

**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 U.S. INTERNATIONAL TRADE

COMMISSION'S SECOND REMAND DETERMINATION

July 6, 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 was William A. Noellert.

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

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

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

Joining in the arguments of the Government of Canada, and the Canadian Forest Industries Council and affiliated companies were: Patrick F.J. Macrory, Spencer S. Griffith, Shannon S.S. Herzfeld, and Margaret L.H. Png on behalf of the Gouvernement du Québec; Randolph J. Stayin on behalf of the Quebec Lumber Manufacturers' Association and members of the Canadian Lumbermen's Association located in Quebec; Lawrence A. Schneider, Claire E. Reade, Michael T. Shor, and Mathew 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, Paul Minorini and Leslie A. Delagran on behalf of the Government of Ontario.

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ORDER

OPINION AND ORDER OF THE PANEL

I. 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/} Since its inception the Panel has issued two opinions, in which the Panel made certain findings and remanded to the Commission for further consideration specified issues as noted therein.^{3/}

^{1/} 19 U.S.C. § 1516a(g)(2).

^{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/} Details of the trade dispute leading to the Panel's review of the Commission's determinations, as well as the procedural history pertinent to the Panel's review, are provided in the Panel's first and second opinions. The Panel's first opinion was issued on July 26, 1993. (Softwood Lumber from Canada, USA-92-1904-02 [hereinafter First Panel Opinion]). The Panel's second opinion was issued on January 28, 1994. (Softwood Lumber from Canada, USA-92-1904-02 [hereinafter Second Panel Opinion]).

In this third Opinion the Panel reviews the Commission's Second Remand Determination, issued on March 14, 1994.^{4/} The Commission in that determination found that an industry in the United States was being materially injured by reason of imports of subsidized softwood lumber from Canada. Chairman Newquist and Commissioner Rohr together issued an affirmative determination. Commissioner Crawford reaffirmed her earlier, separate affirmative determination, which was issued as part of the Commission's First Remand Determination.^{5/} Writing separately, Vice Chairman Watson concluded that, based on his interpretation of the Panel's opinions and his review of the record evidence, the U.S. softwood lumber industry was neither materially injured, nor threatened with material injury, by reason of subsidized softwood lumber imported from Canada. Commissioner Nuzum reaffirmed her original negative determinations on injury and threat of injury reached in the original ITC Final.

On March 24, 1994, the Commission filed a Notice of Motion to Stay Proceedings. Argument in opposition to that Motion was filed on March 30, 1994 by counsel for 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

^{4/} Softwood Lumber from Canada, Inv. No. 701-TA-312 (Remand), USITC Pub. 2753 (Mar. 1994) (Aff. Final) [hereinafter ITC Second Remand].

^{5/} Softwood Lumber from Canada, Inv. 701-TA-312 (Remand), USITC Pub. 2689 (Oct. 1993) (Aff. Final) [hereinafter ITC First Remand]. In that remand determination Chairman Newquist, Vice Chairman Watson and Commissioner Rohr issued a single affirmative decision. Consequently, Commissioner Crawford's views were not necessary to the Commission's affirmative determination and, therefore, the Panel did not render an opinion with respect to Commissioner Crawford's decision. That decision, reaffirmed by Commissioner Crawford on remand, now constitutes an integral component of the Commission's affirmative determination and is reviewed by the Panel in this opinion.

Manufacturers' Association, and members of the Canadian Lumbermen's Association located in Quebec (collectively, "Canadian Complainants" or "Complainants"). The Canadian Complainants on that day also filed a joint brief in opposition to the Commission's Second Remand Determination.^{6/} Briefs in support of the Commission's Second Remand Determination were filed by the Commission and counsel for the Coalition for Fair Lumber Imports ("Coalition") on April 25, 1994.^{7/}

On April 12, 1994 the Panel issued an Order denying the Commission's Motion to Stay Proceedings, and indicated its intent to consider whether a hearing would be necessary with regard to the Commission's Second Remand Determination. By Order dated May 9, 1994, and upon the request of counsel for the Coalition, the Panel established May 13, 1994 as the date for oral argument on Commissioner Crawford's decision, and the affirmative determination of Chairman Newquist and Commissioner Rohr. Arguments were presented at the hearing on behalf of the Canadian Complainants, the Commission, and the Coalition.

