

ARTICLE 1904 BINATIONAL PANEL REVIEW
Pursuant to the
NORTH AMERICAN FREE TRADE AGREEMENT

:
IN THE MATTER OF :
:
CERTAIN SOFTWOOD LUMBER : Secretariat File No.
: USA-CDA-2002-1904-07
PRODUCTS FROM CANADA: FINAL :
AFFIRMATIVE THREAT OF INJURY :
:
DETERMINATION :
:

DECISION OF THE PANEL

September 5, 2003

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¹ The panelists wish to express their appreciation for the excellent support received from Panelist Assistants Mark Leventhal, Esq., Nick Ranieri, Esq. and Ivan Krmpotic, Esq.

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U.S. International Trade Commission, Robin Turner, Esq. and Mary Jane Alves on behalf of THE INVESTIGATING AUTHORITY.

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Arnold & Porter , LLP., Michael T. Shor, Esq., on behalf of ABITIBI CONSOLIDATED, INC.

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Richard Bennet, Esq., on behalf of SHEARER LUMBER PRODUCTS.

Charles Thomas, Esq., on behalf of SHUQUALAK LUMBER COMPANY.

W.J. Wood, Esq., on behalf of TOLLESON LUMBR COMPANY, INC.

Gibson, Dunn & Crutcher, LLP., Gracia Berg, Esq., on behalf of WEST FRASER MILLS AND TOLKO INDUSTRIES, LTD.

Miller & Chevalier LLP., Matthew M. Nolan, Esq. on behalf of WEYERHAEUSER CORPORATION.

Wiley, Rein & Fielding LLP., Jim Slattery, Esq. on behalf of DOMAN LIMITED.

I. INTRODUCTION AND PROCEDURAL HISTORY

This NAFTA Binational Panel is reviewing the International Trade Commission's ("Commission") final determination regarding *Certain Softwood Lumber Products from Canada*, published on May 22, 2002.² The 1996 Canada-United States Softwood Lumber Agreement ("SLA") expired on March 31, 2001.³ On April 2, 2001 the Commission instituted antidumping and countervailing duty injury investigations regarding certain softwood products from Canada in response to a petition filed by the Coalition for Fair Lumber Imports Executive Committee ("Coalition"), the United Brotherhood of Carpenters and Joiners, and the Paper, Allied-Industrial, Chemical and Energy Workers International Union (collectively, referred to as "Petitioners").⁴

On May 23, 2001 the Commission published its preliminary determination in which it concluded that the U.S. softwood lumber industry had not been injured by reason of subject imports, but that there was a reasonable indication that the industry was threatened with material injury by reason of subject imports of Canadian softwood lumber that were subsidized by the Government of Canada and sold in the United States

² Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928 (Final), USITC Pub. 3509 (May 2002, 67 Fed. Reg. 36,022 (Int'l Trade Comm'n May 22, 2002) ("Final Determination"). This decision is published in both a public and confidential version. This is the public version of the opinion from which confidential information has been deleted as noted. In order to minimize lengthy citations, this opinion does not cite to the public or confidential record throughout but in instances where specific references to detailed information appears.

³ Softwood Lumber Agreement Between the United States of America and the Government of Canada, May 29, 1996, 35 I.L.M. P.R. List 1 47 (Vol. 2, Ex. 3) ("SLA").

⁴ Petitions for the Imposition of Antidumping and Countervailing Duties: Certain Softwood Lumber Products from Canada, Vol.1.IA (April 2, 2001) ("Petition") The briefs filed by the parties to the Commission proceeding are identified as the Prehearing or Posthearing Briefs heretofore.

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at less than fair value (“LTFV”).⁵ On the same day, the Commission initiated the final phase of its injury investigation by issuing questionnaires to domestic producers, importers, U.S. purchasers, and Canadian producers, soliciting relevant data for the years 1999 – 2001. The Department of Commerce (“Commerce”) subsequently made affirmative preliminary and final determinations that imports of softwood lumber from Canada were subsidized and sold in the United States at less than fair value.⁶ On May 16, 2002 the Commission unanimously confirmed its preliminary findings that imported Canadian softwood lumber products were not presently injuring the U.S. softwood lumber industry, but that the domestic industry was threatened with material injury by reason of imports of softwood lumber from Canada.⁷ On May 22, 2002 Commerce issued antidumping and countervailing duty orders on imports of certain softwood lumber products from Canada. After the correction of ministerial errors, the amended dumping margins for the six respondent companies ranged from 2.18 percent to 12.44 percent with a weighted average of 8.43 percent. The final amended countervailing duty rate was

⁵ Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928 (Preliminary), 66 Fed. Reg. 28,541 (Int’l Trade Comm’n May 23, 2001)(“Preliminary Determination”).

⁶ On November 6, 2001, Commerce published notice of its preliminary antidumping determination, 66 Fed. Reg. 56,062 (Dep’t. Commerce) November 6, 2001 and its final antidumping determination, Softwood Lumber from Canada, 67 Fed. Reg. 15, 539 (Dep’t Commerce April 2, 2002). Commerce subsequently amended its decision, correcting certain ministerial errors. The amended final determination is at 67 Fed. Reg. 36, 068 (Dep’t Commerce May 22, 2002). 66 Fed. Reg. 43,186 (Dep’t Commerce) November 17, 2002 (Preliminary Determination) and 67 Fed. Reg. 15,545 (April 2, 2002) (Final Determination)(“Commerce Antidumping Final Determination”). The Commerce Antidumping Final Determination is accompanied by an Issues and Decision Memorandum (“Commerce Antidumping IDM”) Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada, 67 Fed. Reg. 15545 (Dep’t. Commerce) April 2, 2002 (“Commerce Countervailing Final Determination”). The Commerce Countervailing Determination is accompanied by an Issues and Decision Memorandum (“Commerce Countervailing IDM”)

⁷ Id. at 2.

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18.79 percent.⁸ On the same day that Commerce issued these orders the requests for binational panel review were filed pursuant to Rule 34 of the Rules of Procedure for Article 1904 Binational Panel Reviews, alleging that the Final Determination was unsupported by substantial evidence on the record, or otherwise not in accordance with the law. The selection of Panelists was accomplished by agreement of the relevant U.S. and Canadian authorities on January 7, 2003 pursuant to Annex 1901.2 of Chapter Nineteen of the North American Free Trade Agreement. On April 4, 2003 the Panel convened a pre-hearing conference pursuant to Rule 66 of the NAFTA Rules of Procedure. All parties to the action were invited to present proposals relating to time allocations and the organization of issues at oral argument. The Panel issued its order relating to oral argument on April 30, 2003 and oral arguments were held on June 11 – 12, 2003 in Washington, D.C.

II. STANDARD OF REVIEW

In accordance with NAFTA Article 1904(1), which mandates that, upon request, binational panel review replace judicial review of final agency determinations, this binational panel is empowered to review the Commission's Final Determination.⁹ This Panel's review is circumscribed by the standard of review articulated in Article 1904(3) of the NAFTA, which requires that this Panel apply the standard of review and general

⁸ Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Certain Softwood Lumber Products From Canada, 67 Fed. Reg. 36, 068 – 36, 077 (Dept. Commerce May 22, 2002).

⁹ Had the NAFTA Binational Panel Review not replaced judicial review, the Final Determination would be reviewable by the United States Court of International Trade ("CIT"). See, 19 U.S.C. Section 1516a.

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legal principles that a U.S. court would apply in its review of a decision of the competent investigating authority. The standard of review applicable here is found in Section 516A(b)(1)(B) of the Tariff Act of 1930, as amended by 19 U.S.C. Section 1516a(b)(1)(B)¹⁰, which requires the Panel to “hold unlawful any determination, finding, or conclusion found...to be unsupported by substantial evidence on the record or otherwise not in accordance with law...” This Panel is limited to reviewing the “administrative record”¹¹ compiled by the investigating authority.¹² In addition, while conducting its review, this Panel is bound by the laws of the United States, including its “statutes, legislative history, regulations, administrative practices, and judicial precedents”, decisions of the Court of Appeals for the Federal Circuit and decisions of the United States Supreme Court.¹³

Substantial Evidence

The determination of whether an agency determination, finding or conclusion is unsupported by “substantial evidence” turns on the meaning of substantial evidence. This term has been the subject of much judicial treatment that has sought to clarify the

¹⁰ See, NAFTA Annex 1911. See, also, *Elkern Metals Co. v. United States*, 2000 Ct. Int’l. Trade LEXIS 17,*13(Ct. Int’l Trade, February 21, 2002)(quoting 19 U.S.C. Section 1516a(b)(1)(B)(i))(emphasis added)

¹¹ NAFTA Article 1911 defines “administrative record” to mean:

- (a) all documentary or other information presented to or obtained by the competent investigating authority in the course of the administrative proceeding, including any governmental memoranda pertaining to the case, including any record of *ex- parte* meetings as may be required to be kept;
- (b) a copy of the final determination of the competent investigating authority, including reasons for the determination;
- (c) all transcripts or records of conferences or hearings before the competent investigating authority; and
- (d) all notices published in the official journal of the importing Party in connection with the administrative proceeding.

¹² See, NAFTA Article 1904(2).

¹³ See, NAFTA Article 1904(2).

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statutorily prescribed standard. The U.S. Supreme Court has stated that substantial evidence is “more than a mere scintilla [of evidence] and is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”.¹⁴ The Supreme Court subsequently elaborated on the standard by saying that substantial evidence could be “something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.”¹⁵

This standard requires that the reviewing body accord deference to the agency’s factual findings.¹⁶ However, deference does not imply that the reviewing body abdicate its responsibility to review meaningfully the agency’s determination. This task goes beyond a cursory review or merely rubber-stamping the agency’s findings. The reviewing body must look to ensure that a reasoned basis supports the agency’s decision. The reviewing body must not defer to an agency’s determination that is premised on inadequate analysis or faulty reasoning.¹⁷ The degree of deference which is to be accorded to the agency is contingent upon “the thoroughness evident in [its]

¹⁴ See, Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951). See also, Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984).

¹⁵ Consolo v. Federal Maritime Commission, 383 U.S. 607, 620 (1966).

¹⁶ See, e.g., American Silicon Techs. v. United States, 2003 U.S. App. LEXIS 13506 (Fed. Cir. 2003); Micron Tech., Inc. v. United States, 117 F.3d 1386, 1394 (Fed. Cir. 1997); Hercules, Inc. v. United States, 673 F. Supp. 454, 463 (Ct. Int’l Trade 1987)(agencies have “broad discretion in the enforcement of trade laws.”)(quoting Manufacturas Industriales de Nogales, S.A. v. United States, 666 F. Supp. 1562, 1567 (Ct. Int’l Trade 1987)); see also Brother Industries, Ltd. v. United States, 771 F. Supp. 374, 381 (Ct. Int’l Trade 1991)

¹⁷ Chr. Bjelland Seafoods A/C v. United States, 14 ITRD 2257, 2260, 1992 Ct. Int’l Trade LEXIS 213(Ct. Int’l Trade 1992); USX Corp. v. United States, 655 F. Supp. 487, 492 (Ct. Int’l Trade 1987). See also, Universal Camera, 340 U.S. at 477 and American Lamb Co. v. United States, 785 F.2d 994, 1004 (Fed. Cir. 1986)(citing S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 638).

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consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements...”¹⁸

Deference to the agency’s findings presupposes a rational connection between the facts found and the choice made by the agency.¹⁹ While the standard does not require ideal clarity, the agency’s path of reasoning must be reasonably discernible.²⁰ As well, there must be an adequate explanation of the rationale for the agency’s decision in order for the reviewing body to assess meaningfully whether it is supported by substantial evidence on the record. The agency must articulate and explain the reasons for its conclusions.²¹

In determining whether the substantial evidence standard has been met, courts and this Panel must consider the record as a whole. That is, the reviewing body must look at all of the evidence on the record that supports the agency’s findings as well as that which detracts from it.²² While the reviewing body may not reweigh the evidence and substitute its opinion for that of the administrative agency²³, the reviewing body is tasked with

¹⁸ Ceramica Regiomontana, 636 F. Supp. at 961, 965(quoting Skidmore v. Swift & Co., 323 U.S. 134, 140(1944)), aff’d, 810 F.2d 1137 (Fed. Cir. 1987).

¹⁹ Bando Chem. Indus. v. United States, 787 F. Supp. 224, 227 (Ct. Int’l Trade, 1992)(citing Bowman Transportation v. Arkansas-Best Freight System, 419 U.S. 281,285 (1974); Avesta AB v. United States, 724 F. Supp.974, 978-9 (Ct. Int’l Trade1989), aff’d 914 F.2d 233 (Fed. Cir. 1990), cert. denied, 111 S. Ct. 1308 (1991).

²⁰ Ceramica Regiomontana, S.A., 810 F.2d1137, 1139 (Fed.Cir.1987)(citing Bowman Transportation, 419 U.S. at 286).

