Panel has considered the effect of decisions issued by the Commission's reviewing courts subsequent to the Panel's initial opinion.^{7/} The Panel has applied the teachings of these decisions in its second review, including the principles that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," and that "considerable deference" is due agencies charged with interpreting the trade

^{7/} See, e.g., Daewoo Electronics Co., Ltd. v. United States, 6 F.3d 1511 (Fed. Cir. 1993); Wheatland Tube Corp. v. United States, Slip Op. 93-220 (Ct. Int'l Trade 1993). The Panel also has reviewed and considered the concerns raised by the Commission and the Coalition with respect to the Panel's prior discussion of "concrete" evidence. (Remand Determination, at 30-31; Coalition Brief in Support of the International Trade Commission's Determination on Remand, December 13, 1993, at 18-19 [hereinafter Coalition Remand Brief]). While the holding in Republic Steel regarding Commission preliminary determinations was reversed, as noted in the Panel's first opinion, the Panel nevertheless continues to be instructed by the CIT's discussion of "concrete" evidence. (8 Ct. Int'l Trade 29, 591 F. Supp. 640, 646 (1984)). See also China Nat'l Arts and Crafts Import & Export Corp. v. United States, 15 Ct. Int'l Trade 417, 422 (1991). Cf. USX Corp. v. United States, 11 Ct. Int'l Trade 82, 655 F. Supp. 487, 490, n.9. (on issues not addressed by the Court of Appeals, "Republic Steel continues to be valid precedent.").

laws.^{8/} In this light, the Panel recognizes the authority of the Commission to use new or different methodologies in performing its functions. It also recognizes the possibility that the particular circumstances of individual cases may require "non-traditional" analysis by the Commission.

Fundamentally, however, the standard of review to be applied by the Panel has not changed. Regardless of the analysis undertaken, the methodologies used, or the type of evidence offered by the Commission, the Panel is obligated under the applicable standard of review to ensure that the Commission's determination is the result of reasoned decision-making based on substantial evidence in the record, and that it is otherwise in accordance with law.

THE COMMISSION'S QUEBEC FINDING

The Commission in its final determination found that imports of subject merchandise from Quebec are not entitled to an injury determination separate from that accorded subject products from elsewhere in Canada. The Panel remanded that aspect of the Commission's determination, finding that the Commission had failed to articulate an adequate explanation for its decision. The Commission has now satisfied that obligation. Based on its explanation and the arguments of the Parties, the Panel finds that the Commission's remand determination with respect to imports from Quebec is supported by substantial evidence and is otherwise in accordance with law.

The Gouvernement du Québec, the Quebec Lumber Manufacturers' Association, and members of the Canadian Lumbermen's Association located in Quebec (the "Quebec Parties"), argue that imports of softwood lumber from Quebec are entitled to a separate injury determination. Citing

^{8/} In both Daewoo and Wheatland Tube the reviewing court found the statutory interpretations and methodologies chosen by the Commerce Department to be reasonable, not in contravention of the statute, and therefore sufficient to support Commerce's determinations.

applicable statutory provisions, the Quebec Parties allege that Commerce determined that imports from Quebec are not subsidized; that Quebec is a "country" for purposes of U.S. countervailing duty law; and that, accordingly, the Commission was required to conduct a separate injury investigation for Quebec imports.

In response, the Commission argues that it is precluded from varying the scope of Commerce's affirmative determination for purposes of rendering an injury determination. The Commission specifically cites to 19 U.S.C. § 1671d(b)(1) as evidence of its obligation to consider for injury purposes all imports with respect to which Commerce has made an affirmative determination.

It is uncontested that the pertinent statutory provision requires the Commission to determine whether an industry in the United States is materially injured "by reason of imports ... of the merchandise with respect to which the administering authority [Commerce] has made an affirmative determination."^{9/} While Commerce did, as noted by the Quebec Parties, investigate subsidies at the provincial level, it nevertheless rendered a determination with respect to subject imports from all parts of Canada, as defined in its scope of investigation. Thus, Commerce did not expressly exclude imports from Quebec in issuing its affirmative final determination.

In the absence of clear and convincing evidence indicating a contrary intent, the plain language of the statute must control the resolution of this issue. The statute does not indicate that the Commission has either express or implied authority to vary the scope of the products with respect to which Commerce has made an affirmative determination for purposes of making an injury determination. Commerce's "country-wide" subsidy finding clearly included imports of softwood lumber from Quebec. In light of the plain language of the statute, the Panel finds that the

^{9/} 19 U.S.C. § 1671d(b)(1) (emphasis supplied).

Commission did not unreasonably interpret the statute as precluding it from rendering a determination other than with respect to the merchandise found by Commerce to be subsidized. The Commission's conclusion, moreover, finds support in the decisions of the Commission's reviewing courts.^{10/}

The Quebec Parties further allege, however, that Quebec must be considered a "country" for purposes of U.S. countervailing duty law, and that as such the Commission must accord imports from Quebec a separate injury determination. Although the term "country" is defined in the applicable statute as including political subdivisions of a foreign country,^{11/} such as the province of Quebec, that provision is not, in the Panel's view, jurisdictional in nature, and does not expressly authorize the Commission to modify Commerce's determination as to the imports found to be subsidized. The broad obligations attributed to the term "country" by the Quebec Parties do not find support in the text of the applicable statute.

Furthermore, nothing in the legislative history suggests that the Commission do anything other than accept Commerce's definition of the country under investigation. In fact, the legislative history expressly indicates otherwise. "The administering authority [Commerce] will determine, on the basis of the facts in each case, what entity or entities will be considered the country."^{12/}

^{10/} See, e.g., Algoma Steel Corp. v. United States, 688 F. Supp. 639, 644 (Ct. Int'l Trade 1988) ("In applying this statute, the ITC does not look behind [Commerce's] determination, but accepts [Commerce's] determination as to which merchandise is in the class of merchandise sold at [less than fair value].") See also Sony Corp. of America v. United States, 712 F. Supp. 978, 984 (Ct. Int'l Trade 1989).

^{11/} 19 U.S.C. § 1677(3).

^{12/} H.R. Doc. No. 153, Part II, Statement of Administrative Action, 96th Cong., 1st Sess. 431 (1979) (emphasis supplied). In this connection, the Panel notes that the broad scope of the "country" provision apparently was intended merely to ensure that all countervailable subsidies, whether provided at the local, provincial, federal or supranational level, are encompassed by the countervailing duty law.

The Commerce Department determined that softwood lumber from "Canada," including Quebec, was subsidized. Under these circumstances, the Commission cannot be faulted for accepting Commerce's finding of imports determined to be subsidized. Nor can it be faulted for accepting Commerce's determination of the country whose products are subject to investigation.^{13/}

The Panel finds the Commission's interpretation of the statute with respect to the Quebec issue to be reasonable, supported by substantial evidence, and otherwise in accordance with law. Accordingly, the Panel affirms the Commission's finding with respect to the treatment of subject products imported from Quebec.