^{6/} Canadian Complainants' Joint Brief in Opposition to the Second Remand Determination, March 30, 1994 [hereinafter Canadian Complainants' Brief].

^{7/} Response of the Investigating Authority to the Canadian Complainants' Joint Brief in Opposition to the Second Remand Determination of the U.S. International Trade Commission, April 25, 1994 [hereinafter ITC Response Brief]; Brief in Support of the International Trade Commission's Second Determination on Remand, April 25, 1994, submitted on behalf of the Coalition for Fair Lumber Imports [hereinafter Coalition Response Brief].

II. STANDARD OF REVIEW

This Panel is required under Article 1904(3) of the FTA and U.S. law to apply the standard of review and general legal principles that a U.S. court would apply in reviewing a Commission determination. That standard of review, as stated in the Panel's Second Opinion, obligates the Panel "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."^{8/}

This standard, discussed in detail in the Panel's prior opinions and incorporated by reference here,^{9/} requires more than a mere recitation of the underlying principles and court decisions delineating the contours of the review standard. Rather, it mandates conscientious application of the standard by the reviewing authority.^{10/}

The Panel is fully aware of its obligations under the applicable standard of review, as well as the limits placed on the Panel's review by virtue of that standard. The Panel believes that it has conscientiously applied the standard of review required by the FTA and U.S. law in its deliberations and in each of its opinions. While the Coalition in its Response Brief has once again highlighted the recent Daewoo decision issued by the Court of Appeals for the Federal Circuit,^{11/} as discussed in the Panel's Second Opinion that decision does not fundamentally alter the standard of review to be applied by the Panel. Nor for that matter do the "intervening" court decisions cited by the

^{8/} Second Panel Opinion, at 4.

^{9/} First Panel Opinion, at 11-17; Second Panel Opinion, at 3-4.

^{10/} Live Swine From Canada, ECC-93-1903-01 USA (April 8, 1993), at 11.

^{11/} Daewoo Electronics Co. v. International Union of Electrical, Technical, Salaried and Machine Workers, 6 F.3d 1511 (Fed. Cir. 1993), reversing in part Daewoo Electronics Co. v. United States, 760 F. Supp. 200 (Ct. Int'l Trade 1991). The Panel of course appreciates the fact that decisions of the Court of Appeals of the Federal Circuit, and the Supreme Court, are binding on Article 1904 Binational Panels and are thus of special relevance to its deliberations. FTA, Art. 1904(2).

Coalition.^{12/} Indeed, the recent Daewoo decision simply reaffirms the standard of review as understood and applied by the Panel.

The Panel also recognizes, as pointed out by Commission counsel, that its review must be based on the grounds invoked by the agency.^{13/} The Panel is not empowered to draw its own conclusions from the record. While it must presume that the Commissioners have considered all of the evidence presented, evidence not fairly encompassed in the discernible "path of reasoning" is not properly before the Panel for review.

III. THE COMMISSION'S AFFIRMATIVE REMAND DETERMINATION

A. Introduction

In its Second Opinion, the Panel addressed the evidence of significant price suppression by reason of the subject imports cited by the Majority in its First Remand Determination. In that opinion, the Panel focused on three pieces of evidence cited by the Majority which directly implicated the question of causation:

1. that Canadian prices tended to rise more slowly and fall more rapidly than domestic prices;
2. that the price of subsidized Canadian imports, particularly Spruce-Pine-Fir (SPF), had

^{12/} See Coalition Response Brief, at App. B, citing ABF Freight System, Inc. v. NLRB, 127 L.Ed.2d 152 (1994); Avesta Sheffield Inc. v. United States, No. 93-01-00062, Slip Op. 94-53 (Ct. Int'l Trade Mar. 31, 1994); Royal Thai Government v. United States, No. 92-03-00174, Slip Op. 94-59 (Ct. Int'l Trade Apr. 7, 1994).

^{13/} ITC First Remand Brief, at 14; ITC Second Remand Brief, at 17-18.

a dominant impact on lumber prices in the U.S. market; and

3. that 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.

Following detailed analysis, the Panel concluded that the second and third evidentiary bases cited by the Commission in support of its causation finding were not "substantial evidence" within the meaning of the statute or were otherwise not in accordance with law.^{14/} The Panel did not invite further analysis by the Commission on these findings.