²¹ Mitsubishi Materials Corp. v. United States, 820 F.Supp.608, 621(Ct. Int’l Trade 1993); USX Corp., 655 F. Supp. at 490; SCM Corp. v. United States, 487 F.Supp.96, 108 (Cust. Ct. 1980); Maine Potato Council v. United States, 613 F. Supp. at1244-45 (Ct. Int’l Trade, 1985).; Bando Chem. Indus. v. United States, 787 F. Supp. at 227 (Ct. Int’l Trade, 1992).

²² Universal Camera, 340 U.S. 474, 483-484 (1951).

²³ The possibility of drawing two inconsistent conclusions from the evidence does not mean that the agency’s conclusion is unsupported by substantial evidence. See, Consolo, at 620. This holds true even if the reviewing body would have made a different choice had the matter been before it de novo. See, Universal Camera, at 488; American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1276 (Ct. Int’l Trade 1984), aff’d sub nom Armco, Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985).

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looking at all of the evidence on the record, including the body of evidence opposed to the agency's view, to determine whether the finding is in fact supported by substantial evidence.

The reviewing body's task in determining whether the agency's decision is supported by substantial evidence is an exercise that is conducted strictly on what is contained in the record²⁴ and by reference to the rationale and findings contained in the determination.²⁵ Counsel's post hoc rationalizations cannot rectify an agency's lack of articulation in the determination.²⁶ As well, the reviewing body is limited to looking at the administrative record that was compiled by the agency. The reviewing body is not to engage in *de novo* review or to make new factual findings to amend the record.²⁷

In Accordance with Law

The question of whether an agency's determination, finding or conclusion is in accordance with law rests on a two-step analysis mandated by the United States Supreme Court.²⁸ The reviewing body must initially determine whether Congress has directly spoken to the issue.²⁹ If it is determined that Congress has directly spoken to the issue, then the agency must apply the law as it is written.³⁰ In ascertaining Congress' intention on the issue, the reviewing body looks at the text of the statute and employs the

²⁴ Daewoo Electronics Company v. International Union, 6 F.3d 1511 (Fed.Cir.1993), cert. denied, 114 S. Ct. 2672 (1994).

²⁵ Hussey Copper, Ltd. v. United States, 834 F. Supp. 413, 427 (Ct. Int'l Trade 1985).

²⁶ Maine Potato Council v. United States, 613 F. Supp. 1237, 1245 (Ct. Int'l Trade, 1985).

²⁷ Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-744 (1985).

²⁸ Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ("Chevron").

²⁹ Chevron, at 842.

³⁰ Windmill Int'l Pte., Ltd. v. United States, 2002 Ct. Int'l. Trade LEXIS 14, at *5-6 (Ct. Int'l Trade February 21, 2002) ("Windmill").

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traditional tools of statutory construction, which include legislative history, the statute's structure, and the canons of statutory construction.³¹

If Congress has not directly spoken to the issue or if the text of the statute is ambiguous, the second step entails the reviewing body determining whether the agency's statutory interpretation is a permissible construction of the statute. This exercise involves an inquiry into the reasonableness of the agency's interpretation.³² In determining whether the agency interpretation is reasonable, the reviewing body may look at, *inter alia*, the express terms of the provisions at issue, the objectives of those provisions, and the objectives of the statutory scheme as a whole.³³

There are permissible limitations to the deference to be accorded to an agency's interpretation. An agency may not, under the guise of lawful discretion or interpretation, contravene or ignore the intent of Congress.³⁴ Agency practice must yield to statutory language and, in cases where such practice is changed, the level of discretion is contingent upon the explanation given for the change.³⁵ The agency must justify any departures it makes from settled practice with reasonable explanations that are themselves supported by substantial evidence on the record.³⁶ While the agency enjoys a

³¹ Timex V.I., Inc., v. United States, 157 F.3d 879, 882 (Fed. Cir. 1998)(citing Chevron, 467 U.S. at 843, n.9). Steel Authority of India, Ltd., v. United States, 146 F. Supp.2d. 900, 905 (Ct. of Int'l Trade 2001).

³² Windmill, at 7.

³³ Id.

³⁴ Cabot Corp. v. United States, 694 F.Supp.949, 953(Ct. Int'l Trade1988)

³⁵ Public Employees Retirement System of Ohio v. June M. Betts, 492 U.S.158, 171 (1989). Texas Crushed Stone Co. v. United States, 35 F.3d 1535 (Fed. Cir. 1994), note 7 at 1541 ("Prior agency practice is relevant in determining the amount of the deference due an agency's earlier interpretation. An agency's interpretation of a relevant provision which conflicts with an agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." Citing INS v. Cardoza-Fonseca 480 U.S. 421, 446 note 30, 107 S. Ct. 1207, 1221 note 30, 94 L. Ed. 2d 434 (1987).

³⁶ Western Conference of Teamsters v. Brock, 709 F. Supp. 1159, 1169 (Ct. Int'l Trade 1989); National Knitwear and Sportswear Ass'n v. United States, 779 F. Supp. 1364, 1369(Ct. Int'l Trade 1991).

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presumption of good faith and conscientious exercise in carrying out its responsibilities,³⁷ it must nonetheless observe the basic principles of due process and fundamental procedural fairness.³⁸

Methodology is the means by which the agency carries out its statutory mandate and is generally regarded to be within its discretion.³⁹ The reviewing body must accord deference to the agency's use of methodology, limiting the review to an analysis of its reasonableness.⁴⁰ However, where the use of the methodology is improper, then any of the findings which flow from it would not be supported by substantial evidence.⁴¹

In conclusion, the applicable standard of review requires that this Panel uphold the Commission's Final Determination if it is (a) supported by substantial evidence on the record and (b) not contrary to law, even if this Panel would have reached a different conclusion if it had considered the case *de novo*. This is the standard of review that has been applied to this case.

³⁷ Saha Thai Steel Pipe Co. v. United States, 661 F. Supp. 1198, 1202 (Ct. Int'l Trade 1987).

³⁸ Sigma Corp. v. United States, 841 F.Supp.1255, 1267-68 (Ct. Int'l Trade 1993); Usinor Sacilor v. United States, 893 F.Supp.1112, 1141 (Ct. Int'l Trade 1995); and Creswell Trading Co. v. United States, 15 F.3d1054, 1062 (Fed. Cir.1994)

³⁹ Brother Industries, Ltd. v. United States, 771 F. Supp. 374, 381 (Ct. Int'l Trade 1991).

⁴⁰ Koyo Seiko Co. v. United States, 66 F. 3d 1204, 1210-1211 (Fed.Cir.1995)

⁴¹ Gifford-Hill Cement Co. v. United States, 615 F.supp.557, 582 (Ct. Int'l Trade1985).

III. ANALYSIS

A. Whether the Commission's Determinations that (a) Western Red Cedar, (b) Eastern White Pine, (c) Square-End Bed Frame Components, and (d) Flangestock are Part of a Continuum of Softwood Lumber Products Defined as a Single Domestic Like Product are in Accordance with the Law and Supported by Substantial Evidence.

1. Commission Determinations

The Commission in this case found that (a) Western Red Cedar, (b) Eastern White Pine, (c) square-end bed frame components, and (d) flangestock are all part of a continuum of softwood lumber products defined as a single domestic like product. Final Determination at 8-15.

2. The Governing Statutory Framework

The Commission undertakes its injury analysis with respect to "the producers as a whole of a domestic like product." 19 U.S.C. Section 1677(4)(A). A "domestic like product" is defined as "a product which is like, or in the absence of like, most similar in characteristics and uses with" subject imports. 19 U.S.C. Section 1677(10).

Under its traditional like product analysis, which has been endorsed by Congress, as well as the Commission's reviewing courts, the Commission has analyzed the similarities and differences between various products within the scope of an investigation, as defined by Commerce, with reference to six "like product" factors:

- 1) physical characteristics and uses;
- 2) interchangeability;

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- 3) channels of distribution;
- 4) customer and producer perceptions of the products;
- 5) common manufacturing facilities, production processes, and production employees; and,
- 6) price.

See e.g., Saccharin From China, Inv. No. 731-TA-1013 (Final), USITC Pub. 3606 at 3 n. 6 (June 2003) (citing NEC Corp. v. Department of Commerce, 36 F. Supp.2d 380, 383 (Ct. Int'l Trade 1998)). No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a particular investigation. See Trade Agreements Act of 1979, Report of the Committee on Finance, United States Senate, S. Rep. No. 96-249 at 90-91 (1979). The Commission "looks for clear dividing lines among possible like products and disregards minor variations." See Nippon Steel Corp. v. United States, 19 C.I.T. 450, 455 (1995); Torrington Co. v. United States, 747 F. Supp. 744, 748-49 (Ct. Int'l Trade 1990), aff'd, 938 F.2d 1278 (Fed. Cir. 1991). When there are no clear dividing lines based on characteristics and uses among possible like products, the Commission holds that such possible like products fit within the "continuum" of the products within the scope, and finds one like product. For example, in Antifriction Bearings (Other Than Tapered Roller Bearings) And Parts Thereof From The Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom, Inv. Nos. 303-TA-19 and 731-TA-391-399 (May 1988), the ITC stated:

When the Commission has been faced with the problem of multiple like products based upon alleged distinctions

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among types of products, it has looked for clear dividing lines in terms of the characteristics and uses of the various products. If the Commission fails to find clear dividing lines, then it usually discusses the question in terms of a continuum and includes everything in one like product.

See also Stainless Clad Steel Plate from Japan, 731-TA-50 (November 1981) ("Since this is a case in which the like product candidates consist of a group of products slightly distinguishable from each other, among which no clear dividing lines can be drawn based on characteristics and uses, we find the like product in this preliminary investigation is all members of the group."); Legal Issues in Certain Color Television Receivers From the Republic of Korea and Taiwan, Inv. No. 731-TA-134 & 135 (Memorandum from General Counsel) (June 7, 1983) ("If there is a 'continuum' of products slightly distinguishable from each other, among which no clear dividing lines can be drawn based on characteristics and uses, the Commission will treat the merchandise as a single line product."); Legal Issues in Steel Wire Nails from Korea, Inv. No. 731-TA-46 (Memorandum from General Counsel) (July 19, 1982) ("The Commission has applied the continuum principle only where there are no clear dividing lines in terms of characteristics and uses.").

3. Analysis

a) Western Red Cedar and Eastern White Pine

In analyzing the like product factors set forth above, the Commission found both similarities and differences between (a) Western Red Cedar ("WRC") and other species of softwood lumber, and between (b) Eastern White Pine ("EWP") and other species of softwood lumber. Final Determination at 8-13. Specifically, for both WRC and EWP,

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the Commission, after analyzing all six like product factors, found, on one hand, similarities and differences in terms of physical characteristics and uses; similarities in terms of (a) interchangeability, (b) manufacturing facilities, production processes and employees; and (c) channels of distribution; and, on the other hand, differences in terms of (a) customer and producer perceptions of the product; and (b) price. Final Determination at 10-11, 13. The Commission, however, reasoned that "the differences do not provide a clear dividing line . . . and do not outweigh the similarities." Final Determination at 10-11, 13. Therefore, the Commission defined "a single domestic like product for the continuum of species that comprise softwood lumber and includes WRC lumber . . . and white pine lumber." Final Determination at 10-11, 13.

We affirm the Commission's holdings that WRC and EWP are part of the single domestic like product for the species that comprise softwood lumber, as we find that there is substantial evidence on the record to support these holdings. As to WRC, the record evidence indicates similarities in terms of uses;⁴² interchangeability;⁴³ manufacturing facilities, production processes, and employees;⁴⁴ and channels of distribution.⁴⁵ Likewise, as to EWP, the record evidence also indicates similarities in

⁴² See Staff Report to Final Determination ("Staff Report" heretofore) at Table II-5; Petitioners' Prehearing Brief at Exhs. 4 and 85. The Panel notes that these similarities in *uses*, without more, could be sufficient to negate any clear dividing line between WRC and other softwood lumber products. Legal Issues in Certain Color Television Receivers From the Republic of Korea and Taiwan, Inv. No. 731-TA-134 & 135 (Memorandum from General Counsel) (June 7, 1983) ("If there is a 'continuum' of products slightly distinguishable from each other, among which no clear dividing lines can be drawn based on characteristics and *uses*, the Commission will treat the merchandise as a single line product.") (Emphasis added).

⁴³ See, e.g., Staff Report at II-8; Petitioners' Prehearing Brief at Appendix A-10 – A-15 and Exhs. 4 and 85; Petitioners' Posthearing Brief at Appendix D-28 – D-31 and D-33 – D-35; WRC Coalition's Prehearing Brief at 16-20; WRC Coalition's Posthearing Brief at 8-9 and Exhs. 4 and 9.

⁴⁴ See, e.g., Staff Report at I-18 and I-19; see also Petitioners' Prehearing Brief at Appendix A-19 – A-22.

⁴⁵ See, e.g., Staff Report at Table II-1.