EVIDENCE OF SIGNIFICANT PRICE SUPPRESSION BY REASON OF SUBJECT IMPORTS

In its Remand Determination the Commission bifurcated the issues of significant price suppression and material injury by reason of Canadian imports. In deference to that approach, the Panel separately reviews the evidence and analysis offered by the Commission in its Remand Determination to support those findings.

A. Price Suppression

The Commission concluded that rising costs for domestic producers necessarily should have led to an increase in prices greater than that which in fact occurred (i.e., price suppression). The Commission's finding of price suppression was based on an analysis of the supply and demand in the market for softwood lumber over the period of investigation. The Commission in its final determination characterized the market for softwood lumber as highly competitive, and subject to

^{13/} See Republic Steel Corp. v. United States, 544 F. Supp. 901, 904 (Ct. Int'l Trade 1982).

inelastic demand. No party challenges this basic description.^{14/} In such circumstances, the log cost increases experienced by the softwood lumber industry, all else being equal, should cause an inward shift in the industry's supply curve, and an increase in the equilibrium price of softwood lumber. In a market characterized by inelastic demand the effect of such a shift should be to cause the equilibrium price to rise relatively substantially. Based upon the normal operation of supply and demand curves having those characteristics, the Commission determined that domestic producers should have been able to "pass cost increases along to customers almost dollar for dollar."^{15/} In the Commission's view, the failure of prices to keep up with cost increases indicates price suppression.

Supply and demand curves depend on ceteris paribus conditions, however, and the Commission acknowledged that all things were not equal during the period of investigation. Due to the recession there was a significant reduction in demand for softwood lumber contemporaneously with the decline in supply. Such a decline in demand should have had an effect on the price in the opposite direction. The Commission determined, however, that despite declining demand, on balance the increased costs of producing lumber during the period of investigation should have resulted in overall price increases.^{16/} The Commission reached this conclusion by finding that the shifts in supply

^{14/} The Panel notes that the Complainants take the view that demand is not perfectly inelastic, but only "fairly inelastic." (Canadian Complainants' Joint Brief in Opposition to the Determination on Remand, November 22, 1993, at 25, n.24 [hereinafter Complainants' Remand Brief], citing Office of Economics Memorandum, EC-P-039, at 21 ("elasticity of demand for softwood lumber [is] fairly inelastic and in a range from -0.3 to -0.9.")). This appears to the Panel to be a fairly wide range of elasticities "in which the true value may fall." Cf. Certain Acetylsalicylic Acid (Aspirin) from Turkey, Inv. No. 731-TA-364 (Final), USITC Pub. 2001, at 9, n.22 (Aug. 1987). The Panel does not understand the Commission to be asserting that demand is perfectly inelastic or that it otherwise falls outside this range.

^{15/} Remand Determination, at 11.

^{16/} Id. at 10-11, 13-14. Overall, prices apparently did increase. In its final determination, the Commission found that "prices of softwood lumber, both imported and domestic, generally increased (continued...)

and demand were about equivalent, and that the upward price effect from the shift in supply was more significant than the downward price effect from the decline in demand, since domestic supply of lumber is more elastic than demand.^{17/} Under these circumstances, relatively equivalent shifts in demand and supply would, again ceteris paribus, result in an equilibrium price point higher than the original equilibrium price point.^{18/} In the judgment of the Commission, however, the price increases which actually occurred in the marketplace were less than those expected given the operation of the posited supply and demand curves. Although this method of analysis appears to call for a fairly precise quantification of the supply and demand shifts involved, the Commission stated, nevertheless, that it was not attempting to undertake a "precise quantification of the shifts in supply and demand," nor was it attempting to "predict a specific equilibrium market price."^{19/}

An initial and obvious difficulty with the Commission's supply-demand model is that, as the Complainants point out,^{20/} and as the Commission recognizes, it depends on "all else being equal."

(...continued)

during the period under investigation." ITC Final, at 31. In its Remand Determination the Commission stated that "[p]rices for most products showed the largest increases between the fourth quarter of 1991 and the first quarter of 1992," but refused to give much weight to the latter increases because they were "reportedly due, at least in part, to the initiation of this investigation and Commerce's imposition of preliminary countervailing duties." Remand Determination, at 14, n.36.

^{17/} Id. at 13.

^{18/} It is well recognized that if both supply and demand decrease (i.e., shift to the left), the quantity will definitely fall, but the price may go either way, depending on which curve shifts more. In this case, because demand was in an estimated range that was relatively more inelastic than the estimated elasticity range for supply, if the shifts are about equivalent the normal operation of such supply and demand curves would indeed put the new equilibrium price point at least somewhat higher than the original equilibrium price point. The Complainants argue, however, that the shifts were not equivalent. Complainants' Remand Brief, at 27.

^{19/} Remand Determination, at 13, n.35.

^{20/} Complainants' Remand Brief, at 26.

Although the Panel does not consider that the Commission has in fact established that the circumstances of the lumber market were such that the supply-demand model would operate as the Commission has posited, the Panel decides that it need not pursue this issue in view of its conclusion, set out below, that the Commission has not met the substantial evidence standard in support of its conclusion that significant price suppression was caused by Canadian imports of softwood lumber.^{21/}

The Panel also need not pursue the remaining evidence offered by the Commission to support its finding of significant price suppression. On remand the Commission inferred that by-product prices increased over the period because revenues from the sale of by-products increased 9 percent, while by-product production declined.^{22/} The Commission further noted that plywood prices increased at a faster rate than lumber prices, despite the fact that softwood log costs are a less significant portion of plywood costs than lumber costs, and so increased log costs exerted less upward pressure on plywood prices.^{23/}

Both of these references raise the question of whether the Commission is relying to some extent on a "cross-sectoral" analysis, without responding to the Panel's previously expressed concerns on that issue. Nevertheless, since the references are meant to be supportive only, and in view of the

^{21/} The Panel, accordingly, also does not pursue the question of whether injury or causation can, as a matter of law, be proven by a showing that actual results in the market are at variance with the results anticipated by a set of self-selected supply and demand curves. Cf. Daewoo Electronics Co., Ltd. v. United States, 15 Ct. Int'l Trade 124, 130, 760 F. Supp. 200, 206 (1991), rev'd in part on other grounds, Daewoo Electronics Co., Ltd. v. United States, 6 F.3d 1511 (Fed. Cir. 1993) (disapproving determinations "ordained by selection of the demand curve rather than arising from, and being based on, the data in the record.").

^{22/} Remand Determination, at 14.

^{23/} Id. at 15.