As to the first evidentiary basis, however, the Panel agreed "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."^{15/} The Panel stated in summary, however, that "[a]t this time" (i.e., as presented by the Majority in their First Remand Determination),^{16/} the Commission's price trends analysis did not constitute substantial evidence of causation and was not in accordance with law. The Panel remanded this issue to the Commission "for further consideration"^{17/} requesting it, in the forthcoming remand determination, "to provide a full analysis and explanation of the underlying data and the methodology

^{14/} Second Panel Opinion, at 13.

^{15/} Id.

^{16/} Id.

^{17/} Id.

employed in the creation and presentation of the price trends analysis."^{18/}

Based on the foregoing, it was both explicit and clear that the Panel held itself open to be convinced by an appropriate price trends analysis and that the Commission was free to re-work its existing price trends analysis to attempt to make it appropriate and sustainable from the Panel's perspective.

In its Second Remand Determination, however, the Plurality took the position that "the panel's second decision *requires* us to conclude that the information we have collected on the issue of the effects of the price of imports on prices in the U.S. softwood lumber market does not demonstrate whether subsidized Canadian imports are having any injurious effects on U.S. lumber prices."^{19/} In effect, the Plurality took the position that the Panel had precluded any price trends analysis by the Commission.

As suggested above, the Panel strongly disagrees. The Panel made repeated references to the fact that the Commission's price effects findings did not, as presented, and as explained by the Commission, rise to the level of substantial evidence at that time. The Panel made clear its desire for additional information, and for an explanation of why the price trends evidence relied on by the Commission adequately supported its affirmative determination.

Accordingly, if the Plurality regarded themselves as being precluded from relying on price effects because there was not adequate support in the record for their interpretation of price trends, that was a conclusion they were perfectly entitled to reach. If, on the other hand, the Plurality proceeded on the assumption that the Panel had precluded them from reviewing price effects at all,

^{18/} Id. at 20-21.

^{19/} ITC Second Remand, at 1 (emphasis in original). Vice Chairman Watson in his separate determination expressed a similar view.

or price trends in particular, they were simply mistaken. However, the Panel has no choice but to render a decision on the Plurality's affirmative determination as currently presented, which by its express terms no longer places any reliance on "price effects" in support thereof.^{20/}

B. The Plurality Determination

As noted above, before making the specific findings on which they relied for purposes of their affirmative Second Remand Determination, the Plurality specifically found that the language of 19 U.S.C. § 1677(7)(E)(ii) is "very explicit that a finding that the price of imports is itself injurious is *not* an absolute requirement" in reaching an affirmative decision.^{21/} In effect, the Plurality determined that so long as the issue of price effects is considered, a specific finding of a price effect was, and is, not a precondition to the reaching of an affirmative determination.

For their part, the Canadian Complainants appear not to contest this interpretation, arguing instead that the Panel has already ruled on the issues connected with the Plurality's remaining findings. The Commission and the Coalition respond that the Canadian Complainants misconstrue both the Second Remand Determination and the Panel's prior opinions. They further assert that abundant evidence supports the Plurality's affirmative determination.

The Panel agrees with the Plurality that a specific finding of price effects is not a precondition

^{20/} The Panel understands that its review of the Commission's Second Remand Determination is to be conducted as a full review of a new determination by the Commission, with decisions made and opinions stated by the Panel in connection with the original Determination and the First Remand Determination not necessarily controlling. On the other hand, the Panel also notes the requirement that remand determinations be made in accordance with the decisions of the Panel, and that the prior Panel decisions reflect the Panel's understanding of the law and its relationship to the specific facts involved in this investigation.

^{21/} ITC Second Remand, at 4 (emphasis in original).

to the reaching of an affirmative determination, although the absence of such effects may weaken the ability of the Commission to reach such an affirmative determination, as well as the ability of a court or Binational Panel to sustain such an affirmative determination.^{22/} Section 1677(7)(E)(ii) of the statute expressly states that the presence or absence of any factor required to be considered "shall not necessarily give decisive guidance with respect to the determination of the Commission." The plain wording of that provision clearly supports the Plurality's interpretation. As to this precise finding, therefore, the Panel concludes that it is "in accordance with law."^{23/}

Following the above discussion, the Plurality set out six specific "findings and judgments" in support of their affirmative Second Remand Determination. It is these six "findings and judgments" that are the subject of the Panel's review in this opinion.