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terms of uses;⁴⁶ interchangeability;⁴⁷ manufacturing facilities, production processes, and employees;⁴⁸ and channels of distribution.⁴⁹ Although the Commission concedes that there are differences in (a) customer and producer perceptions or preferences, and (b) price between WRC and other species of softwood lumber and between EWP and other species of softwood lumber, it is not the role of this Panel to reweigh the like product factors, and determine whether these differences outweigh the similarities. See Fujitsu Limited v. United States, 36 F. Supp.2d 394, 398 n.4 (Ct. Int'l Trade 1999) ("[I]t is not the province of the courts to change the priority of the relevant like product factors or to reweigh or judge the credibility of conflicting evidence."). Instead, we note that the CIT has on numerous occasions recognized that the Commission has considerable discretion to determine the domestic like product. For example, in Acciai Speciali Terni S.p.A. v. United States, 118 F. Supp.2d 1298, 1307 (Ct. Int'l Trade 2000), the CIT stated that "Congress has provided the ITC with broad authority for making its like-product determination." And in NEC Corp. v. Department of Commerce, 36 F. Supp.2d 380, 384 (Ct. Int'l Trade 1998), the CIT made the following observation concerning a reviewing court's standard of review of the ITC's like product findings:

In reviewing the Commission's like product findings under the substantial evidence test, it is not the province of the courts to change the priority of the relevant like product factors or to reweigh or judge the credibility of conflicting

⁴⁶ See Tembec's Prehearing Brief at 10, 13-15; OFIA/OLMA's Prehearing Brief at 10, 13-15; Petitioners' Prehearing Brief at Appendix A-26 and A-27 and Exhs. 4 and 85; Petitioners' Posthearing Brief at Appendix D-31 and D-32.

⁴⁷ See Staff Report at Table II-5; Petitioners' Prehearing Brief at A-28 – A-31 and Exh. 85; Petitioners' Posthearing Brief at Appendix D-32.

⁴⁸ See, e.g., Staff Report at I-20; see also Petitioners' Prehearing Brief at A-34 and A-35; Petitioners' Posthearing Brief at Appendix A-23 and A-24.

⁴⁹ See, e.g., Staff Report at Table II-1.

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evidence It is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence.

Moreover, in Cheflin Corp. v. United States, 170 F. Supp.2d 1320, 1330 (Ct. Int'l Trade 2001), the CIT noted that the fact that a different conclusion *could* be drawn from the evidence on the record was not sufficient for the CIT to disturb the ITC's domestic like product determination, stating:

Having carefully reviewed the Review Determination and the underlying record, this Court concludes that the Commission's determination that domestic stainless steel cookware is the domestic like product is supported by substantial evidence. Cheflin has presented no argument that demonstrates that the Commission drew an invalid conclusion from the evidence on the record; *Cheflin succeeds only in showing that a different conclusion could have been drawn from this evidence.* (Emphasis added).

In light of the fact that the Commission analyzed all six like product factors in light of the record evidence, the Commission's considerable discretion to determine the domestic like product, and the fact that there is substantial evidence on the record to support the Commission's holdings that WRC and EWP are part of the single domestic like product for the continuum of species that comprise softwood lumber, we affirm the Commission's holdings as to WRC and EWP.

b) Square-End Bed Frame Components and Flangestock

The Commission found that both square-end bed frame components and flangestock are part of a continuum of softwood lumber products defined as a single domestic like product. Final Determination at 15. However, in so finding, the

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Commission neglected to analyze the six like product factors, in stark contrast with its comprehensive analysis for both WRC and EWP. Final Determination at 13-15.

The Commission did not analyze the six like product factors for square-end bed frame components and flangestock because, as the Commission concedes, it never collected particularized data for these products.⁵⁰ The Commission states that it did not collect particularized data for these products because of "Complainants' failure to raise and support these issues in a timely fashion during the proceeding."⁵¹ Specifically, the Commission states that, "due to Complainants' failure to raise and support these issues in a timely fashion during the proceeding, the Commission was unable to evaluate the similarities and differences between square-end bedframe components and other softwood lumber on the one hand, and flangestock and other softwood lumber, on the other, based on more than two of its traditional factors."⁵²

We find the reason that the Commission asserts for its failure to analyze the six like product factors for square-end bed frame components and flangestock, *vis*, Complainants' failure to raise and support these issues in a timely fashion during the proceeding, to be without merit, as the record evidence clearly indicates that Complainants' did, in fact, raise and support these issues in a timely fashion.

Specifically, as to square-end bed frame components, record evidence indicates that both the International Sleep Products Association ("ISPA") and Abitibi Consolidated, Inc. ("Abitibi") timely raised this issue. The ISPA presented sworn live testimony at the

⁵⁰ See Brief of the Investigating Authority The U.S. International Trade Commission, dated Dec. 27, 2002 ("Commission Brief") at 212. (P.R. List 1 76).

⁵¹ Id. at 216.

⁵² Id.

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Commission's April 23, 2001 staff conference regarding why it believed bed frame components constituted a distinct like product from softwood lumber.⁵³ In addition, following the staff conference, the ISPA submitted a post-conference brief to the Commission providing further factual and legal argument on this issue.⁵⁴ Meanwhile, Abitibi submitted detailed comments and arguments on the bed frame component issue in comments on the Commission's final draft questionnaire and explicitly requested that the Commission modify its questionnaires so as to gather distinct data for square-end bed frame components.⁵⁵ In this letter, Abitibi expressly stated:

Abitibi intends to contend that . . . square end bedframe components should be treated as [a] distinct like product[] for purposes of the Commission's final determination. Abitibi requests that the Commission gather distinct data for th[is] product[], just as it has proposed doing for Western Red Cedar and White Pine.⁵⁶

As to flangestock, record evidence indicates that Abitibi, as well as the Ontario Forest Industries Association ("OFIA"), the Ontario Lumber Manufacturers Association ("OLMA"), and Tembec Inc. ("Tembec"), timely raised this issue. Abitibi submitted detailed comments and arguments on flangestock in comments on the Commission's final draft questionnaires and explicitly requested that the Commission gather distinct data for flangestock.⁵⁷ In addition, OFIA/OLMA's and Tembec's comments on the Commission's final draft questionnaires, filed contemporaneously, requested nine questions addressing flangestock out of a total of twenty-one requested questions, including questions relevant

⁵³ See April 23, 2001, Staff Conference Transcript at 123-24 (List 1, Doc. 32).

⁵⁴ See Post Conference Brief of the ISPA at 1 (List 1, Doc. 41).

⁵⁵ See Abitibi's December 11, 2001, Comments on Draft Questionnaires at 1 and 10 (List 2, Doc. 140).

⁵⁶ *Id.* at 1.

⁵⁷ See Abitibi's December 11, 2001, Comments on Draft Questionnaires at 2-6, 10 (List 2, Doc. 140).

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only to like product issues.⁵⁸ For example, OFIA/OLMA and Tembec explicitly requested that the Commission ask the following question:

If your firm purchases finger-jointed flangestock, please describe any special characteristics and end uses, and compare finger-jointed flangestock with other softwood lumber in terms of interchangeability, price, availability and channels of distribution.⁵⁹

As clearly evidenced by the foregoing, timely requests were made to the Commission to collect data for square-end bed frame components and flangestock. Therefore, we find the Commission's reasoning for not analyzing the six like product factors for these products – Complainants' failure to raise and support these issues in a timely fashion during the proceeding – to be disingenuous and unsupported by the record evidence. In light of the express and timely requests the Commission received for it to collect distinct information for square-end bed frame components and flangestock, the Commission was under an affirmative obligation to have done so. See, e.g., Allegheny Ludlum Corp. v. United States, 287 F.3d 1365, 1373 (Fed. Cir. 2002) ("[T]he Commission is obligated to make active, reasonable efforts to obtain relevant data."); Roquette Freres v. United States, 583 F. Supp. 599, 604 (Ct. Int'l Trade 1984) ("It is incumbent on the ITC to acquire all obtainable or accessible information from the affected industries on the economic factors necessary for its analysis."); Budd Co. Ry. Div. v. United States, 507 F. Supp. 997, 1003-04 (Ct. Int'l Trade 1980) ("[I]t is clear that all information that is accessible or may be obtained from whatever its source may be, must be reasonably sought by the Commission.") (internal quotations omitted). In its

⁵⁸ See OFIA/OLMA's and Tembec's Comments on Draft Questionnaires at 2-3, 5-6 (List 1, Doc. 127).

⁵⁹ Id. at 2.

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final questionnaires, the Commission could have easily solicited information as to both square-end bed frame components and flangestock. Yet, the Commission neglected to collect this clearly relevant information. The Commission's failure to do so does not absolve itself of its responsibility to analyze the six like product factors to determine whether square-end bed frame components and flangestock are part of the so-called continuum of softwood lumber products defined as a single domestic like product. Accordingly, we hold that the Commission's domestic like product analysis regarding square-end bed frame components and flangestock was not in accordance with law and was not supported by substantial evidence. We, therefore, remand the Commission's holding that both square-end bed frame components and flangestock are part of a continuum of softwood lumber products defined as a single domestic like product. We instruct the Commission on remand to consider, based on the existing record evidence, all six like product factors to determine whether square-end bed frame components and flangestock are part of a continuum of softwood lumber products defined as a single domestic like product.

4. Conclusion

Based on the foregoing, we affirm the Commission's holdings that WRC and EWP are part of the single domestic like product for the continuum of species that comprise softwood lumber. We remand the Commission's holdings that square-end bed frame components and flangestock are part of the single domestic like product for the continuum of species that comprise softwood lumber and instruct the Commission on remand to consider, based on the existing record evidence, all six like product factors to

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determine whether square-end bed frame components and flangestock are part of a continuum of softwood lumber products defined as a single domestic like product.

B. Whether the Commission Erred By Not Making a Separate Injury Determination for the Maritime Provinces

1. Commission Determination

The Commission found that it was not legally required to make a separate injury determination for the Maritime Provinces. Final Determination at 27-29. The governments of the Canadian provinces of New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, the Maritime Lumber Bureau of Canada, and the softwood lumber producers located in these Provinces are collectively referred to as the “Maritime Provinces.”

It reasoned that

“[t]he antidumping statute direct[ed] the Commission to make its injury determination in the final phase of an investigation ‘by reason of imports . . . of the merchandise with respect to which the administering authority has made an affirmative determination.’ [citation omitted]. Thus, the subject imports that the Commission considers in its injury analysis are defined by Commerce, and when Commerce made its final affirmative antidumping duty determination, it clearly identified the subject merchandise as softwood lumber from Canada, including the Maritime Provinces.”

Final Determination at 28. The Commission concluded that “the reviewing courts have repeatedly affirmed ... [its] ... practice of not going behind Commerce’s determinations to make its own independent assessments. [citations omitted] Final Determination at 28 – 29. Finally, the Commission determined that since it did not have authority to determine whether the Maritime Provinces are a “country” under 19 U.S.C. Section 1677(3)

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because that authority is vested in Commerce, no separate injury analysis was conducted.

Final Determination at 29.

2. Analysis

The Maritime Provinces claim that the Commission erred by not making “a separate injury determination with respect to imports of softwood lumber produced in the Maritime Provinces and by improperly disregarding evidence submitted regarding the unique historical position of the Maritimes in its final determination.”⁶⁰ Resolution of these issues requires scrutiny of the statutory and legal framework underlying the antidumping statute.⁶¹

a) Statutory and Legal Framework

The antidumping statute divides the responsibilities for the making of the necessary determinations. Commerce is responsible for determining whether imports from a “country” are being sold at less than normal value. 19 U.S.C. Section 1673(1). The Commission determines whether injury to the domestic industry is being caused “by reason of imports of the merchandise with respect to which the administering authority has made an affirmative determination.” 19 U.S.C. Section 1673d(b)(1).

⁶⁰ Brief of the Complainants The Provinces of New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, The Maritime Lumber Bureau, And Lumber Producers Located In These Provinces, dated October 7, 2002 (“Maritime Provinces Brief”) at 1. P.R. List 1 54. The Maritime Provinces also contend that the Commission erred when it cross-cumulated dumped and subsidized imports in its final determination. The Panel’s ruling with respect to the cross-cumulation issue is found at Section C.

⁶¹ Although the statutory framework for countervailing duty determinations is similar, since Commerce excluded the Maritime Provinces from its affirmative countervailing duty determination, the Panel discusses these issues only with respect to the antidumping statute. See, 67 Fed.Reg. 15,545, 15,547 (Dep’t Commerce April 2, 2002). Commerce’s exemption is inapplicable to Crown timber harvested in other Canadian Provinces but produced as lumber in the Maritimes. Id.