Panel's conclusion on the issue of causation, the Panel declines at this time to pursue the matter further.^{24/}

B. Causation

On remand the Commission concluded that price increases for U.S. softwood lumber over the period of investigation were less than they otherwise would have been, and that this price suppression was caused, in part, by Canadian imports to a significant degree.^{25/} To support the latter conclusion the Commission relied on three specific evidentiary findings:

1. Canadian prices tended to rise more slowly and fall more rapidly than domestic prices;
2. the price of subsidized Canadian imports, particularly Spruce-Pine-Fir (SPF), has a dominant impact on lumber prices in the U.S. market; and
3. the weighted average composite U.S. price in the Northern market, where Canadian import penetration is highest, is lower than that price in the Southern market, where import penetration is lower.^{26/}

^{24/} Such declination should not be construed as an implicit approval by the Panel of cross-sectoral comparisons generally, or as conducted by the Commission in this case. Although the Panel has not found it necessary to rule on the cross-sectoral issue, either with respect to the original final determination or this remand determination, the Panel continues to regard cross-sectoral comparisons as highly suspect under the applicable statutes and the extensive legislative history interpreting those statutes. Assuming it is legally permissible to place significant reliance on such comparisons, however, the Panel continues to believe that a proper methodology must be used by the Commission in carrying them out_a matter which the Panel addressed at some length in its previous opinion.

^{25/} Remand Determination, at 7.

^{26/} Id. at 16. The Commission also appeared to rely heavily on the volumes of Canadian softwood lumber imports in the U.S. market as probative of the key elements of the statute (i.e., an effect on the U.S. industry, an effect on domestic prices, and causation). 19 U.S.C. § 1677(7)(B). Insofar as the effect on the domestic industry is concerned, the Commission stated that "the large volume of imports of subsidized lumber perforce has had a significant impact on the domestic (continued...)"

With respect to the first evidentiary basis, the Panel accepts that a fully developed and rational price trends analysis may be a useful tool in assessing causation and, with appropriate factual support and applying an appropriate methodology, could demonstrate the sufficiency of information in the record. At this time, however, the Panel finds that the price trends data and analysis as presented by the Commission do not constitute substantial evidence of causation and are otherwise not in accordance with law. The Panel therefore remands this issue to the Commission for further consideration.

As to the remaining bases for the Commission's affirmative remand determination, the Panel holds that the Commission's findings with respect to the dominant impact of Canadian SPF on U.S. softwood lumber, and the comparison of regional prices and import penetration, are not supported by substantial evidence on the record or are otherwise not in accordance with law.

1. Reliance on Price Trend Data

The first evidentiary basis used by the Commission to support its finding of causation, as set out in its Remand Determination, is that "comparing trends in composite price indices for U.S. and Canadian lumber indicates that during the period of investigation, prices for imported subsidized

(...continued)

industry." Id. at 5. As for the effect on domestic prices, the Commission stated that "it is inconceivable as a matter of economic logic that prices would not have been higher were it not for the significant volume of subsidized imports." Id. at 6. Finally, as for causation the Commission stated, first, that "the significant volume of subsidized Canadian imports had significant price suppressing effects" and, second, that "[t]he effects of the significant volume of subsidized imports of Canadian lumber on prices in part explain the price suppression suffered by the domestic industry." Id. at 7. The Panel addressed the seemingly well established rule that causation cannot be proven by volumes alone at pages 32-34 of the Panel Opinion.

Canadian lumber increased more slowly, and declined more rapidly, than did U.S. lumber prices."^{27/}

A few sentences later the Commission adds the further conclusion that "specific comparisons of SPF price trends and price trends for other species also show that, during the period of investigation, SPF prices fell more rapidly or increased more slowly than did prices for other species."^{28/}

The question for the Panel is whether the above conclusory statements are supported by substantial evidence on the record and are otherwise in accordance with law. The difficulty facing the Panel in providing an answer to this question is that the Commission provides little information on how these conclusions are reached. Still, it is incumbent on the reviewing authority to satisfy itself that conclusions are supported by substantial evidence, and that there is a "rational connection between the facts found and the choice made."^{29/}

Proof that the failure of domestic prices to rise in accordance with increased costs was due to the prices of Canadian softwood lumber rising more slowly and falling more quickly than domestic prices, was offered in the form of a series of indexed graphs purporting to show a variety of price comparisons for Canadian and U.S. lumber.^{30/} These comparisons relied on Producer Price

^{27/} Id. at 16.

^{28/} Id. at 17.

^{29/} Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962).

^{30/} The Panel notes that the only specific reference by the Commission to reductions in Canadian and domestic softwood lumber prices is set forth in footnote 67 of the Remand Determination. The figures presented, however, are from Office of Investigations Memorandum INV-Q-174, October 14, 1993, and are based on the revised 11.54 percent subsidy rate found by the Commerce Department in its remand determination, not the 6.51 percent rate originally considered by the Commission. The Panel also notes that the Commerce Department subsequently revised the rate to zero percent. See footnote 5, supra.

Indices ("PPIs"), SPF price trends in relation to the price trends of other species, and trends based on information derived from responses to questionnaires sent out by the Commission on remand.^{31/}

The Panel notes at the outset its concern regarding the use of PPIs as a specific proof of causation. The Panel has found no Commission precedent utilizing PPIs for the specific and precise purpose of establishing price underselling, price depression, or price suppression, three elements of the statute which are clearly probative of causation. Nor has it found any court decision which has accepted such use as substantial evidence of such a finding. Product-specific PPIs normally have a much broader purpose and use as, for example, building blocks for more comprehensive indices, which are often used as indicators of inflation in the country involved, as "deflators" of other economic series, and as factors for escalating various forms of long-term contracts. However, putting two different countries' PPIs side-by-side and drawing conclusions therefrom-particularly the kind of precise conclusions that are involved in a price suppression analysis-seems highly unusual, even assuming that the exact same product series is involved for both countries.

In the typical injury case, price underselling, price depression or price suppression would be proved by reference to data in the record on actual prices. The difficulty in the instant case, of course, is that the information in the record was not, in the Commission's view, reliable for that purpose. The question therefore is whether resort to a tool that is far more general in nature and does not even purport to show prices-only price changes-is an acceptable alternative. The Panel

^{31/} The price trends graphs, which were presented to the Panel by the Coalition, are found in Appendix A to the Coalition's Remand Brief. A number of them first appeared in the Coalition Pre-Hearing Brief, Pub. Doc. 168. None was discussed by the Commission prior to its Remand Determination.

emphasizes in this connection that PPIs do not measure prices at all, they measure the average change in prices.^{32/}

Without more, the Panel at this time is not convinced that the indexed rates of price changes of a basket of softwood lumber species in Canada, calculated in one manner by Statistics Canada with respect to the conditions existing in the Canadian economy, when compared to the indexed rates of price changes of a basket of different softwood lumber species in the United States, calculated in perhaps a somewhat different manner by the Bureau of Labor Statistics^{33/} with respect to the conditions existing in the U.S. economy, says much at all about whether the basket of Canadian softwood lumber species had a price suppressive effect on the basket of U.S. softwood lumber species. In the absence of adequate information on the question of comparability of the PPI series and, most importantly, without a convincing argument that a PPI comparison conducted in this