^{22/} 19 U.S.C. § 1677(7)(B)(i) requires the Commission to consider three factors in addressing whether the domestic industry has been materially injured by subsidized imports: (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. Under 19 U.S.C. § 1677(7)(b)(ii), the Commission may consider "other economic factors" as well. The Panel notes that the Commission has made affirmative decisions despite being unable to find detrimental price effects. See Certain High Information Content Flat Panel Displays and Display Glass Therefore from Japan, Inv. No. 731-TA-469, Views on Remand, USITC Pub. 2610 (1993), at I-17-18; Defrost Timers from Japan, Inv. No. 731-TA-643 (Final), USITC Pub. 2740 (1994), at I-12. In those instances, however, the causation finding was supported by significant increases in volume and/or market share. In this case, of course, the record establishes that imports declined in quantity terms and that market share remained essentially stable during the period of investigation.

^{23/} It should be observed, however, that the Plurality's interpretation that price effects are not mandatory to support an affirmative determination does not obviate the requirement that Commission determinations be based on substantial evidence and be otherwise in accordance with law.

Finding #1

1. The domestic industry is currently experiencing material injury.

The Panel notes that the Majority in the original Determination had adduced evidence in support of this conclusion.^{24/} On the basis of those citations, the Panel concludes that finding #1 is supported by substantial evidence on the record and is otherwise in accordance with law.

Finding #2

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

The Panel concludes this finding is supported by substantial evidence on the record and is otherwise in accordance with law.

In so stating, the Panel specifically recognizes that the conditions of competition in this industry are important factors which can, in combination with probative evidence of causation, support an affirmative determination.

The Panel feels constrained to point out, however, that the Plurality's "commodity market" findings appear to be largely a recharacterization of the "analytical framework" applied by the Majority in the original affirmative determination.^{25/} As stated by the Majority at that time, a point

^{24/} See ITC Final, at 14-22.

^{25/} ITC Final, at 27-28.

with which the Panel agrees, the analytical framework merely posits a "greater likelihood" of injury by reason of imports. The Plurality admit as much with respect to finding #2, stating that "[i]n such a market, the effects of the volume of imports are likely to be far more significant" ^{26/} In any event, on this point the Panel reiterates its position that neither the analytical framework nor a general finding about conditions of competition, in and of itself, is adequate in law to support an affirmative causation finding. ^{27/}

Moreover, as the Panel stated in its first opinion, "likelihood" in a final (as opposed to a preliminary) determination ^{28/} and "volumes alone" are, either alone or together, insufficient to support an affirmative determination. ^{29/}

^{26/} ITC Second Remand, at 4 (emphasis supplied). See also ITC Response Brief, at 15 ("[T]he Commission, as it had in its first two determinations, merely observed that the conditions of competition made injury more likely in this case.").

^{27/} See First Panel Opinion, at 28 ("[T]he analytical framework, its conditions having been satisfied, does not in and of itself constitute substantial evidence of material injury by reason of Canadian imports In the Panel's view, the analytical framework does not, and cannot, preordain a finding of causation.").

^{28/} First Panel Opinion, at 29.

^{29/} First Panel Opinion, at 32, and 33 n.97; see also Coated Ground Paper From Belgium, Finland, France, Germany, and the United Kingdom, Inv. Nos. 731-TA-487, 488, 489, 490, and 494 (Final), USITC Pub. 2467 (Dec. 1991), Views of Commissioner Lodwick, Commissioner Rohr, and Commissioner Newquist, at 17 n.57, and Additional Views of Commissioner Newquist, at 53.

Finding #3

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

The Panel concludes that finding #3 is supported by substantial evidence on the record and is otherwise in accordance with law.

Finding #4

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

By way of supporting explanation, the Plurality went on to say that this "significance" finding also amounts to a finding that the subsidized Canadian imports were causally linked to the material injury being suffered by the domestic softwood lumber industry.^{30/} The Plurality stated as follows:

The finding that the volume of imports is significant is a finding under the Commission's statute that the volume of imports is causally linked under the conditions in the market to the condition of the domestic industry.