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The statute does not explicitly delegate authority to Commerce to determine what entity or entities will be considered a “country” for purposes of a final antidumping duty determination. The statute provides that:

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

19 U.S.C. Section 1677(3). The legislative history, however, indicates that Commerce is responsible for this determination. It states that:

“The administering authority will determine, on the basis of the facts in each case, what entity or entities will be considered the “country” for the purposes of a title VII proceeding ...However, a customs union may not be considered a country in antidumping proceedings. Thus, the foreign market value of merchandise in such a proceeding may not be calculated on a customs-union-wide basis.”

S. Rep. No. 96-249, U.S.C.C.A.N. at 381, 467 (emphasis added).⁶² Thus, the Commission’s final injury determination is premised upon Commerce’s factual determination of the scope of the imported merchandise, that is to say, its finding as to what constitutes the subject imports from which foreign country (i.e., entity or entities).

The reviewing courts have consistently constrained the Commission from making determinations that are otherwise left to Commerce. Algoma Steel Corp. v. United States,

⁶² The administering authority means the Secretary of Commerce. 19 U.S.C. Section 1677(1).

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688 F. Supp. 639, 644 (Ct. Int'l Trade 1988), aff'd, 865 F.2d 240, 241 (Fed.Cir.1989), Goss Graphic System, Inc. v. United States, 33 F. Supp. 2d 1082, 1093 (Ct. Int'l Trade 1998); NEC Corp. v. Department of Commerce, 36 F.Supp. 2d 380, 383 (Ct. Int'l Trade 1998); Makita Corp. v. United States, 974 F.Supp. 770, 783 (Ct. Int'l Trade 1997). See Certain Softwood Lumber from Canada, Secretariat File No. USA-92-1904-02, Decision of the Binational Panel (July 26, 1993) (Panel affirmed Commission's conclusion that it did not have authority to treat Quebec as "country" separate from Canada for purposes of its injury determination because Commerce had included imports of softwood lumber from Quebec within the country whose products were subject to investigation).

b) Application to Softwood Lumber Proceeding

The Maritime Provinces make similar arguments before the Panel as they did before the Commission. We conclude that the Commission properly rejected the Maritime Provinces' arguments. As described above, the antidumping statute and its underlying legislative history together clearly vest Commerce with the authority to decide the scope of the subject imports and when an entity will be considered a "country" under the antidumping statute.⁶³ Consequently, the Commission was correct in not conducting a separate injury analysis with respect to imports from the Maritime Provinces. The

⁶³ The statute does not address who will make the determination of what particular entities qualify as "countries," but as shown above, the legislative history does. Consequently, the Maritime Provinces reliance on the ITC's responsibility under 19 U.S.C. Section 1336 is inapposite. Moreover, unlike some of the definitions in the antidumping statute, there is no statutory provision in which the Commission separately applies the "country" definition. For this reason, Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1085-86 (Ct. Int'l Trade 1988), is distinguishable because in that case, both Commerce and the Commission were required to define the domestic "industry" to support their separate statutory determinations. See also Certain High-Information Content Flat Panel Displays and Display Glass Therefor from Japan, Inv. No. 731-TA-469 (Final), USITC Pub. 2413 (Int'l Trade Comm'n Aug. 1991); High Information Content Flat Panel Displays and Display Glass Therefor from Japan, 56 Fed. Reg. 32,376, 32, 380 Dep't Commerce (July 16, 1991)(Commerce and Commission make separate domestic "like product" determinations to fulfill distinct statutory requirements).

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Maritime Provinces' relief lies with challenging Commerce's determination to include them within the scope of its antidumping investigation.⁶⁴ The Maritime Provinces also claim that their circumstances are distinct from those of the other Canadian provinces because (1) the vast majority of the Maritime Provinces timber production comes from privately held forest lands; (2) the provincial forest policies for the rest of the production are market-based; and (3) the Maritime Provinces have not been subject to the previous timber disputes due to these circumstances.⁶⁵ It is true that the Maritime Provinces have not been subject to the MOU, the SLA, and the Maritime Accord, and are not part of the countervailing duty investigation here.⁶⁶ The fact remains, however, that Commerce found that these unique factual circumstances did not warrant excluding the Maritime Provinces from the antidumping duty determination. The Commission noted that "there is no dispute that Commerce' affirmative final antidumping duty determination involves softwood lumber imports from Canada, including the Maritime Provinces." Final Determination at 28 (emphasis in original). Moreover, contrary to the Maritime Provinces' contention that the Commission did not consider these facts, the final determination shows it was aware of the Maritime Provinces unique history but determined that it was legally constrained to find otherwise given Commerce's final affirmative antidumping duty determination involving softwood lumber imports from the Maritime Provinces. Final Determination at 28-29.

⁶⁴ On July 17, 2003, the NAFTA Panel reviewing Commerce's antidumping final determination rejected the Maritime Provinces' challenge to their inclusion within the scope of its antidumping investigation. See *Certain Softwood Lumber Products From Canada*, Secretariat File No. USA-CDA-2002-1904-02 (July 17, 2003) at 181.

⁶⁵ Maritime Provinces' Brief at 2-5, 22-24.

⁶⁶ See, Amendment Notice of Initiation of Countervailing Duty Investigation: Certain Softwood Lumber from Canada, 66 Fed. Reg. 40228 (Int'l Trade Comm'n July 27, 2001).

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Finally, the Maritime Provinces also contend that the Commission should have considered the contents of the Petition, and other statements by Petitioners, which allegedly only speak to subsidy-induced dumping.⁶⁷ We find that the Commission did not err in this regard as Commerce is responsible for scrutinizing the petition and determining the scope of the investigation.⁶⁸

3. Conclusion

The Panel finds that the Commission’s interpretation of the statute with respect to the Maritime Provinces is reasonable, supported by substantial evidence and is otherwise in accordance with law, and affirms its finding that it did not have authority to treat the Maritime Provinces as a “country” entitled to a separate injury determination.

⁶⁷ Maritime Provinces Brief at 25-30.

⁶⁸ See, Amendment Notice, 66 Fed. Reg. at 40229; Makita, 974 F. Supp. at 777 (“the responsibility for such definition [of the scope of the investigation] lies with the ITA, not the domestic petitioner.”), in any event, the Petition apparently includes dumping allegations that cover all Canadian lumber imports, including from the Maritime Provinces. Counsel for the Coalition indicated at the hearing that the Petition alleged as follows: “Petitioner believes that virtually all Canadian soft lumber producers sold subject merchandise for less than fair value.” Transcript of Oral Argument, June 12, 2003 Volume 2 at 46. As there was industry support for the Petition, the Maritime Provinces reliance on Suramerica de Aleaciones Laminadas v. United States, 44 F.3d 978, 984 (Fed. Cir. 1994) is misplaced.

C. Whether The Commission Erred In Its Determination To Cross-Cumulate Dumped And Subsidized Imports In Its Threat Of Injury Analysis

1. Commission Determination

In the segment of its determination entitled “IV. Separate Injury Determinations And Cross-Cumulation”, the Commission decided that “we conclude, as we have in prior cases, that we are legally required to cross-cumulate subsidized and dumped imports from the same country.” Final Determination at 29 (footnote omitted) and at 30-31.

On the basis of this conclusion, the Commission applied the cross-cumulation approach in both its actual injury and threat of injury analyses.

2. Analysis

The Commission’s conclusion relied heavily on the Federal Circuit’s decision in Bingham & Taylor v. United States, 815 F. 2d 1482 (Fed. Cir. 1987) which held that, while the 1984 statutory amendments did not explicitly address cross-cumulation as distinct from cumulation, the statute should be interpreted as making cross-cumulation of dumped and subsidized imports mandatory whenever the statutory cumulation factors were otherwise satisfied. The Commission held that the new statutory language in the Uruguay Round Agreements Act (“URAA”), 19 U.S.C. Sections 1677 (7) (G) (i) and 1677 (7) (H)

“clearly requires the Commission to cumulate imports from *all countries* with respect to which petitions are filed (or investigations self-initiated) *under sections 702 or 732* on the same day. Although the URAA does not expressly mention cross-cumulation, the new statutory language, like

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the language addressed by the Bingham & Taylor court, is broad enough to encompass cross-cumulation...we find that the statute is better interpreted as consistent with mandatory cross-cumulation.”

Final Determination at 30. (emphasis in original).

The Canadian Parties⁶⁹ and the CLTA⁷⁰ argue that the statute requires that the Commission make separate determinations, one involving allegedly subsidized imports and the other involving allegedly dumped imports. This approach, they maintain, is required both by the U.S. statute and by the United States’ international obligations.⁷¹ The CLTA also argues that the Commission erred in interpreting the statute as requiring cross-cumulation in its threat of injury determination. In the alternative, the CLTA argues that (1) the statute, as amended by the URAA, now precludes cross-cumulation because the statutory language does not mention cross-cumulation, and it should be construed consistently with the WTO’s Agreement on Subsidies and Countervailing Measures and the WTO’s Antidumping Agreement, which are international obligations of the United States and describe the findings of injury as to subsidies and as to dumping in different and separate terms, and (2) in any event, any authority given by the statute to the

⁶⁹ The Canadian Parties consist of the Governments of Canada, Alberta, British Columbia, Manitoba, Ontario, Saskatchewan, Quebec, Northwest Territories and The Yukon Territories. (“Canadian Parties”). While these collective governments are referred to as the Canadian Parties throughout, the Panel wishes to clarify that this is not to be confused with the Parties to the NAFTA agreement and the Parties referred to under the NAFTA Rules of Procedure wherein capital “P” Party refers to the United States of America, the Government of Canada and the Government of Mexico.

⁷⁰ The CLTA consists of the Canadian Lumber Trade Alliance and its Constituent Associations, Alberta Forest Products Association, British Columbia Lumber Trade Council, Free Trade Lumber Council, Ontario Forest Industries Association, Ontario Lumber Manufacturers Association and the Quebec Lumber Manufacturers Association (“CLTA”)

⁷¹ Brief of the Canadian Parties, dated October 7, 2002 (P.R. List 1 53) (“Canadian Parties’ Joint Brief”) at 25-28; Brief of the CLTA, dated October 8, 2002 (P.R. List 1 68) (“CLTA Initial Brief”) at 69-84.

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Commission to cross-cumulate is discretionary in nature, not mandatory as the Commission concluded. Although the statute now provides for mandatory cumulation in current injury determinations in 19 U.S.C. Section 1677 (7)(G)(i), it also explicitly provides that the Commission shall exercise discretion in deciding whether to cumulate for purposes of assessing threat of injury (19 U.S.C. Section 1677 (7) (H)). Complainants argue that, because any authority to cross-cumulate necessarily derives from the cumulation provision of the statute, the Commission may not interpret its authority to cross-cumulate more broadly than its authority to cumulate. Thus, at a minimum, the Panel must remand the case for the Commission to consider whether it would be an appropriate exercise of discretion to cross-cumulate dumped and subsidized imports in this case.⁷²

The Commission argues that the legislative history of the URAA indicates Congress' clear intent to endorse the prior practice of the Commission of cross-cumulating subsidized and dumped imports. Moreover, as the Federal Circuit stated in Bingham & Taylor, "for the courts to engraft onto the statute a prohibition against cross-cumulation, where Congress itself has not done so, would be improper."⁷³ The Commission further states that there is no doubt that it would have cross-cumulated dumped and subsidized imports of softwood lumber from Canada even if it had described its authority to cross-cumulate as discretionary rather than as mandatory. The Commission urges that there is ample law to the effect that a court (or here a Panel)

⁷² CLTA Initial Brief at 69-84; Reply Brief of the CLTA, dated January 21, 2003 ("CLTA Reply Brief") at 50-56.

⁷³ 815 F. 2d at 1487.

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should remand a case to an agency for further consideration only if the court is in substantial doubt whether the administrative agency would have made the same ultimate finding with the erroneous findings removed from the picture.⁷⁴ In the oral argument before this Panel, Commission counsel likewise took the position that the law gives the Commission discretion on whether to cumulate or cross-cumulate in the context of a threat of injury inquiry and that the Panel should not remand here because the Commission would undoubtedly reach the same conclusion in favor of cross-cumulation if it reviewed the question as a discretionary one.⁷⁵

The Coalition also argues that the Commission properly decided to cross-cumulate. Cross-cumulation, it states, is not based solely on the Commission's statutory authority on this matter, but rather is also based on the logical and legal imperative to cumulate simultaneous unfair trade practices. In revising the statutory cumulation provisions in the URAA, Congress made no changes substantively affecting the Commission's cumulation practice. Thus, since 1994, the Commission has continued to cross-cumulate consistently, no respondent has challenged in court the agency's continuous application of the Bingham & Taylor rule, and Congress has voiced no objection to the practice. The Coalition also takes the position that, even if the Panel finds that the statute does not require cross-cumulation, at most, the Panel can remand to the Commission for a reasoned determination whether, in this case, it would be factually appropriate to make a single threat determination with regard to imports that are both

⁷⁴ Commission Brief at 164-172.

⁷⁵ Transcript of Oral Argument, June 12, 2003 Vol. 1 at 239-52.