^{32/} "[P]roducer price indexes are designed to measure only the change in prices received for the output of domestic industries." Bureau of Labor Statistics, "Technical Notes," at 1. Their purpose, therefore, is not to measure the level of prices but rather their rate of change. Figure 1 of the Coalition's Brief on Price Effects of Subsidized Canadian Lumber, List No. 2R, Doc. No. 36, was entitled "Comparison of Softwood Lumber Prices" and subtitled "U.S. PPI vs. Canadian PPI." That figure, which normalized the then divergent absolute price levels of Canadian and U.S. softwood lumber at the beginning of 1988, and which has a dramatic visual impact, of course cannot show prices at all because PPIs measure only the rate of change of prices. Even the Commission, at page 16 of its Remand Determination, stated that "comparison of price indices shows that Canadian prices tended to rise more slowly and fall more rapidly than domestic prices." (emphasis added). As noted, the Panel believes that a comparison of price indices can in fact show only that the relative rates of increase or decrease in the prices of the Canadian PPI series and the U.S. PPI series were disparate, not that the prices of the products being indexed thereby were necessarily so.

^{33/} At the remand hearing, Commission counsel indicated that the Commission did not attempt to compare the analytical approaches taken by Statistics Canada and the Bureau of Labor Statistics in the compilation of their respective PPI series. Of course, numerous differences could arise in their respective approaches, such as whether constant dollar output is involved; whether the data are seasonally adjusted or unadjusted; whether the Laspeyres or Paasche (or other) formula is utilized; whether the data measure shipment or order prices; whether true transaction prices are being measured (including discounts); whether the prices are delivered or F.O.B.; etc.

manner truly has causative implications, the Panel is inclined to the view that the PPI evidence is not probative.

Furthermore, the Panel finds that a price index is only as good as the price information on which it is based. In this instance a number of the graphs were based on questionnaire data that the Commission had declared "accurate and reflective of trends," but nevertheless unsuitable for "reasoned judgment concerning under- or over-selling."^{34/} Accordingly, this raises a question in the minds of the Panelists whether the data are robust enough for their present use. Certain other graphs were based on data published by Random Lengths, data which the Commission had also found unsuitable for comparing price levels, particularly in light of the different bases used for quoting prices by Canadian and U.S. producers.^{35/}

Even assuming, however, that the data deficiencies mentioned above can be overcome, the Commission still does not demonstrate how the conclusions it draws follow from the price trends analysis. Apparently relying on the graphs developed by the Coalition, the Commission simply treats the conclusion that prices of imported Canadian lumber rose more slowly and fell more quickly than domestic prices as self-evident. But the Commission must support its conclusions by reasoned analysis, not by revelation. In the Panel's view, the conclusion drawn by the Commission is not self-evident. Without more, the Coalition's graphs cannot be considered to prove the Commission's hypothesis.

First, the price trends data have been "normalized" by reference to a specific base date. The selection of that base date is critical because the figures show the relationship of Canadian and

^{34/} ITC Final, at 30.

^{35/} ITC Final, at 30. See also Complainants' Remand Brief, at 70-71.

U.S. prices in the light of the price difference that existed between them as at that base date. What is not indicated is whether that differential was typical of the price relationship throughout the period of investigation. Nor is there any indication of the point at which any change in that differential has an impact on sales.^{36/}

In fact, the conclusions drawn by the Commission about price movements are based on an apparent assumption that any downward movement of import prices that neither followed nor was equal to a downward movement of domestic prices, or any upward movement of import prices that was not equal to or in advance of domestic price increases, was price suppressive.^{37/} Such an assumption does not amount to substantial evidence in support of an essential element in the Commission's conclusion.

Second, even in light of adequate information about the base date selection, and verification that any change in the differential between domestic and imported lumber would be insignificant, it is not self-evident that on average Canadian prices fell more quickly and rose more slowly than domestic prices throughout the period of investigation. A cursory glance at the slopes on the graphs relied on by the Commission might suggest that prices of imported lumber fell more quickly and rose more slowly about half of the time, and rose more quickly and fell more slowly the other half of the time. Further information and a more precise analysis clearly is needed. Mere affirmation that the graphs prove the points for which they are offered does not substitute for proof, and cannot constitute substantial evidence.

^{36/} See Complainants' Remand Brief, at 67.

^{37/} In its final determination, the Commission noted that "[v]ariations in the price differential among species will cause purchasers to switch," and that "sales are sensitive to relatively small price movements." ITC Final, at 28, 29.

Third, there is one thing that the price trends analysis lacks—one key element that would establish it as reliable and change what is no more than a theory into solid evidence. If the market had functioned as the Commission asserts, then Canadian market share would have increased. If all price changes did have an impact on sales, as the Commission apparently assumes, then the effect of Canadian prices, whether higher or lower, of always lagging domestic prices as they rose or fell, would have resulted in a larger Canadian share of the lumber market.^{38/} But this did not occur, and in fact over the period of investigation the Canadian market share declined slightly.

The Commission's response to this, contained in a footnote to its written response brief, is the Coalition's argument that domestic producers chose to compete on the basis of price, rather than lose market share.^{39/} The Coalition also argues, however, that market share of Canadian imports did increase in value, while declining in volume,^{40/} and that if SYP is excluded, Canadian market share in fact increased in volume.^{41/}

These arguments do not remedy the fundamental defect in the Commission's analysis. No evidence appears on the record that the domestic softwood lumber industry ever made a concerted decision to fight on price during the period of investigation. Moreover, the notion of always fighting on price rather than conceding market share, when taken at an individual company level, appears inconsistent with the Commission's finding that "individual producers in a competitive

^{38/} This would also be the implication of the Commission's statement in its final determination that "sales are sensitive to relatively small price movements." ITC Final, at 29.

^{39/} The Coalition has advanced this argument from the outset. See comment of Michael H. Stein, Esq., counsel for the Coalition, at the Commission's staff conference in the preliminary investigation, at 49. ("The industry can attempt to maintain prices and cede market share, or it can attempt to fight on the basis of price, keep market share").

^{40/} Coalition Remand Brief, at 62-63.

^{41/} Remand Hearing Transcript, at 119.

industry are price takers."^{42/} The argument that there was an increase in the value of imported softwood lumber does not meet the objection raised, and the proposal to measure market share after excluding SYP flies in the face of the conclusion of the Commission in its final determination that "[o]n the whole, lumber is a commodity product with a significant proportion of all lumber, both domestic and imported, competing head-to-head on the basis of price."^{43/}

Accordingly, the Panel finds that the price trends data and analysis put forward in the Remand Determination do not yet rise to the level of substantial evidence and are otherwise not in accordance with law. Should the Commission on remand rely on price trend information to support an affirmative determination, the Commission is instructed to provide a full analysis and explanation of the underlying data and the methodology employed in the creation and presentation of the price trends analysis.