^{30/} The general views of Chairman Newquist, Vice Chairman Watson, and Commissioners Rohr and Crawford on causation were set forth in footnotes 85-86 of the ITC Final. Chairman Newquist and Commissioner Rohr therein state their view that the Commission need only determine that subsidized imports are "a cause" of injury, citing Granges Metallverken AB v. United States, 716 F. Supp. 17, 25 (Ct. Int'l Trade 1989). See also footnote 5 of the ITC First Remand.

Not only did the Plurality place this unusual interpretation^{31/} on the literal and usual meaning of a finding that volumes are "significant", it also went on to aver that by failing to remand the Majority's earlier "significance" finding, the Panel had somehow approved by default this causation finding.

The Panel does not accept this conclusion. There was nothing in the Majority's First Remand Determination that suggested they were placing the Plurality's current reading on the word "significant."^{32/} The Panel merely recognized in its Second Opinion that imports at a market share level of 28% during the period of investigation are significant volumes of imports; imports at that volume cannot in any reasonable manner be regarded as insignificant.

As to the substance of the Plurality's finding, the Panel recognizes that a finding that subject imports are "significant" may, as indicated by the Plurality, "support" a determination of a causal connection between the material injury suffered by the domestic industry and the unfairly traded imports. In the instant case, the large (though generally stable) market share of imports in the

^{31/} From a substantive standpoint, the Panel finds the Plurality's supporting statement is ambiguous and open to several interpretations.

It could be an essentially legal finding that in all cases, whenever the Commission determines that the volume of unfair imports is "significant," such imports are ipso facto to be considered causally linked to any injury otherwise determined to be suffered by the domestic industry;

It could be a joint legal and factual finding that in all commodity market cases (cases in which the analytical framework can be said to apply), whenever the Commission determines that the volume of unfair imports is "significant," causation is thereby proved as well; or

It could be a more strictly factual finding that in this case, a finding that the Canadian import volumes are "significant," when combined with the conditions of competition existing in the softwood lumber industry, should be taken as proof of causation.

^{32/} Indeed the Majority's First Remand Determination appears to make a clear distinction between the significance of the volume of Canadian imports and the evidence of price effects (i.e., evidence of causation.) As the Majority stated, "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. We do not, however, rely solely on this basic analysis for our affirmative determination. Subsidized Canadian lumber imports have demonstrable price effects, as discussed below." ITC First Remand, at 6.

competitive market represents an important factor that may assist in reaching an affirmative determination, provided that there is other probative evidence bearing more directly on causation.

However, the Panel finds nothing in the language of Title VII, its implementing regulations, its legislative history, in the decisions of the Commission,^{33/} or the decisions of any court, that supports the Plurality's conclusions that a causation finding can be presumed by, or subsumed under, the Commission's significance finding. To the extent, therefore, that the Plurality has made such a finding, the Panel holds that such finding is not in accordance with law. To the extent that the Plurality has purported to make a finding that in the circumstances of this case a finding of "significance" should be taken as proof of causation, the Panel holds that such a finding is not supported by substantial evidence on the record and is inconsistent with previous rulings of the Panel.

^{33/} The Panel observes that the Commission itself has indicated that "significant" volume does not automatically indicate causation, even where an industry is experiencing material injury. In Certain Calcium Aluminum Cement and Cement Clinker from France, Inv. No. 731-TA-645 (Final), ITC Pub. 2772 (May 1994), a unanimous (one Commissioner not participating) Commission, including both Chairman Newquist and Commissioner Rohr, stated (at I-16):

While the volume of LTFV imports and the market share held by CA cement produced from those LTFV imports is significant, the level of imports and market share is consistent with historical levels. For the reasons discussed above, we also find that any increase in the volume of the imports or market share were not significant, and that the decline in [the domestic producers'] market share was not by reason of the subject imports.

Finding #5

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

The Panel concludes that this finding is supported by substantial evidence on the record and is otherwise in accordance with law.

Finding #6

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

The Plurality also noted that the Panel had not remanded the Majority's conclusion that the decline in lumber demand and the restrictions on timber supply did not fully explain the industry's injury.

Although the Plurality does not specifically cite the evidence supporting this finding, the Majority's prior affirmative determinations have indicated that the finding was: (1) demonstrated by the evidence of price suppression caused by the subject imports; and (2) corroborated by a comparison of the softwood lumber operations of U.S. producers to their operations producing other wood products and building materials (i.e., the cross-sectoral comparison).