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dumped and subsidized.⁷⁶ However, the Coalition contends that such a remand “would be without any basis whatsoever in the law, a waste of the Commission’s (and the Panel’s) time and resources, and an abuse of the NAFTA panel process” because there is in fact no basis upon which the Commission could determine in this case that dumped imports of softwood lumber threaten material injury while subsidized imports do not or vice versa.⁷⁷

This Panel finds that the Commission erred in concluding that the statute requires cross-cumulation in a threat of injury case. Bingham & Taylor does not support the Commission’s conclusion in this regard. That case concerned cumulation in the context of an actual injury finding, not threat of injury as here, and, moreover, involved an earlier version of the statute. The court’s decision was based on the interpretation of 19 U.S.C. Section 1677 (7) (C) (iv) (1984), a predecessor of the current provision in 19 U.S.C. Section 1677 (7) (G), dealing with cumulation for determining *actual material injury*. The language of that provision was, and is, mandatory (“...the Commission shall cumulatively assess...”). However, in 1988, subsequent to the decision in Bingham & Taylor, Congress amended the statute further, one such amendment providing specifically for the authorization of cumulation in threat determinations, at the Commission’s discretion.⁷⁸ That provision was essentially retained in the URAA and is presently codified in 19 U.S.C. Section 1677 (7) (H), headed “Cumulation for determining threat of material injury”, which reads in part as follows:

⁷⁶ Brief of the Coalition, dated December 27, 2002 (“Coalition Brief”) at Vol. I, IV-222. (P.R. List 1 78).

⁷⁷ Id. at IV-224.

⁷⁸ Omnibus Trade & Competitiveness Act of 1988, Pub. L. 100-418, Section 1330 (a).

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“ (H) Cumulation for determining threat of material injury. To the extent practicable and subject to subparagraph (G) (ii), for purposes of clause (i) (III) and (IV) of subparagraph (F), the Commission may cumulatively assess the volume and price effects of imports of the subject merchandise...” (emphasis added)

Indeed, the Statement of Administrative Action (“SAA”) that accompanied the URAA expressly noted that “Section 222 (e) of the bill adds section 771 (7) (H) [19 U.S.C. Section 1677(7)(H)] to preserve the Commission’s discretion to cumulate imports in analyzing threat of material injury.”⁷⁹

The CIT reviewed the legislative history of this provision in Czestochowa v. United States, 890 F. Supp. 1053, 1061 (Ct. Int’l Trade 1995), and pointed out that “the threat provision is discretionary because such [threat] determinations involve projections regarding future developments which involve difficult predictions regarding trends, and distant trends for different sources of imports might argue against cumulation.” (footnote omitted)

Accordingly, to the extent that the Commission’s authority to cross-cumulate is co-extensive with its authority to cumulate (a question on which this Panel does not opine for purposes of this review proceeding), the Commission’s authority in threat cases is discretionary and not mandatory as the Commission determined.

In addition to relying on Bingham & Taylor, the Commission referred to two of its previous decisions to support its reading of the statute on cross-cumulation, Certain Steel Wire Rod from Canada, Germany, Trinidad & Tobago, and Venezuela, Inv. Nos.

⁷⁹ H.R.Doc. No. 103-316 (1994) at 850.

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701-TA-368-371 (Final), USITC Pub. 3075 (Nov. 1997) and Stainless Steel Wire Rod from Germany, Italy, Japan, Korea, Spain, Sweden and Taiwan, Invs. Nos. 701-TA-373 (Final) and 731-TA-769-75 (Final) USITC Pub. 3126 (Sept. 1998). Final Determination at 29, n. 182. However, a reading of the determination in the first case reveals that the Commission actually applied mandatory cross-cumulation only for the current injury determination, while exercising discretion in the context of the threat determination, citing 19 U.S.C. Section 1677 (7)(H)(at 21 and 35). As to the second of these cases, it involved current injury, and the Commission stated that “[t]he Commission has determined to cross-cumulate dumped and subsidized imports from Italy, and no party has argued to the contrary. The Commission’s practice has been to cumulate such imports.” (at 13, n.64).

Other precedents also support the discretionary nature of cross-cumulation in the threat of injury context. In the 1990 binational panel review of the Commission’s decision in New Steel Rails from Canada, USA-89-1904-09 and 10 at 24-25. (Aug. 13, 1990), the panel held, in the context of a threat determination, that, under the then-applicable version of the statute “ ‘cross-cumulation’ of imports from a single country is within the discretion accorded the Commission to consider the ‘hammering effect’ of simultaneous imports”. In another determination, made only a few months ago, the Commission itself reached the following conclusion:

“ [19 U.S.C. Section (7) (H) of the Act] ...leaves to the Commission’s discretion the cumulation of imports in analyzing threat of material injury. Based on an evaluation of the relevant criteria as well as our analysis supporting

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cumulation in the context of assessing present material injury, we exercise our discretion to cumulate imports from Belarus, Russia, and Ukraine for purposes of assessing threat of material injury.”

Urea Ammonium Nitrate Solutions from Belarus, Russia, and Ukraine, Invs. Nos. 731-TA-1006, 1008, and 1009 (Final) USITC Pub. 3591 at 22 (April 2003).

The Panel therefore holds that the Commission erred in interpreting the statute to require cross-cumulation in connection with its threat of injury inquiry. As earlier noted, the Panel has been urged by the Commission and the Coalition to affirm the Commission’s action, notwithstanding that the action was predicated on an erroneous view of the law, on the ground that the agency would have reached the same result had it considered cross-cumulation on a discretionary basis. In effect, these parties are asking the Panel not only to carry out its charge of reviewing the Commission’s decision on the issue of cross-cumulation but also to (1) interpret the statute as rejecting Complainants’ argument that, in its current post-URAA version, the legislation precludes cross-cumulation, (2) further interpret the statute as giving the Commission discretion over cross-cumulation in this threat case and (3) affirm the Commission’s original cross-cumulation ruling on the ground that the agency would have exercised its discretion in favor of cross-cumulation, had it realized that it had discretion in the matter.

It is plain that this Panel could not adopt such a “shortcut” approach to the review process without taking an overly expansive and, indeed, improper position regarding its authority under the NAFTA. In the first place, the Panel cannot accept Commission counsel’s attempt to modify the reasoning which was articulated by the Commission in

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reaching its conclusion on the cross-cumulation issue. “[A] ‘post hoc rationalization’ by counsel cannot be used as a substitute for the ITC’s absent or missing reasoning.”⁸⁰

Secondly, for this Panel to undertake to interpret the statute, where the Commission has not had the opportunity to revisit its earlier flawed interpretation, would be to usurp the statutory authority and duty of the Commission. The issue of the Commission’s authority to cross-cumulate in threat cases is not one as to which the “unambiguously expressed intent of Congress” is directly reflected in the statutory language.⁸¹ Hence, a reviewing court or panel must take into account the administrative interpretation of the legislation and may not “simply impose its own construction on the statute....”⁸² This Panel may not substitute its judgment for that of the Commission.⁸³ Accordingly, this issue must be remanded to the Commission to enable it to give further attention to the issue of legislative interpretation and to apply the correct reading of the law to the case at hand.

3. Conclusion

The Commission’s decision on the issue of cross-cumulation was not in accordance with law. It is remanded for the Commission to reconsider its interpretation of the statute in the context of a threat determination and, applying the fresh interpretation,

⁸⁰ SCM Corp. v. United States, 487 F. Supp. 96, 107 (Cust.Ct. 1980) (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 169 (1962)) (“For the courts to substitute their or counsel’s discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review”) Usinor Industeel, S.A. v. United States, Slip Op. 02-39, 01-00006, 2002 WL 818240, at *9 (Ct Int’l Trade April 29, 2002), (“[W]here an explanation is lacking on the record, post hoc rationalization for the [Commission’s] actions is insufficient and remand may be appropriate for further explanation”) (quoting Timken Co. v. United States, 937 F. Supp. 953, 955 (Ct. Int’l Trade 1996); see also Metallverken Nederland B.V. v. United States, 728 F. Supp. 730, 743 (Ct. Int’l Trade 1989).

⁸¹ Chevron at 842-843.

⁸² Id. at 843.

⁸³ Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1101 (Ct. Int’l Trade 1988).

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to reach an appropriate conclusion. In revisiting the questions of how to interpret and apply the statute, the Commission should consider the relevant arguments of the parties and should reach a reasoned conclusion.

D. Whether The Commission Improperly Failed To Consider Whether The Threat Of Injury Is Through The Effects Of Subsidies Or Of Dumping

1. Commission Determination

The Commission determined “that an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada that are subsidized by the Government of Canada and sold in the United States at less than fair value.” Final Determination at 44 (footnote omitted). It reasoned that “[t]he statutory language clearly requires the Commission to consider the impact of the subject imports and not the effects of the dumping or subsidies.” Final Determination at 30. In its determination of threat of material injury, the Commission stated that Commerce determined that there were 11 programs that conferred countervailable subsidies to Canadian producers and exporters of softwood lumber and that none of the subsidies identified by Commerce were subsidies described in Article 3 or 6.1 of the WTO Subsidies Agreement. Final Determination at 39-40 and n. 249. The Commission also stated that it had considered CLTA’s argument regarding the stumpage subsidy but found the economic theory relied upon by CLTA not clearly applicable in this market. Final Determination at 39, n. 245.

2. Analysis

The Canadian Parties and the CLTA make a number of arguments to the effect that the Commission erred in failing to consider certain matters and to make required determinations with regard to threat of injury from dumping and threat of injury from

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subsidies. In the view of the Panel, these points can be framed in terms of three separate legal issues: (A) Whether a determination of threat of injury can be made by the Commission only if it is accompanied by a finding that the threat of injury is through the effects of subsidies or through the effects of dumping; (B) Whether the provisions of the statute, in any event, require the Commission, in determining whether there is a threat of material injury, to consider information regarding the nature of the countervailable subsidies and the likely effects to be caused by the subsidies, as well as to make findings on those matters; and (C) if the Commission has obligations in this regard, whether they were satisfied in the Commission’s decision under review. We will take up these issues below in the order stated.

(A) The Canadian Parties argue, first, that the separate antidumping and countervailing duty sections of the statute establish that the Commission is required to make two *separate* determinations, one involving subsidies and the other involving dumping.⁸⁴ This argument goes to the issue of cross-cumulation which is discussed in part C of this section of this Panel decision. A second and distinct argument made by the Canadian Parties is that, with respect to an affirmative determination of injury, including threat of injury, the statute requires the Commission to find a *causal relationship* between the effects of the subsidies or the effects of the dumping and the injury or threat of injury to the domestic industry.⁸⁵ The Canadian Parties’ argument in this regard relies chiefly on the well settled doctrine enunciated by the Supreme Court in Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) (“Charming Betsy”) that, absent express

⁸⁴ Canadian Parties’ Joint Brief at 25-27.

⁸⁵ Id. at 27-31; Reply Brief of the Canadian Parties, dated January 21, 2003 (“Canadian Parties’ Joint Reply Brief”) at 14-17.

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Congressional language to the contrary, a statute should never be interpreted to conflict with the international obligations of the United States. The Canadian Parties urge that the WTO Agreement on Subsidies and Countervailing Measures (“SCM Agreement”) and the WTO Antidumping Agreement are international obligations of the United States for this purpose and that these undertakings require that, for a determination of injury, including threat of injury, it must be demonstrated that the subsidized or dumped imports are, *through the effects of the subsidies or dumping*, causing or threatening the injury.⁸⁶

The Commission argues that its determination is fully consistent with the law. Its function, under the statute, is to determine, *inter alia*, whether a domestic industry is threatened with material injury *by reason of the subject imports*.⁸⁷ Thus, under the statute, specifically, 19 U.S.C. Section 1677(7)(E)(i) and 19 U.S.C. Section 1677 (F)(i)(I), the Commission need only “consider” information provided by Commerce regarding the nature and effects likely to be caused by the countervailable subsidy, and there is no requirement that the Commission make any findings regarding the nature and effects of countervailable subsidies.⁸⁸ The Commission urges that its reading and application of the statute are in keeping with the United States’ international commitments, as confirmed by well settled case law and by the SAA, which is an authoritative expression by the United States concerning the interpretation and application of the URAA.⁸⁹

The Coalition argues that the Commission is required by the statute to determine whether an industry in the United States is materially injured or threatened with material

⁸⁶ Canadian Parties’ Joint Reply Brief at 14-16.

⁸⁷ 19 U.S.C. Section 1671 (a) (2); 19 U.S.C. Section 1673.

⁸⁸ Commission Brief at 137-141.

⁸⁹ Id. at 142-144.