2. The Role of Spruce-Pine-Fir in the U.S. Market

The second evidentiary basis offered by the Commission to support its finding of causation relates to its original conclusion that prices of Canadian SPF have a significant influence on U.S. softwood lumber prices. Citing various facts in support of its position, the Commission in its final determination found that "[p]rices for spruce-pine-fir (SPF) are a bellwether in the market, serving as a reference point for pricing."^{44/} The Commission then utilized this finding as a principal

^{42/} Remand Determination, at 11, n.27. While there is some evidence in support of the "compete on price" argument, it is difficult for the Panel to understand how the "industry" could have successfully stood its ground and fought on price if no single member of the industry was able or in a position to do so.

^{43/} ITC Final, at 28; see also 6-7, n.14.

^{44/} ITC Final, at 31. The Commission cited as support for this finding the information contained
(continued...)

basis for reaching its conclusion on causation: "The major species group represented in Canadian import volumes, SPF, has a significant influence on price movements in the U.S. market."^{45/} In effect, the Commission found that the substantial volume of Canadian SPF, because of SPF's characteristic as a "bellwether" or "reference point for pricing," had a price suppressive effect within the meaning of the applicable statute,^{46/} not only on U.S.-produced SPF but on other domestically produced species as well.

Following its consideration of the Panel's remand order, the Commission in its Remand Determination abandoned the "bellwether" terminology but readopted the substance of its earlier finding, determining that "the price of subsidized Canadian imports, particularly SPF, has a dominant impact on lumber prices in the U.S. market."^{47/} Citing this time to responses to a series of questionnaires submitted to various industry participants during the remand period,^{48/} the Commission determined that the information contained in such responses "supports the conclusion that SPF prices,

(...continued)

in footnote 107 to the final determination. The Panel addressed this finding and its supporting information at pages 37 through 45 of the Panel Opinion.

45/ ITC Final, at 34.

46/ 19 U.S.C. § 1677(7)(C)(ii).

47/ Remand Determination, at 16.

48/ The Remand Determination does not make clear the total number of questionnaires dispatched to industry participants in the remand investigation (i.e., the size of the intended sample), nor does it make clear the percentage of the intended sample, either in absolute terms or as a percentage of industry production, that responded to the questionnaires. However, the Office of Investigations Memorandum INV-Q-174, October 14, 1993, indicates that 33 producers, 28 importers and 26 purchasers did respond to the questionnaire requests, and the results of those responses were summarized in that Memorandum. The Panel notes that in the original investigation, "the Commission [had] sent questionnaires to more than 100 producers who accounted for more than 75 percent of U.S. production in 1991. Fifty producers, accounting for nearly 49 percent of 1991 production responded to the Commission's questionnaires." ITC Final, at 14, n.41.

which are predominantly import prices, have a significant effect on lumber prices overall.^{49/} Utilizing this new evidence, the Commission on remand again found that Canadian SPF had a price suppressive effect on domestically produced softwood lumber, whether SPF or other species.

The remand questionnaire prepared by Commission staff was sent to three categories of participants in the softwood lumber market (producers, importers and purchasers). Each questionnaire was identical in purpose and followed, mutatis mutandis, the same format.^{50/} Each information request was focused not on the national softwood lumber market as a whole, but on seven large submarkets,^{51/} and asked with respect to each of those submarkets several broad questions.

The first question or information request (Question 1) was to "rank [specified factors] as critical, very important, somewhat important, or not important when establishing transaction prices for (sales to U.S. customers) or (purchases from U.S. or Canadian suppliers) of softwood lumber."

The factors identified by the Commission included:

- Futures market quotes

^{49/} Remand Determination, at 17.

^{50/} Separate questionnaire forms were issued to producers, importers and purchasers but, with necessary changes in detail, the same information was solicited in each case.

^{51/} Atlanta, Georgia; Baltimore, Maryland; Boston, Massachusetts; Chicago, Illinois; Dallas, Texas; Los Angeles, California; and Seattle, Washington. For purposes of tabulating the responses to the questionnaires, each producer, importer or purchaser response within one of these seven submarkets was considered to be a single response. Office of Investigations Memorandum INV-Q-174 (October 14, 1993), Attachment A at 1, 3 and 8. For example, if a producer participated in each of the seven submarkets, its single questionnaire response as a producer would actually be tabulated or summarized as seven different responses. If that producer also occupied the role of an importer and answered the importer questionnaire in the same manner as the producer questionnaire, the aggregate responses would be doubled for composite summary purposes. The same approach also was taken with respect to tabulating the responses to the importer and purchaser questionnaires.

- Overall availability of lumber
- Weather conditions
- Competing quotes from other suppliers in your market areas
- The size of an order
- Random Lengths or other trade publications
- Lead times between order and delivery
- Other factors^{52/}

In addition, the Commission asked three principal questions of each respondent, namely:

- 2a) Are there any particular mills, warehouses, distributors, retailers, or other organizations in either Canada or the United States that tend to lead softwood lumber prices up or down, or that have a significant impact on prices in the market areas in which your firm (sells) or (purchases) softwood lumber?
- 2c) Does your firm use price quotes by any of these organizations as a reference when establishing prices for (sales to customers) or (purchasers from suppliers) in your market areas?
- 3a) Are there any species of softwood lumber from Canada or the United States that are used as a reference to establish transaction prices for other species of softwood lumber in your market areas?

^{52/} A summary of the responses to this question prepared by the Coalition indicates that respondents listed the following items as "other factors": customers' needs and preferences; demand factors; tally; Canadian prices; time of year; cost of manufacturing; housing starts and activity; quality of product and service; and grade and availability of softwood lumber from Canada. See Table 1, Brief on Price Effects of Subsidized Canadian Lumber of the Coalition for Fair Lumber Imports, List No. 2R, Doc. No. 36. These nine factors plus the seven factors specifically identified by the Commission in the questionnaire thus total sixteen items or factors considered by the industry to be relevant to the establishment of transaction prices for the purchase or sale of softwood lumber. The availability of a particular lumber species (e.g., SPF) as such a factor was not identified in the question nor, apparently, in the responses. Based upon the record, changes in seasonal demand, exchange rates, and U.S. government policies (e.g., reduction in logging permits) also appear to affect prices but were not specifically noted in the two lists.

At the January 10, 1994 hearing, counsel for the Canadian Complainants presented a table summarizing the responses to these three inquiries.

a) SPF as a Reference Point for Pricing

The Commission's finding on remand that "[SPF] has a dominant impact on lumber prices in the U.S. market" continues to rely, in part, on the "reference point for pricing" characteristic of SPF as its causation link to price suppression of U.S. softwood lumber. This time, however, the Commission relies on the results of the remand questionnaires as support for the "reference point"/price suppression finding.