In the absence of evidence demonstrating price suppression by reason of imports, the

Plurality's finding may rest on a cross-sectoral comparison.^{34/} If so, that comparison, which previously was used by the Commission merely to confirm the conclusion that the decline in demand and constraints on timber supply were not the only causes of the domestic industry's injury, would now appear to constitute a substantive basis for the Plurality's determination. The Panel believes that, to the extent the Plurality's finding relies on such a cross-sectoral comparison and is necessary to their affirmative determination, the Plurality has not adequately responded to the Panel's concerns regarding the statutory validity of such a comparison, and the methodology employed by the Commission in reaching its conclusion.

Therefore, the Panel remands this finding for an articulation by the Commission as to the bases, whether one or several, underlying this finding, and reminds the Commission for this purpose that the Panel's position regarding cross-sectoral comparisons stated in its previous opinions has not changed.^{35/} If the Commission desires to place significant reliance on one or another cross-sectoral comparisons, it must confirm that it has statutory authority to do so and such comparison(s) must be conducted in a methodologically sound manner.

As the Panel indicated, the Plurality has demonstrated the "likelihood" of injury by reason of imports -- but "likelihood" created by the conditions of competition (analytical framework) and the "significant" but decreasing volume and generally stable market share are not, alone, enough to support an affirmative determination. These factors may indicate that, depending on its probative value, not very much additional evidence may be necessary to sustain an affirmative determination. However, it is for the Commission to meet the substantial evidence standard by providing the

^{34/} Hearing Transcript, at 71-73.

^{35/} First Panel Opinion, at 54-73; Second Panel Opinion, at n.21 and accompanying text.

additional support that the Panel has indicated is required.

The Panel remands the Plurality's determination for a decision not inconsistent with this Opinion.

C. Commissioner Crawford's Determination

Commissioner Crawford joined the Commission Majority in the original affirmative injury determination. Following the Panel's remand, Commissioner Crawford issued a separate affirmative determination, in which she relied on an "analytical framework" different from that employed by the Commission Majority.^{36/} That determination was reaffirmed by Commissioner Crawford in the Commission's Second Remand Determination.^{37/}

In applying her analytical framework, Commissioner Crawford evaluates the volume and price effects of the subsidy at issue in the context of the market characteristics unique to the industry under investigation. Those characteristics are determined in part through an evaluation of the elasticities of demand, substitution, and domestic supply, estimates of which were produced by the Commission staff. Based on her review of the evidence and the staff's calculations, Commissioner Crawford determined that demand for lumber is price inelastic, that Canadian and domestic lumber are highly substitutable, such that purchasing decisions are based primarily on price, and that the elasticity of domestic supply is low, but not inelastic. She also found that the high substitutability of the products, the rapid dissemination of information in the lumber market, and the large number of individual buyers and sellers, indicated that the domestic market is "perfectly competitive." In that context, Commissioner Crawford considered the factors required by the Commission's governing statute,

^{36/} ITC First Remand, at 25.

^{37/} ITC Second Remand, at 9.

namely, the volume of imports, their price effects, and their impact on the domestic industry. The Commissioner was aided in that endeavor by an economic model developed by the Commission staff, which predicts high, medium, and low ranges of price, output and revenue effects of the subsidized imports depending on selected input parameters.^{38/}

All of the parties recognize that an economic analysis of the type performed by Commissioner Crawford has been used by the Commission in the past, and decisions based on such an analysis have been upheld by the Court of International Trade with respect to antidumping cases.^{39/} The Canadian Complainants, while noting that this case represents the first use of the model in the context of a subsidy proceeding, did not object in principle to its use. They focused their challenge to Commissioner Crawford's determination on the choice of input parameters used in the model and apparently relied on by the Commissioner, and her alleged mechanistic application of those parameters and the results predicted by the model.^{40/}

^{38/} In the First Remand Determination opinion issued by Commissioner Crawford, after making a full analysis based on the initial 6.51% subsidy margin determined by the Commerce Department, Commissioner Crawford also addressed the revised subsidy determination by the Commerce Department following Binational Panel review, which increased the rate to 11.54%. Commissioner Crawford noted that because her analysis involved evaluation of the effects of the subsidy, higher subsidy rates magnified the effects of the subsidized imports, and the impact on the domestic industry. (ITC First Remand, at 30).