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injury by reason of imports of the merchandise that was the subject of an affirmative final determination of a countervailable subsidy or sales at less than fair value. The Commission is not required to determine whether subsidization or dumping are causing or threatening injury. The U.S. courts, GATT dispute settlement panels and the SAA all have confirmed that this is the U.S. law and that it is consistent with the United States' WTO obligations. The Coalition urges that the Charming Betsy doctrine is, in any event, not relevant here because that doctrine cannot be properly applied to overrule Congress when Congress has specified U.S. law and has determined the extent of the United States' obligations.⁹⁰

The Panel's review begins with the language of the statute to ascertain whether Congress has directly spoken to the precise question at issue.⁹¹ The Panel notes that the statute describes the Commission's obligation to make determinations in subsidy and dumping investigations in specific terms. 19 U.S.C. Section 1671d (b) (1) provides that the Commission shall make a final determination of whether an industry in the United States is materially injured or is threatened with material injury "by reason of imports, or sales (or the likelihood of sales) for importation, of the merchandise with respect to which the administering authority has made an affirmative determination [concerning whether or not a countervailable subsidy is being provided]." Similarly, 19 U.S.C. Section 1673d (b) (1) charges the Commission with making a final determination of whether an industry in the United States is materially injured or is threatened with material injury "by reason of imports, or sales (or the likelihood of sales) for importation,

⁹⁰ Coalition Brief at IV-206-211.

⁹¹ Chevron at 842.

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of the merchandise with respect to which the administering authority has made an affirmative determination [concerning sales at less than fair value].”

The purport of this language is clear, and the courts have consistently held that it simply obligates the Commission to make a determination about the effect of *imports of the subject merchandise* on the domestic industry making the like product and not about the effect of the dumping or subsidization of those imports.⁹² In particular, the CIT has held that, in a subsidies case, the statute does not require the Commission to find a causal connection between the foreign subsidies and the injury to the domestic industry.⁹³

The Canadian Parties point out that the courts have long upheld as consistent with the statute injury causation methodologies applied by some past members of the Commission which were based on the effects of dumping or subsidies.⁹⁴ While there have been court decisions upholding such methodologies as permissible tools of analysis, these rulings have not restated the ultimate statutory causation test.⁹⁵

⁹² Algoma Steel Corp., Ltd. v. United States, 688 F. Supp. 639, 645 (Ct. Int’l Trade 1988) (“...the real question addressed to ITC by the statute is what effect imports in a class of merchandise sold at LTFV have on the domestic industry producing the ‘like’ product.”), aff’d, 865 F. 2d 240 (Fed. Cir. 1989) (“Algoma Steel”); Iwatsu Electric Co., Ltd. v. United States, 758 F. Supp. 1506, 1510 (Ct. Int’l Trade 1991) (“...Congress has directed ITC to determine whether a class of imports sold at LTFV is causing injury...[T]he statutory language does not dictate that the injury be traced back to the particular sales found to be at LTFV, nor does it require that ITC demonstrate that dumped imports, through the effects of particular margins of dumping, are causing injury.”); Titanium Metals Corp. v. United States, 155 F. Supp. 2d 750, 757 (Ct. Int’l Trade 2001.)

⁹³ Alberta Pork Marketing Board v. United States, 669 F. Supp. 445,465-66 (Ct. Int’l Trade 1988).

⁹⁴ Canadian Parties’ Joint Brief at 29-30.

⁹⁵ See, e.g., United States Steel Group v. United States, 96 F. 3d 1352, 1361-62 (Fed. Cir. 1996) (Commissioners are not bound by a uniform methodology in “determining whether a domestic industry is injured, or threatened with injury, by reason of subsidized and/or [less than fair value] imports.”); Copperweld Corp. v. United States, 682 F. Supp. 552, 559 and 564 (Ct. Int’l Trade 1988) (“...these sentences provide little support for the view the plurality ignored the requirement to base a finding of injury on the *imports* as the statute requires...[but consideration of the dumping margins or net subsidy] is neither required nor proscribed by the governing statute.”) (emphasis in original); Gerald Metals Inc. v. United States, 27 F. Supp. 2d 1351, 1357 (Ct. Int’l Trade 1998) (upholding Commissioner Crawford’s causation analysis isolating the effects of dumped imports upheld as a reasonable application of the statutory standard requiring a finding that injury occurred by reason of the LTFV imports).

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The question raised by the Canadian Parties and the CLTA regarding the consistency of the U.S. statutory test with the obligations of the United States under the international trade agreements has been a recurrent one. In Algoma Steel, the plaintiff argued that the Commission had erroneously based its injury finding on some sales that were not dumped, in violation of Article 3 of the GATT Antidumping Code which required a showing “that the dumped imports are, through the effects of dumping, causing injury...” The court rejected this argument, stating:

Whatever the ideal embodied in GATT, Congress has not simply directed ITC to determine directly if dumping itself is causing injury... Perhaps Congress believed that such a standard was not sufficiently specific or that it involved a type of analysis that was unworkable. In any case, Congress opted to direct ITC to determine if imports of a specific class of merchandise, determined by ITA to have been sold at LTFV, are causing injury. This seems to be Congress’ way of implementing GATT.⁹⁶

GATT dispute settlement panels had the occasion, in the Atlantic Salmon from Norway cases, to consider Norway’s claims that determinations of material injury made by the Commission in its investigations of imports of fresh and chilled Atlantic salmon from that country were inconsistent with the trade agreement obligations of the United States. Norway argued, *inter alia*, that the Commission had failed to demonstrate that the material injury was caused “through the effects of dumping” or “through the effects of the subsidy”. Nonetheless, the GATT panels concluded that by treating the “effects of dumping” to mean the effects of dumped imports, and the “effects of the subsidy” to mean the effects of the subsidized imports, the Commission had not acted inconsistently

⁹⁶ 688 F. Supp. at 645 (footnote omitted).

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with the trade obligations of the United States. United States-Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP 87, Nov. 30, 1992, at ¶ 571; United States-Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, SCM/153, Dec. 4, 1992, at ¶ 337, (“Norwegian Salmon”).

The Canadian Parties and the CLTA rely on the more recently concluded SCM Agreement and WTO Antidumping Agreement, pointing out that these agreements provide that, for a determination that actual injury or a threat of injury exists, it must be demonstrated that the subsidized or dumped imports are, *through the effects of the dumping or subsidization*, causing or threatening to cause the harm to the domestic industry.⁹⁷ They argue that recent international dispute settlement decisions, including one issued by the WTO Appellate Body, cast doubt on the correctness of the conclusions reached in the Norwegian Salmon case and that the U.S. statute should be interpreted consistently with the SCM Agreement and Antidumping Agreement requirements.⁹⁸ Therefore, they assert, the statute should be interpreted as requiring the Commission to base its threat analysis on the effects of dumping or the effects of subsidies.

As discussed above, however, the language shaping the causation requirements of the Commission’s injury determinations has long been a feature of the statute. In the view of the Panel, this language contains little, if any, ambiguity on the point at issue, and it has consistently been interpreted as the Commission applied it here. Notably, the SAA

⁹⁷ SCM Agreement, Art. 15.5, Antidumping Agreement, Art. 3.5

⁹⁸ Canadian Parties’ Joint Reply Brief at 14-16, citing United States-Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, Report of the Appellate Body, WT/DS213/AB/R (Nov. 28, 2002) at ¶ 87; CLTA Reply Brief at 48, n.46.

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mentions the Norwegian Salmon panel decisions favorably and states that “Article 3.5 of the Antidumping Agreement and 15.5 of the Subsidies Agreement do not change the causation standard from that provided in the 1979 Tokyo Round Codes” (which were considered in those decisions) and that “...existing U.S. law fully implements Articles 3.5 and 15.5.”⁹⁹ The Panel must give great weight to the SAA in this regard because 19 U.S.C. Section 3512 (d) provides that the SAA, which has been approved by Congress, “shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application.”

Since the causation standard which is to guide the Commission’s injury determinations is clearly set forth by the statute, the Panel is not free to consider possible alternate interpretations of the U.S. law based on the international trade agreements. The Charming Betsy doctrine of statutory interpretation, which does not apply where the Congressional language is clear, is, by its terms, inapplicable here. Indeed, Section 102 of the URAA, (19 U.S.C. Section 3512(a)(1)) provides expressly that “[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.” The Panel’s charge is to review the Commission’s determinations solely in the context of United States law.¹⁰⁰ Accordingly, the Panel concludes that, as a matter of United States law, in finding threat of injury, the Commission was not required to

⁹⁹ H.R. Doc. No. 103-316 (1994) at 851.

¹⁰⁰ North American Free Trade Agreement, Article 1904 (2).

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determine that the threat of injury was caused through the effects of subsidies or of dumping.

(B) The Canadian Parties and the CLTA argue that, in any event, the Commission had a specific statutory duty to consider the nature and likely effects of the countervailable subsidy at issue and to make findings in this regard. This obligation is based, they argue, on several of the statutory provisions, namely 19 U.S.C. Section 1677 (7) (E) (i), 19 U.S.C. Section 1677 (7) (F) (i) (I), and 19 U.S.C. Section 1677 f (i)(3)(B).¹⁰¹ In particular, CLTA maintains that the respondents “submitted a comprehensive analysis demonstrating that the only non-*de minimis* subsidy found by the Department (inadequate provincial stumpage charges for timber and timber-harvesting rights) would not cause market distortion that might injure the U.S. softwood lumber industry” and that the Commission mentioned this evidence and argument only in a footnote, and “made no finding regarding the likely trade effects of the subsidy despite [the Commission’s] clear statutory obligation to do so.”¹⁰² The Commission merely “acknowledged” this argument and evidence, CLTA urges, whereas the statute required the Commission to “evaluate” them.¹⁰³

The Commission argues that the statutory provisions in question require only that the Commission “consider” information provided to it by Commerce regarding the nature and effects of the countervailable subsidies, particularly whether any subsidy is of the kind described in Article 3 or 6.1 of the WTO Subsidies and Countervailing Measures

¹⁰¹ Canadian Parties’ Joint Brief at 26- 29; Canadian Parties’ Joint Reply Brief at 11-14; CLTA Initial Brief at 51- 69; CLTA Reply Brief at 46- 50.

¹⁰² CLTA Initial Brief at 52.

¹⁰³ CLTA Reply Brief at 47.

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Agreement. In this case, states the Commission, that information was clearly considered.¹⁰⁴ As to the arguments and evidence presented by respondents with respect to the effects of the countervailable subsidies, the Commission simply “acknowledged” them, which is all that the statute requires.¹⁰⁵ The Coalition argues that “the plain language of the statute requires the Commission to consider the information concerning the nature of the subsidy provided to it *by the Department of Commerce*...the Commission is not required to conduct its own independent analysis of the nature of any countervailable subsidy or to consider information from other sources.”¹⁰⁶ This information was properly taken into account by the Commission.¹⁰⁷ Moreover, the Coalition argues, the subsidy here, as reported by Commerce, is particularly likely to lead to injury because of the subsidy’s size and other factors.¹⁰⁸ The Coalition also argues, *inter alia*, that “the Commission’s finding that Complainants’ economic theory was not shown to apply to this market, Final Determination at 39, n. 245, P.R. 423, is more than supported by substantial evidence on the record.”¹⁰⁹

We now address the specific statutory provisions on which the parties rely in their efforts to identify the Commission’s pertinent obligations. 19 U.S.C. Section 1677 (7) (E)

(i) provides:

“(E) Special Rules
For purposes of this paragraph-
(i) Nature of countervailable subsidy

¹⁰⁴ Commission Brief at 141-45.

¹⁰⁵ Id. at 146-47.

¹⁰⁶ Response Brief of the Coalition, dated December 27, 2002 (“Coalition Response Brief”) at IV-159 (emphasis in original). (P.R. List 1 78).

¹⁰⁷ Id. at IV-158.

¹⁰⁸ Id. at IV-160-IV-163.

¹⁰⁹ Id. at IV-158.

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In determining whether there is a threat of material injury, the Commission shall consider information provided to it by the administering authority regarding the nature of the countervailable subsidy granted by a foreign country (particularly whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement) and the effects likely to be caused by the countervailable subsidy.”

19 U.S.C. Section 1677 (7) (F) (i) (I) provides:

“(F) Threat of material injury
(i) In general

In determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of the subject merchandise, the Commission shall consider, among other relevant economic factors - (I) if a countervailable subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement), and whether imports of the subject merchandise are likely to increase.”

As noted above, the Commission and the Coalition contend that these two provisions obligate the Commission only to consider such information as may have been presented to the Commission by Commerce regarding the nature of the subsidy involved and the likely effect of that subsidy. The Canadian Parties and the CLTA argue, to the contrary, that these provisions require the Commission to consider and make determinations on the nature of the subsidy and its likely trade effects, based not only on

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the information provided by Commerce, but also on the arguments and economic analysis presented by respondents.

The Panel concludes that it is clear that the introductory language of Section 1677 (F)(i), directing the Commission to consider “[the] relevant economic factors” in assessing a threat of injury case, imposes on the Commission an obligation to consider any pertinent information concerning the nature of the subsidy and its likely effects that is presented to it, whether by Commerce or the parties. We view the Federal Circuit’s decision in Suramerica de Aleaciones Laminadas, C.A. v. United States, 44 F.3d 978 (Fed. Cir. 1994) (“Suramerica”) as controlling authority on this issue.