The Panel is presented with two questions: first, is the "reference point for pricing" finding supported by substantial evidence on the record; and second, even if adequately supported by substantial evidence on the record, is it otherwise in accordance with law for the Commission to establish causation on the basis of the fact that prices of an import species serve as "a reference point" for the prices of largely different, domestic species. The Panel finds in the negative on both issues.

As a preliminary matter, the Panel in its earlier opinion specifically noted that an important distinction had to be drawn between price leadership and the Commission's "reference point for pricing" finding. In effect, the Panel concluded that being "a reference point for pricing" was a lesser order of beast than being a price leader, which has been a recognized tool for assessing causation in previous cases.^{53/} In particular, the Panel observed that:

^{53/} The appropriateness of price leadership as a tool for establishing causation has been recognized in numerous Court of International Trade decisions. See Metallwerken Nederland B.V. v. United States, 728 F. Supp. 730, 739 (Ct. Int'l Trade 1989); Maverick Tube Corp. v. United States, 687 F. Supp. 1569, 1578 (Ct. Int'l Trade 1988); Copperweld Corp. v. United States, 682 F. Supp. 552, 565 (Ct. Int'l Trade 1988); and Gifford-Hill Cement Co. v. United States, 615 F. Supp. (continued...)

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.^{54/} (emphasis in original).

In both the original and remand determinations, the Commission clearly did not find, on the record at hand, that Canadian SPF was a price leader for purposes of assessing its impact on the prices of competing products in the U.S. market. At best, with the data available to it the Commission could find only that SPF, most of which is Canadian, was "a reference point for pricing." As suggested above, the question for the Panel is whether even this finding is adequately supported by substantial

(...continued)

577, 588 (Ct. Int'l Trade 1985). In addition to the cases giving rise to the foregoing judicial reviews, the Commission has examined or relied on price leadership in numerous other cases, such as Certain Red Raspberries from Canada, Inv. No. 731-TA-196 (Final), USITC Pub. 1707, at 13 (June 1985); Coated Groundwood Paper from Belgium, Finland, France, Germany, and the United Kingdom, Inv. Nos. 731-TA-487-490 & 494 (Final), USITC Pub. 2467, at 22, n.77 (December 1991); Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from Brazil, France, Germany, and the United Kingdom, Inv. Nos.

701-TA-314-317 (Final); Inv. No. 731-TA-552-555 (Final), USITC Pub. 2611, at 41 (March 1993); and Certain Flat-Rolled Carbon Steel Products from Argentina, Inv. Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353 (Final); Inv. Nos. 731-TA-573-579, 581-592, 594-597, 599-69, and 612-619 (Final), USITC Pub. 2664, at 49-50 (August 1993). In light of such substantial and convincing authority, the Panel would always be prepared to accept a substantiated case of price leadership as an appropriate tool for establishing causation in a Commission injury determination. However, research has disclosed no case in which the Commission has relied on the "reference point for pricing" analysis as support for a causation finding. Language of this kind usually appears in the information section of Commission determinations where Commission staff comments on whether list prices serve as points of departure or reference points for the negotiation of actual transaction prices. See, e.g., Certain Flat-Rolled Carbon Steel Products from Argentina, Volume II, at I-151.

54/ Panel Opinion, at 39, n.119.

evidence on the record and, if it is, whether such a characteristic has the same legal significance as would a finding of price leadership.

Insofar as factual support for the finding is concerned, the Panel notes that 31 out of 32 (97%) of the purchaser responses held that one species of softwood lumber is not used as a reference point for pricing of other species; 60 out of 81 (74%) of the importer responses held similarly; while 80 out of 134 (60%) of the producer responses held that one species of softwood lumber could be a reference point for the pricing of another species. Thus, the most disinterested group of respondents (purchasers)^{55/} was virtually unanimous in rejecting the notion that one species of softwood lumber could be a reference point for pricing of another species. The Panel notes that almost three-quarters of the importing group took the similar view while only a relatively small majority of the U.S. producers took the contrary view.

Expressed another way, two out of the three groups examined overwhelmingly rejected the assertion put forward by the Commission, while only one group (the domestic producers) supported it. On an overall composite basis, 59% of all responses were against the Commission position while only 41% supported it. The Commission offers no explanation in the Remand

^{55/} Research suggests that the Commission and its staff appear most frequently to turn to purchaser questionnaires to resolve issues of price leadership. See Certain Flat-Rolled Carbon Steel Products from Argentina, *supra*, at 49-50; Professional Electric Cutting and Sanding/Grinding Tools from Japan, Inv. No. 731-TA-571 (Final), USITC Pub. 2658, at I-37, n.28; Certain Special Quality Carbon and Alloy Hot-Rolled Steel Bars and Rods and Semifinished Products from Brazil, Inv. No. 731-TA-572 (Final), USITC Pub. 2662 (July 1993), at I-86 and n.160; and Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from Brazil, France, Germany, and the United Kingdom, *supra*, at 41-42. Because of their relatively more disinterested standing, this approach appears to the Panel to be highly appropriate, although the Panel would stress that soliciting the same or similar data from producer and importer groups can in no way be considered inappropriate. Rather, purchaser responses on this issue would appear to be inherently more convincing to a reasonable mind than the views expressed by parties that are more directly involved in the proceeding and/or interested in its outcome.

Determination why it rejected the "majority" view, including the virtually unanimous view of the purchaser sector, in favor of the view contra. Nor did Commission counsel at the remand hearing offer any explanation of this aspect of the Commission's decision.

The Panel is quite cognizant of its obligation under the substantial evidence standard not to reweigh the evidence or to substitute its judgment for that of the Commission.^{56/} However, the Panel also notes that an agency's determination must have a reasoned basis and that there must be a rational connection between the facts found and the choice made by the agency.^{57/} The Commission "is obligated to weigh all the pertinent evidence gathered in an investigation in reaching a determination."^{58/} The Commission may "not rely upon isolated tidbits of data which suggest a result contrary to the clear weight of the evidence,"^{59/} must not engage in "unexplained or inadequately supported selectivity [of evidence],"^{60/} and "must have some justification, supported by substantial evidence in the record" for selecting certain data over other data.^{61/}

With this standard of review in mind, the Panel concludes that the "reference point for pricing" finding is not supported by substantial evidence on the record. The virtually unanimous rejection of that notion by the purchasers, who typically form the most disinterested group of questionnaire respondents, the seconding of that rejection by the importer group, and the relatively

^{56/} See the Panel's extensive review of the substantial evidence standard set forth at pages 12-17 of its original opinion.

^{57/} Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962).

^{58/} Roses, Inc. v. United States, 720 F. Supp. 180, 183 (Ct. Int'l Trade 1989).

^{59/} USX Corp. v. United States, 655 F. Supp. 487, 489 (Ct. Int'l Trade 1987).