The Panel recognizes that this analysis using the higher subsidy rate is a separate, alternative determination which does not affect the prior determination based on the 6.51% rate. Even though the Commerce Department subsequently, at the direction of another Binational Panel, found a zero percent subsidy (Commerce Department Notice (January 6, 1994)), this Panel does not find it necessary to review either Commissioner Crawford's determination using the 11.54% rate, or to request the futile act of making a determination using a zero percent subsidy rate. The Panel's review of Commissioner Crawford's determination is limited to Part III of her opinion on remand discussing material injury by reason of the subsidized imports. (ITC First Remand, at 26-30).

^{39/} See Trent Tube Div., Crucible Materials Corp. v. United States, 741 F. Supp. 921, 927-29 (Ct. Int'l Trade 1990); USX Corp. v. United States, 682 F. Supp. 60, 69 (Ct. Int'l Trade 1988).

^{40/} Brief of the Canadian Complainants, Nov. 23, 1993, at 95 et seq.

Specifically, Canadian Complainants point out that based on Tables 1 and 2 of the staff's model, contained in Memorandum EC-P-039,^{41/} Commissioner Crawford in her analysis appears to have relied on an artificial U.S. market share for Canadian imports, which assumed that the Memorandum of Understanding no longer was in effect. In addition, Complainants argue that the model incorrectly assumes that 100 percent of Canadian production is exported to the United States; utilizes a parameter for elasticity of domestic supply which differs from that found appropriate by Commissioner Crawford; and does not consider net back adjustments for freight. Finally, Canadian Complainants assert that Commissioner Crawford's analysis does not adequately account for the amount, if any, of Canadian subsidies passed through to the U.S. market.

In response, Commission counsel argues that none of the tables presented in EC-P-039 corresponds exactly with Commissioner Crawford's decision. Rather, Commissioner Crawford evaluated the detrimental effects predicted by the staff's model, and determined that those results were reasonable. The Commissioner then considered the significance of those results in the context of her findings regarding the characteristics of the softwood lumber market, and concluded that the domestic industry was materially injured by reason of subsidized lumber imported from Canada. In addition, counsel for the Commission points out that Table 4 of EC-P-039 directly contradicts the Complainants' assertions regarding the alleged use of improper inputs regarding Canadian lumber's share of the U.S. market, and the proportion of Canadian lumber production exported to the United States. With respect to the pass-through issue, Commission counsel contends that as noted in a separate staff Memorandum,^{42/} the model was designed to evaluate the pass-through of subsidies.

^{41/} List 1, Doc. 254.

^{42/} See Economic Memorandum EC-P-038, attached to memorandum EC-P-039.

The Coalition also contested Complainants' assertions, arguing that Commissioner Crawford relied on ranges for the parametric inputs to the model, and that in view of the Commissioner's other findings she did not mechanistically select or apply the highest parameters used in the model, or the upper bounds of the economic effects produced by the model. The Coalition further asserts that, even if all of the adjustments suggested by Complainants are made, the economic effects determined by the model are only slightly reduced.

The Panel on numerous occasions has indicated its recognition that the Commission is afforded wide discretion in selecting and applying methodologies to carry out its statutory mandate.^{43/} In the Panel's view, the model developed by the Commission staff is an acceptable tool for informing the Commission of the possible effects of subsidized imports.^{44/} It is noteworthy that the model is specifically designed to measure the effect only of the subsidized imports, thereby avoiding the danger

^{43/} See, e.g., First Panel Opinion, at 14; Second Panel Opinion, at 4. The Panel has repeatedly indicated its recognition that the Commission is free to use any suitable methodology permitted by law, so long as the analysis produced in that methodology is based on substantial evidence in the record. (First Panel Opinion, at 14; Second Panel Opinion, at 4). What the Panel has called "traditional" methodologies or forms of evidence are those which have been the basis of numerous Commission determinations, and received approval by the reviewing courts.