In Suramerica, the Federal Circuit affirmed a ruling of the Court of International Trade, which had, *inter alia*, ordered the Commission to consider two factors not listed in the statute that tended to show a threat of material economic harm. The Federal Circuit reviewed the legislative history of Section 1677 (7)(F)(i) and pointed out that the Congress, reflecting on the uncertainty and risk associated with a threat of injury inquiry, had decided that the Commission should be required to examine *all* relevant factors relating to possible threat of material injury, including any factor not listed in the statute that tends to make the existence of a threat of material injury more probable or less probable.¹¹⁰ Therefore, the Federal Circuit held, “Section 1677 (7)(F)(i) directs that ITC ‘shall’ consider all relevant economic factors in a threat investigation. Section 1677 (7) (F)(i) leaves ITC with no discretion in this matter.”¹¹¹

¹¹⁰ 44 F.3d at 983.

¹¹¹ 44 F.3d at 984.

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It is plain also that, in the context of a threat of injury investigation involving countervailable subsidies, economic issues relating to the nature of the subsidy and its likely trade effects are potentially “relevant economic factors” within the ambit of Section 1677(7) (F) (i). The mention in Section 1677 (7)(E)(i) of the nature of the subsidy and its likely effects, and in Section 1677 (7) (F)(i)(I) of the nature of the subsidy, confirm that the Congress viewed these factors as relevant to the Commission’s threat of injury inquiry. They were, therefore, factors which the Commission was obligated to consider.

The Complainants here urge that the Commission was not only bound to consider their arguments and evidence in this regard, but that the agency was also required by the statute to make determinations or findings on the matters presented by Complainants. They point out that 19 U.S.C. Section 1677 f (i)(3)(B) requires that the Commission include in a final determination of injury “an explanation of the basis for its determination that addresses relevant arguments that are made by interested parties who are parties to the investigation or review (as the case may be) concerning volume, price effects, and impact on the industry of imports of the subject merchandise.”

Compliance with Section 1677 f (i)(3)(B) would appear to require that the Commission acknowledge the relevant arguments presented to it and offer a reasoned explanation if those arguments are discounted by the Commission.¹¹² However, it is also settled law that the Commission does not have to explicitly address in its determinations all of the information presented to it, only that it consider this information and address

¹¹² Altx v. United States, 167 F. Supp. 2d 1353, 1359 (Ct. Int’l Trade 2001).

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significant arguments and evidence which seriously undermine its reasoning and conclusions.¹¹³ In particular, the Commission is not required to issue findings and conclusions on an issue concerning a statutory factor simply because the issue was presented by a party.¹¹⁴

We turn now to the question of whether the Commission’s consideration of the Complainants’ arguments and evidence on the nature of the subsidies and their likely trade effects satisfied the statutory standard.

(C) It is uncontroverted that the Commission’s commentary in the Final Determination of the economic arguments submitted regarding the “nature of the subsidy and its likely effects” is limited to a single footnote:

“We have considered CLTA’s argument regarding the stumpage subsidy, but find that the economic theory presented by CLTA is not clearly applicable in this market. Ricardian rent theory relies on the assumption of fixed supply; however, there is evidence on the record in these investigations that the lumber supply is not necessarily fixed. See, e.g., Tr. At 41-45 and Petitioners’ Posthearing Brief at Appendix D-24. Moreover, the record also contains several other studies that have reached different conclusions regarding the effects of stumpage fees on

¹¹³ Usinor v. United States, 2002 WL 1998315 (Ct. Int’l Trade July 19, 2002) at *14; Asociacion De Productores De Salmon Y Trucha De Chile A.G. v. Commission, 180 F. Supp. 2d 1360, 1370 (Ct. Int’l Trade 2002), citing Ranchers-Cattlemen Action Legal Foundation v. United States, 74 F. Supp. 2d 1353, 1379 (Ct. Int’l Trade 1999) and Granges Metallverken AB v. United States, 716 F. Supp. 17, 24 (Ct. Int’l Trade 1989) (“there is no statutory requirement that the Commission respond to each piece of evidence presented by the parties”).

¹¹⁴ Nippon Steel Corp. v. United States, 1995 WL 17040 (Ct. Int’l Trade April 3, 1995) (citing Trent Tube Div. v. Avesta Sandvik Tube AB, 975 F. 2d 807, 814 (Fed Cir. 1992) and Grupo Indus. Camesa v. United States, 853 F. Supp. 440 (Ct. Int’l Trade 1994)). In Dastech Int’l. v. United States Int’l Trade Comm’n, 963 F. Supp. 1220, 1227 (Ct. Int’l Trade 1997) the court stated:

“In a threat determination, where the ITC is required to consider economic factors other than those enumerated by statute, it would be helpful if all such factors, including those considered and rejected, were discussed in the commissioners’ views. Nonetheless, all that is required of such decisions is that the court be able to determine the reasoning behind them ...”

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output. See Petitioner's Posthearing Brief at Appendix D-23". Final Determination at 39 n. 245.

As conceded by the Commission,¹¹⁵ the Commission did not make any findings based on any competing economic theories, nor did it make any findings based on the information provided to it by Commerce. In the underlying investigation, economic theories were offered to show the effects of the subsidy. The CLTA contends that one such theory, contained in the so-called "Nordhaus study", asserts that prices of Canadian lumber would be higher as a result of the provincial stumpage charges - not lower.¹¹⁶ In addition, the CLTA argues that the Nordhaus study shows that the stumpage subsidy has the effect of deterring lumber production and lumber exports, and thus, would not lead to an imminent increase in subject imports from the above non-injurious levels observed during the POI.¹¹⁷ Further, the CLTA argues that the Commission failed to adequately consider the evidence provided by the Nordhaus study in reaching its affirmative threat finding, thereby rendering its determination unsupported by substantial evidence and contrary to law.¹¹⁸ We disagree with the CLTA. The Commission clearly considered CLTA's argument concerning the effects of the subsidy, but found that "the economic theory presented by CLTA is not clearly applicable in this market. Ricardian rent theory relies on the assumption of fixed supply; however, there is evidence on the record in these investigations that lumber supply is not necessarily fixed." Final Determination at 39, n.245 (citing ITC Hearing Transcript at 41-45 and Petitioners' ITC Posthearing Brief

¹¹⁵ Commission Brief at 147.

¹¹⁶ CLTA Initial Brief at 57.

¹¹⁷ Id.

¹¹⁸ Id. at 57-58.

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at Appendix D-24). In addition, as the Commission correctly notes, the record contains several other studies that have reached different conclusions regarding the effects of stumpage fees on output. Final Determination at 39, n.245 (citing Petitioners' Posthearing Brief at Appendix D-23). Whether or not the Commission may have meant to say 'timber supply' in footnote 245, when it said 'lumber supply', we are satisfied from the record citations alluded to in the footnote that the Commission adequately understood and assessed the issue involved. Therefore, we find that the Commission did adequately consider -- but dismissed -- the evidence provided by the Nordhaus study in reaching its affirmative threat finding. The Panel finds that the Commission's conduct is supported by case law which confirms that the "Commission is not required to explain its use, or lack thereof of economic models". See USEC, Inc. et al. v. United States, 132 F.Supp. 2d 1, 16 (Ct. Int'l Trade 2001); see generally U.S. Steel Group v. United States, 873 F. Supp. 673, 697-98 (Ct. Int'l Trade 1994); CEMEX, S.A. v. United States, 790 F. Supp. 290, 299 (Ct. Int'l Trade 1992); USX Corp. v. United States, 682 F. Supp. 60, 69-70 (Ct. Int'l Trade 1988).

3. Conclusion

Accordingly, the Panel concludes that, as a matter of United States law, in finding threat of injury, the Commission was not required to determine that the threat of injury was caused through the effects of subsidies or of dumping.

The Panel concludes that it is clear that the introductory language of Section 1677 (F)(i), directing the Commission to consider "[the] relevant economic factors" in assessing a threat of injury case, imposes on the Commission an obligation to consider

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any pertinent information concerning the nature of the subsidy and its likely effects that is presented to it, whether by Commerce or the parties.

While the Commission's statements on this matter are terse, this Panel can follow the logic of the Commission's reasoning. Giving deference to the Commission's conclusions, supported by the underlying evidence, we affirm that they are sufficiently stated to indicate the Commission's consideration of the issue. Therefore, the Panel finds that the Commission did "consider" the nature of the subsidy and its likely trade effects and confirms that the Commission fulfilled its statutory burden in this regard.

E. Whether the Commission's Determination that the Domestic Softwood Lumber Industry is Threatened with Material Injury by Reason of Subsidized Imports and Dumped Imports from Canada is Supported by Substantial Evidence

1. Commission Determination

The Commission in this case did not find present material injury by reason of subject imports. Final Determination at 37. This was due, in large part, to the fact that the Commission could not conclude that subject imports had a *significant* price effect during the period of investigation. Final Determination at 35.¹¹⁹ The Commission, however, did find that the domestic softwood lumber industry is threatened with material injury by reason of subsidized imports and dumped imports from Canada. Final Determination at 44.

2. The Governing Statutory Framework

In making its affirmative threat finding, the Commission is required to determine "whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted." 19 U.S.C. Section 1677(7)(F)(ii). The Commission is not permitted to make such a determination "on the basis of mere conjecture or supposition." Id. To "avoid speculation and conjecture," and due to the predictive nature of a threat determination, the Commission is directed to use "special care" in making its threat determination. See Statement of Administrative; See also Goss Graphic Systems, Inc. v. United States, 33 F.

¹¹⁹ The Commission's negative present material injury finding was not challenged before this Panel.

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Supp.2d 1082 (Ct. Int'l Trade 1998) ("Due to the predictive nature of a threat of material injury determination, the ITC must use special care in making such a determination to avoid speculation or conjecture.").

To guide the Commission's threat analysis, Congress has set forth eight specific factors that the Commission must consider in each case. See 19 U.S.C. Section 1677(7)(F)(i). In this case, the factor concerning potential product-shifting¹²⁰ and the factor pertaining to the shifting of agricultural products¹²¹ were not at issue. Final Determination at 37, n. 226.¹²² The Commission, therefore, evaluated the following six remaining statutory threat factors in determining whether the domestic industry is threatened with material injury:

- "such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement), and whether imports of the subject merchandise are likely to increase." 19 U.S.C. Section 1677(7)(F)(i)(I) ("Nature of the subsidy" threat factor);
- "any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports." 19 U.S.C. Section 1677(7)(F)(i)(II) ("Capacity" threat factor);
- "a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports." 19 U.S.C. Section 1677(7)(F)(i)(III) ("Volume" threat factor);
- "whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are

¹²⁰ See 19 U.S.C. Section 1677(7)(F)(i)(VI).

¹²¹ See 19 U.S.C. Section 1677(7)(F)(i)(VII).

¹²² No party argued before this Panel that these statutory factors were at issue.

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likely to increase demand for further imports." 19 U.S.C. Section 1677(7)(F)(i)(IV) ("Price" threat factor);

- "inventories of the subject merchandise." 19 U.S.C. Section 1677(7)(F)(i)(V) ("Inventory" threat factor); and
- "the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like production." 19 U.S.C. Section 1677(7)(F)(i)(VIII) ("Development and production" threat factor).

In addition, in predicting that imports from Canada were likely to increase substantially – a finding central to its affirmative threat determination -- the Commission evaluated the following factors¹²³:

- export orientation of Canadian producers to the U.S;
- effects of the expiration of the Softwood Lumber Agreement ("SLA");
- subject import trends during periods when there were no import restraints; and
- forecasts of strong and improving demand in the U.S. market.

All of these factors are analyzed below to determine whether the Commission's affirmative threat determination is supported by substantial evidence. Further, we also consider whether the Commission ensured that the threatened injury is "by reason of" subject imports, and that it did not attribute to subject imports threatened injury from other sources in finding that subject imports threaten to cause material injury. See 19 U.S.C. Section 1677(7)(F)(ii).

In undertaking this analysis, this Panel notes that it must be "especially vigilant" in reviewing the Commission's affirmative threat determination because "the

¹²³ The Commission also evaluated the capacity threat factor and the volume threat factor in predicting that imports from Canada were likely to increase substantially. See discussion of capacity threat factor at 40, and discussion of volume threat factor at 40.

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Commission's inquiry by its very nature endeavors to predict events that have not yet occurred." Suramerica de Aleaciones Laminadas, C.A. v. United States, 818 F. Supp. 348, 353 (Ct. Int'l Trade 1993), aff'd, 44 F.3d 978 (Fed. Cir. 1994) We are also guided in this endeavor by the holding in Dastech International, Inc. v. United States, 963 F. Supp. 1220 (Ct. Int'l Trade 1997) where the court stated:

Despite the deference that this court must give the ITC's determination the court's review is neither passive nor powerless. . . . A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent. The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia.