^{60/} Armstrong Rubber Co. v. United States, 685 F. Supp. 252, 256 (Ct. Int'l Trade 1988), vacated mem. by agreement of the parties, 887 F.2d 1094 (Fed. Cir. 1988).

^{61/} Timken Co. v United States, 894 F.2d 385, 388 (Fed. Cir. 1990).

small majority contra among the producers-when taken into conjunction with the complete failure of the Commission to explain why it accepts the view of the latter against the former-has rendered it impossible for the Panel to sustain this finding.

As to its legal sufficiency, the Panel reiterates that it has carefully reflected upon the appropriateness of not foreclosing the Commission from developing new tools by which to analyze cases. Nevertheless, the Panel believes that being "a reference point for pricing" is indeed very different from being a price leader, which is an established concept in law and in Commission practice with obviously probative causative implications. In the Panel's view, the fact that SPF prices are or may be included on a list of factors that a member of the domestic softwood lumber industry might refer to for purposes of establishing his own transaction prices is legally insufficient, without more, to sustain a finding that Canadian SPF has caused price suppression, to a significant degree, of domestic softwood lumber prices.

The fact that SPF is a "reference point for pricing" appears to mean little more than that SPF prices could be expected to be included among a list of items that a producer, importer or purchaser might (or might not) refer to when focusing on a particular purchase or sale of SPF, or some other species of softwood lumber. The responses to the Commission's remand questionnaire indicate that at least sixteen (and very likely more) items are involved in the pricing of softwood lumber.^{62/} Without unfairly minimizing the appropriate weight to be given SPF as one such factor, assuming that it does have weight for this purpose, the Panel simply is not convinced that the special identification of one of those items by the Commission is adequate to establish causation in this case. In the Panel's view it is not adequate to convince "a reasonable mind" of such causation.

^{62/} Interestingly, SPF prices were not identified by respondents in their replies to the "all others" question, nor were they broken out by the Commission in the seven identified factors.

Accordingly, the Panel holds that the Commission's "reference point for pricing" finding is unsupported by substantial evidence on the record and is otherwise not in accordance with law.

b) Competitive Price Quotations

In its Remand Determination, the Commission also found that "[p]roducers, importers, and purchasers consistently indicated that competing quotes were important in establishing transaction prices."^{63/} The remand questionnaire solicited this information both through Question 1 and Question 2c.^{64/} Question 1 is very broad and appears to do little more than restate the accepted conclusion that the softwood lumber industry is a competitive one and that competing quotes are or can be important in establishing transaction prices for softwood lumber, although in an economic sense individual competitors are thought to be "price takers."^{65/} Neither Question 1 itself nor the responses thereto specifically identify SPF, and thus such responses cannot themselves be taken as substantial evidence in support of the Commission's causation finding.

Question 2c is somewhat more focused for this purpose, inquiring whether the respondent utilizes price quotations from U.S. or Canadian firms identified in its response to Question 2a as "a reference" in establishing its own softwood lumber transaction prices. All three groups of respondents rejected this notion, with the purchasers again being virtually unanimous on the point. Twenty nine out of thirty one (94%) purchaser responses were negative (or not applicable); 65 out

^{63/} Remand Determination, at 17-18.

^{64/} Respondents were asked in Question 1 to rank the importance of "[c]ompeting quotes from other suppliers in your market areas."

^{65/} Remand Determination, at 11, n.27.

of 86 (76%) importer responses were negative; and 76 out of 133 (57%) producer responses were negative.

The specific language adopted by the Commission in its Remand Determination does not suggest, clearly at least, that the Commission relied on the minority responses to Question 2c in support of its causation finding. Nevertheless, as the preceding discussion might suggest, the Panel does not believe that the responses to Question 2c, whether taken in conjunction with Question 1 or standing alone, can be considered substantial evidence in support of such a finding. Moreover, and as noted above, the Panel does not believe that the fact that some identified factor may be "a reference" or "a reference point" for establishing domestic softwood lumber prices is legally sufficient to establish causation under the circumstances of this case.

c) Canadian Mills as Price Leaders

The Commission in its Remand Determination also stated that "[s]everal Canadian producers and U.S. importers and wholesalers distributing imported Canadian lumber, i.e., primarily SPF, were identified as tending to lead prices or having a significant impact on prices in the U.S. market."^{66/} The data underlying this finding were developed in response to Question 2a of the remand questionnaire, which inquired whether particular mills or other Canadian or U.S. organizations tended to lead prices up or down or otherwise significantly impact prices.

Twenty-four out of twenty-nine (83%) of the purchaser responses were negative as to the proposition that either Canadian or U.S. mills tend to lead prices or have a significant impact on prices; 57 out of 85 (67%) of the importer responses were similarly negative; while 73 out of 129

^{66/} Remand Determination, at 18. The Commission did not quantify the word "several."

(57%) producer responses were positive. Once again, the Commission rejected without explanation the purchaser responses (which were overwhelmingly negative), as well as the importer responses (also negative), in favor of the producer responses (positive). The Commission further failed to note in its determination that some of the responses to this question identified U.S. mills as likely to lead prices or have a significant impact on U.S. prices.

In the opinion of the Panel, and particularly in light of its previous findings regarding the factual and legal sufficiency of the remand evidence as well as the fact that the Commission did not find price leadership in this case, this evidence is simply too inadequate to support the Commission's dominant impact finding, and the Commission's finding is otherwise not in accordance with law.

3. Regional Comparison

The final evidentiary basis advanced by the Commission to support its finding of causation on remand relies on data collected early in the investigation for the purpose of comparing the health of Western U.S. softwood lumber producers with the remainder of the country. The Commission used this information to develop a regional analysis, conducted by comparing weighted average composite prices in different regions of the United States, and correlating resulting price differences with import penetration in the same regions. The Commission found the average composite price "significantly higher" in the Southern region as compared to the Northern region, and a larger import penetration in the North.^{67/}

^{67/} Remand Determination, at 11. Notably, the Commission did not provide information as to how it derived its weighted averages.

Complainants point out that the data used to construct the composite prices are the same data which, although "accurate and reflect[ing] pricing trends in the market," were rejected by the Commission in its final determination for purposes of making price comparisons. The Commission discussed the "day-to-day" volatility of the market, daily and even hourly price changes, and problems in obtaining specific information in explaining why the collected data were unsuitable for use in conducting such price comparisons.^{68/}

The Commission Remand Determination sets forth its regional price comparison material in a single paragraph, with two footnotes. One footnote includes the statement that: "Comparing composite prices in regional markets minimizes differences in the baskets of species used to calculate those prices."^{69/} No other explanation is set forth as to why the data previously rejected for comparing prices can now be used for that purpose.