The use of a new type of methodology, or evidence in support of a methodology, should, this Panel believes, be subject to special scrutiny. This is not because new methodologies are not permissible, or even in appropriate circumstances desirable; this is because these methodologies have not stood the test of time, repeated argument and analysis, and consideration by reviewing courts. Such scrutiny is not a higher standard of review; it is merely recognition that new methodologies must be adequately explained. As Judge Restani stated in USX, 682 F. Supp. at 70, discussing the use of an economic model, "until such equations are accepted as the everyday subject of antidumping decisions, however, they must be explained for the benefit of the parties and the court." Because this Panel is required to apply the same standard of judicial review as the CIT would apply, it is important for it to be confident that an approach or methodology would be found appropriate by the Commission's reviewing courts, before it endorses its use in a specific case.

^{44/} The Commission's Office of Economics has described this tool as one "for use in conjunction with other evidence on the record." Economic Memorandum EC-P-038, at 1, n.4.

of weighing alternate causes of injury to the domestic industry.^{45/}

The Panel also considers that the substantial evidence standard could be satisfied where the Commission's model is used in conjunction with other probative evidence on the record, and the model's results and other record evidence are subjected to the judgment of the reviewing Commissioner(s). It is clear in this case that Commissioner Crawford conducted a thorough review of the record, made certain findings regarding the characteristics of the domestic industry and the domestic market, and applied her judgment to the evidence of record and the results produced by the model in considering the factors enumerated in the Commission's statute.

The Panel notes, however, that it is unclear from Commissioner Crawford's determination whether in relying on the economic model her analysis takes into account evidence of the actual conditions of the market, namely, Canadian lumber's actual share of the U.S. market; the actual proportion of Canadian production exported to the United States; the parameter for elasticity of domestic supply found to be reasonable by the Commissioner; and net back adjustments for freight.^{46/} In addition, Commissioner Crawford's determination fails to make clear, or explain, the basis for her position on the pass-through issues raised by the Canadian Complainants. Specifically, there is no discussion of whether the model itself fully accounts for all pass-through issues, or whether an additional evaluation by a Commissioner using the results is required.^{47/}

^{45/} Id. at 3.

^{46/} The only net back analysis conducted appears to be the one included in INV-Q-174, which uses the 11.54% subsidy rate.

^{47/} The Panel notes that while Economic Memorandum EC-P-038 states that the model is intended to take these factors into account, at 5-6, 10, the equations contained in the Technical Appendix do not appear to account for any portion of the subsidy being absorbed in Canada (e.g., by the mill as profit or by its employees as increased compensation).

The Complainant's discussion of pass through points out the significant difference between
(continued...)

The Panel recognizes that clarification of the above factors may not affect the results of the model or the decision of Commissioner Crawford. However, the Panel believes that where reliance is placed on an economic model that is predictive in nature, particularly where such a model is being used for the first time in a subsidy case, it is essential that such matters be clarified. The Panel is unable to affirm a determination that is based in part on the use of such an economic model until the concerns raised here are satisfied. Finally, it is incumbent on Commissioner Crawford to decide whether, after taking into account the factors raised by the Panel, her determination would be negative or affirmative. The Panel therefore remands Commissioner Crawford's determination for clarification as to whether her reliance on the economic model takes into account these factors. To the extent Commissioner Crawford's analysis of the model's results did not consider the listed factors, the Commissioner is instructed to do so and provide the Panel with a new determination.

(...continued)

an antidumping margin, which represents the actual difference in prices determined by the Commerce Department; and a countervailing duty margin, which represents an amount or benefit received by the foreign producer, which may or may not be reflected -- or reflected fully -- in the price at which the goods are sold.

See Commissioner Brunsdale's comments in her dissent to the original ITC Final, at 41-43.

**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 Second Determination on Remand, for further consideration consistent with this Opinion.

The results of the remand shall be provided to the Panel by the International Trade Commission within 30 days of the date of this Order.

DECISION AND ORDER ISSUED JULY 6, 1994

SIGNED IN THE ORIGINAL BY:

July 6, 1994
Date

Joseph F. Dennin
Joseph F. Dennin,
Chair

July 6, 1994
Date

Steven W. Baker
Steven W. Baker

July 6, 1994
Date

Harry B. Endsley
Harry B. Endsley

July 6, 1994
Date

James F. Grandy
James F. Grandy

July 6, 1994
Date

Donald M. McRae
Donald M. McRae