This Panel has emphasized the need for the Commission to "provide an adequate explanation of its findings in order to permit meaningful review."^{70/} While the evaluation of data, including their reliability, is committed to the expert determination of the Commission,^{71/} and the reviewing authority must not substitute its judgment for that of the Commission,^{72/} the Commission nevertheless must demonstrate that the evidence is sufficient to allow a reasonable person to reach

^{68/} ITC Final, at 30.

^{69/} Remand Determination, at 11, n.68 and 69.

^{70/} Panel Opinion, at 48.

^{71/} Matsushita Electric Industrial Co., Ltd. v. United States, 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984).

^{72/} Alberta Pork Producers Marketing Board v. United States, 11 Ct. Int'l Trade 563, 582, 669 F. Supp. 445, 449 (1987).

the same conclusion.^{73/} It must also provide a "rational connection between the facts found and the choice made by the agency."^{74/}

The Panel does not believe that the Commission has met this standard with regard to the use of the previously rejected data for price comparison purposes. No explanation is set forth of why the use of average composite prices changes the previously stated position of the Commission on such use. No discussion is presented of why such comparisons are valid despite the marked differences in regional markets. No information is provided on why species differences can be discounted, apart from the non-explanatory footnote previously quoted. Further, even if that footnote can be read to show the Commission's path of reasoning on the "baskets of species" issue, this reasoning remains at odds with the view expressed in the final determination, without any reasoned explanation.

The Complainants also challenge the regional analysis on the basis that the price differential determined by the Commission, a \$7.92 difference between \$262.48 and \$270.40, was statistically insignificant. Complainants cite "elementary statistical analysis" demonstrating that the price differential was much less than the \$33 or \$42 price differentials necessary for statistical significance at the 95% confidence level_the confidence level often required by statisticians.^{75/}

The 95% degree of certainty has been referred to by Judge Restani as "often what statisticians require in order to find a significant correlation."^{76/} She further indicated that "the

73/ See Matsushita, at 51.

74/ Panel Opinion, at 16.

75/ Complainants' Remand Brief, at 43-44.

76/ Maine Potato Council v. United States, 9 Ct. Int'l Trade 460, 462, 617 F. Supp. 1088 (1985); see also Hazelwood School District v. United States, 433 U.S. 299, 97 S.Ct. 2736, 53 L. Ed.2d 768 (continued...)

Commission is not required to accept data which in the course of ordinary scientific research could properly be rejected."^{77/} Commission counsel at the remand hearing indicated that the Commission is not subject to any specific requirements, such as standard deviations, concerning the statistical significance of the data it reviews.^{78/} This position was also stated by the CIT in Alberta Pork Producers Marketing Board. Referencing Judge Restani's statements above, the Court stated that "nothing in the statute requires that the Commission reassess data collected and accepted in its determination in order to verify its consistency with some ambiguous level of scientific reliability."^{79/}

The Panel believes that the determination which must be made here is whether the data can be considered sufficiently reliable that a reasonable mind could rely on the information to support its determination. The Commission is often required to make determinations despite "short statutory deadlines in an injury investigation and the difficulties facing the Commission in obtaining information."^{80/} The reviewing authority must respect these limitations, but cannot allow the difficulty of obtaining data to relieve the Commission of the obligation to act only on the basis of substantial evidence on the record. While data limitations and inconsistencies may require the

(...continued)
(1977), at n.17.

^{77/} Id.

^{78/} Remand Hearing Transcript, at 74.

^{79/} Alberta Pork Producers Marketing Board v. United States, 11 Ct. Int'l Trade 563, 585, 669 F. Supp. 445, 463 (1987).

^{80/} Hannibal Industries, Inc. v. United States, 13 Ct. Int'l Trade 202, 208, 710 F. Supp. 332 (1989), citing Atlantic Sugar Ltd. v. United States, 2 Fed. Cir. (T) 130, 133-34, 744 F.2d 1556, 1560 (1984).

Commission to make judgments in situations involving less than 95% certainty, this does not give the Commission leave to rely on data which are potentially, indeed quite probably, in error.^{81/}

The statistical analysis performed by the Complainants demonstrates that the variance between the prices relied on by the Commission is less than one quarter to one third of the standard deviations involved. In these circumstances, the likelihood that the actual figures taken from the ranged sample are accurate is quite small.

In Copperweld Corp. v. United States, the Court stated:

[I]n a final investigation, the ITC is directed to determine whether an industry in the U.S. *is* materially injured by reason of the imports of merchandise at less than fair value. 19 U.S.C. § 1673d(b)(1)(A)(i) (1982). This standard is more exacting than that which is applicable in a preliminary determination. In a final investigation, the ITC must determine whether or not material injury actually exists; a 'reasonable indication' of injury is never enough.^{82/}

The Panel believes that the quality of the evidence produced by an analysis with a relatively low degree of statistical certainty, using data previously rejected and now used without adequate explanation for price comparison purposes, is at most no better than a "reasonable indication," and therefore insufficient for a final determination. It does not provide the substantial evidence required to support a finding of price suppression due to the subject imports. The Panel therefore finds that the regional analysis conducted by the Commission is insufficient to support its affirmative determination.

81/ Alberta Pork Producers Marking Board, at 587: "Having found a potential error in the data specifically relied on by the Commission in reaching its determination regarding the depressing price effect of increased Canadian imports, the Court remands this action."

82/ Copperweld Corp. v. United States, 12 Ct. Int'l Trade 148, 169, 682 F. Supp. 552, 571 (1988) (emphasis in original).

CONCLUSION

Having reviewed the Commission's determination on remand, and the arguments of the Parties, the Panel affirms the Commission's remand determination with regard to imports from Quebec.

With respect to the Commission's causation determination, the Panel finds that the information and analysis regarding the role of SPF in the U.S. softwood lumber market, and the regional price and import penetration comparisons, do not constitute substantial evidence of price suppression by reason of imports of softwood lumber from Canada or are otherwise not in accordance with law.

As to the Commission's price trends analysis, the Panel finds that the analysis, in its present form, does not constitute substantial evidence and is otherwise not in accordance with law. Should the Commission on remand rely on price trend data to support an affirmative determination, the Commission shall provide a full analysis and explanation of the underlying data and the methodology employed in the creation and presentation of the price trends analysis.

Accordingly, the Panel remands the Commission's October 25, 1993 determination. The Commission shall complete its redetermination on remand within 45 days of the date of this Opinion.

**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

Pursuant to the United States-Canada Free Trade Agreement, and for the reasons stated in the Opinion, the Panel affirms in part and remands in part the United States International Trade Commission's Remand Determination, for further consideration consistent with this Opinion.

The results of the remand shall be provided to the Panel by the International Trade Commission within 45 days of the date of this Order.

January 28, 1994

Date

Joseph F. Dennin,
Chair

January 28, 1994

Date

Steven W. Baker

January 28, 1994

Date

Harry B. Endsley

January 28, 1994

Date

James F. Grandy

January 28, 1994

Date

Donald M. McRae