Dastech, 963 F. Supp. at 1222-1223 (citations omitted).

3. Analysis

a) Threat Factors Mandated By Statute

i. Nature of The Subsidy Threat Factor

The statutory threat factor regarding the nature of the subsidy requires that the Commission assess (a) “such information *as may be presented to it by the administering authority* as to the nature of the subsidy (particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement) and (b) whether the imports of the subject merchandise are likely to increase”. See 19 U.S.C. Section 1677(7)(F)(i)(I) (emphasis added).

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In this instance the “administering authority” is Commerce. As acknowledged by the Commission, “Commerce provided the Commission with two sources of information regarding the nature and effects of the countervailable subsidies: (1) its final countervailing duty determination; and (2) the Issues and Decision Memorandum supporting its countervailing duty determination”¹²⁴. In the Issues and Decisions Memorandum, Commerce specifically made no finding regarding the “effects” of the countervailable subsidies. Commerce stated,

[w]hile we agree with the respondents that the statute does not prohibit the Department from considering whether a subsidy has market-distorting effects, we are also mindful of the need to balance administrative burdens, the effective enforcement of the law, and the ability to complete our investigations within strict statutory time limits. In light of the complexity of the respondents’ proposal, the burden that it would place on the Department, and the need to complete this investigation in a timely manner, we have determined that it would not be justified for the Department to depart from its well-settled practice of not considering the effects of the subsidy in question.”¹²⁵

Commerce further explained in its Issues and Decisions Memorandum that the governing statute did not require Commerce to make a finding regarding the effects of countervailable subsidies.¹²⁶

¹²⁴ Commission Brief at 141.

¹²⁵ Commerce Countervailing IDM.

¹²⁶ The statute provides in relevant part that “The determination of whether a subsidy exists shall be made without regard to whether the recipient of the subsidy is publicly or privately owned and without regard to whether the subsidy is provided directly or indirectly on the manufacture, production, or export of the merchandise. [Commerce] is not required to consider the effects of the subsidy in determining whether a subsidy exists under this paragraph”. See 19 U.S.C. Section 1677(5)(C). The SAA also specifically addresses this issue. “Section 771(50)(C) provides that in determining whether a subsidy exists, Commerce is not required to consider the effects of the subsidy. In Certain Softwood Lumber Products from Canada, USA-92-1904-02, a three member majority ruled that in order to find certain government practices to be subsidies, Commerce must determine that the practice has an effect on the price or output of the merchandise under investigation. In so ruling, the majority misinterpreted the holding of Georgetown Steel

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The information that Commerce did provide regarding the nature of the subsidies as stated in the Final Determination is as follows:

“In its final countervailing duty determination, Commerce determined that there were 11 programs that conferred countervailable subsidies to Canadian producers and exporters of softwood lumber, including: the Provincial Stumpage programs in the Provinces of Quebec, British Columbia, Ontario, Alberta, Manitoba and Saskatchewan; two programs administered by the Government of Canada; two programs administered by the Province of British Columbia, and one program administered by the Province of Quebec. Final Determination at 39.

The Commission acknowledged that Commerce did not find any of the countervailing subsidies that were subsidies described in Article 3 or Article 6.1 of the WTO Subsidies Agreement. Final Determination at 39.

We have discussed and approved as adequate, supra, the Commission’s consideration of the arguments put forth by Complainants concerning the nature of the subsidy. The Panel therefore upholds the Commission’s treatment of this statutory threat factor. However, since the Commission failed to reach a conclusion, this factor does not support any conclusion in the threat of injury determination. The Coalition acknowledges that this becomes a neutral point in the threat of injury determination.¹²⁷

Corp. v. United States, 801 F.2d 1308 (Fed.Cir. 1986), which was limited to the reasonable proposition that the CVD law cannot be applied to imports in nonmarket economy countries. Although this panel decision would not be binding in future cases, the Administration wants to make clear its view that the new definition of subsidy does not require that Commerce consider or analyze the effect (including whether there is any effect at all) of a government action on price or output of the class or kind of merchandise under investigation or review.” SAA at 926.

¹²⁷ Coalition Brief at IV-160, “In this case, the Commission did not expressly consider the nature of the subsidy as a ‘plus’ factor, although the analysis below demonstrates that it should have.”

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Consequently, the Panel confirms that with respect to the statutory nature of the subsidy threat factor, there is no finding requiring the support of substantial evidence.

ii. Capacity Threat Factor

The statutory threat factor regarding capacity requires the Commission to assess whether either (a) "any existing unused production capacity" or (b) "imminent, substantial increase in production capacity" in Canada, indicates "the likelihood of *substantially* increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports." See 19 U.S.C. Section 1677(7)(F)(i)(II) (emphasis added).

As to the issue of whether "any existing unused production capacity" in Canada indicates "the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports," the Commission never found that this was the case. The Commission cited to Table VII-1 of the Staff Report which indicated that the unused Canadian production capacity in 2001 was 16.3 percent. Final Determination at 40. The Commission also cited to Table VII-2 of the Staff Report which indicated that unused production capacity was forecasted to fall to 11.5 percent in 2002 and to 9.6 percent in 2003. Final Determination at 40. However, the Commission failed to tie this existing unused production capacity to "the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports." All the Commission said on this point is that "despite the excess capacity already available in 2001 as capacity utilization

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declined to 83.7 percent, *Canadian producers expect to further increase their ability to supply the U.S. softwood lumber markets.*" Final Determination at 40 (emphasis added) (citing Table VII-2 of the Staff Report). That "Canadian producers expect to further increase their ability to supply the U.S. softwood lumber markets" falls far short, in our opinion, of the conclusion that the existing unused production capacity indicates "the likelihood of substantially increased imports." Moreover, the Commission's finding that "Canadian producers expect to further increase their ability to supply the U.S. softwood lumber markets," is undermined by its own staff's findings in Table VII-2 which shows Canadian exports to the United States falling from 60.9 percent in 2001 to 58.8 percent in 2002 and to 58.5 percent in 2003. Tellingly, Table VII-2 also shows Canadian exports to other export markets concomitantly increasing from 7.8 percent in 2001 to 8.4 percent in 2002, and then to 8.8 percent in 2003.

Because existing Canadian unused production capacity was predicted to decline, and Canadian exports to the United States were predicted to fall (with exports to other export markets predicted to increase) we find that there is no support on the record to show that "existing unused production capacity" in Canada indicates "the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports."

As to whether the existence of "imminent, substantial increase in production capacity" in Canada indicates "the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports," the Commission never found that there

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was, in fact, an "imminent, substantial increase in production capacity" in Canada." The Commission did note, in citing to Table VII-2 of the Staff Report, that "Canadian producers projected additional capacity increases." Final Determination at 40. However, an analysis of the "projected additional capacity increases" shows that such increase is less than 1 percent –an increase that may not, in our mind, be fairly characterized as "imminent" and "substantial," and which the Commission did not deem to be "imminent" or "substantial." Specifically, Canadian producers projected an increase in capacity from 2001 to 2002, according to Table VII-2 of the Staff Report, of 0.72 percent (from 25,804 mmbf to 25,990 mmbf). Likewise, Canadian producers' projected capacity increase from 2002 to 2003 comprised 0.83 percent (from 25,990 mmbf to 26,206 mmbf).¹²⁸

Other record evidence also fails to show an "imminent, substantial increase in production capacity" in Canada. A July 2001 RISI report entitled "North American Lumber Yearbook," showed that Canadian producers' capacity as a whole would decrease 180 million board feet from 2001 to 2002 – from 32.82 billion board feet to 32.64 billion board feet -- and then increase 40 million board feet from 2002 to 2003 – from 32.64 billion board feet to 32.68 billion board feet -- for a net loss over the two-year period of 140 million board feet.¹²⁹ Accordingly, the record does not support the finding that there was an "imminent, substantial increase in production capacity" in Canada.

In light of the above, considering that (a) there is no support on the record to show that "any existing unused production capacity" in Canada indicates "the likelihood of substantially increased imports of the subject merchandise into the United States, taking

¹²⁸ See Table VII-2 of the Staff Report

¹²⁹ See RISI North American Lumber Forecast (Jan. 2002) at 61.

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into account the availability of other export markets to absorb any additional exports," and (b) the record does not show that there was an "imminent, substantial increase in production capacity" in Canada, we hold that the Commission's finding that the capacity threat factor indicates a threat of material injury is not supported by substantial evidence.

iii. Volume Threat Factor

The threat factor regarding volume requires the Commission to assess whether there has been "a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports." See 19 U.S.C. Section 1677(7)(F)(i)(III). In the Final Determination, the Commission's discussion of this threat factor was limited to the following two sentences:

The volume of subject imports from Canada increased by 2.8 percent from 1999 to 2001. As a share of apparent domestic consumption, subject imports from Canada increased from 33.2 percent in 1999 to 34.3 percent in 2001. Final Determination at 41. As set forth in the Staff Report, imports from Canada increased from 17,983 mmbfs in 1999 to 18,483 mmbfs in 2001, a 2.8 percent increase. See Staff Report at Tables IV-1 and C-1.

In addition, in its discussion of finding no present material injury, the Commission noted the "relatively stable market share maintained by subject imports over the period of investigation." Final Determination at 35.

We note that the Commission's findings that the volume increased 2.8 percent, and a "relatively stable market share [was] maintained by subject imports over the period of investigation," does not equate to the Commission finding— nor a claim that it found — "a significant rate of increase of the volume or market penetration" that 19 U.S.C. Section 1677(7)(F)(i)(III) requires to permit an inference of "the likelihood of substantially

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increased imports." Final Determination at 36.¹³⁰ The record evidence relied upon by the Commission that is before this Panel is simply devoid of any support for the proposition that there has been "a significant rate of increase of the volume or market penetration of imports of the subject merchandise." This is indicated by the Commission's brief before this Panel wherein it asserts that "Complainants also ignore the fact that the Commission's finding of a likelihood of substantially increased imports was supported by six subsidiary findings and not only by the increase in imports during the period of investigation."¹³¹ We interpret this statement by the Commission as at least a tacit admission that its argument that a "significant rate of increase of the volume or market penetration of the imports" indicates "the likelihood of substantially increased imports" may not succeed. That being said, the Commission apparently invites the Panel to consider the other five subsidiary findings¹³² to find that the Commission's prediction that imports from Canada were likely to increase substantially – a finding central to its affirmative threat determination – is supported by substantial evidence.

Although no judicial precedent provides guidance to the Panel as to what constitutes "a significant rate of increase," a statutory provision does serve that purpose. Specifically, 19 U.S.C. Section 1677(24)(A)(i) states that "imports from a country of merchandise corresponding to a domestic like product identified by the Commission are 'negligible' if such imports account for less than 3 percent of the volume of all such

¹³⁰ In its assessment of the impact of subject imports on the domestic industry, the Commission noted "the small increase in their market share."

¹³¹ Commission Brief at 111.

¹³² The other five subsidiary findings are the findings on the capacity threat factor, and the findings on the four non-statutory threat factors (i.e., export orientation of Canadian producers to the U.S.; effects of the expiration of the SLA; subject import trends during periods when there were no import restraints; and forecasts of strong and improving demand in the U.S. market).

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merchandise imported into the United States." 19 U.S.C. Section 1677(24)(A)(iv), entitled Negligibility in threat analysis, states that the Commission must determine that imports will increase by more than 3 percent for such imports not to be negligible. ("The Commission shall not treat imports as negligible if it determines that there is a potential that imports from a country . . . will imminently account for more than 3 percent of the volume of all such merchandise imported into the United States."). In this regard, the Commission, in Hydraulic Magnetic Circuit Breakers from South Africa, recently acknowledged that imports that account for less than 3 percent of all such merchandise imported into the United States shall be deemed negligible. The Commission stated: "By statute, imports from a subject country corresponding to a domestic like product that account for less than three percent of all such merchandise imported into the United States during the most recent 12 months for which data are available . . . shall be deemed negligible." Hydraulic Magnetic Circuit Breakers from South Africa, Inv. No. 731-TA-1033 (Preliminary), Pub. 3600 June 2003 at 8.

Notwithstanding that 19 U.S.C. Section 1677(24) is not directly on point, the Panel considers it to be a useful analogy to demonstrate that the 2.8 percent increase in volume in subject imports is neither significant nor substantial. Accordingly, we hold that the Commission's finding that the volume threat factor indicates threat of material injury is not, without further explanation, supported by substantial evidence.

iv. Price Threat Factor

The threat factor regarding price requires the Commission to assess "whether imports of the subject merchandise *are entering at prices* that are likely to have a

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significant depressing or suppressing effect on domestic prices." See 19 U.S.C. Section 1677(7)(F)(i)(IV) (emphasis added). Based on the "are entering at prices" language, the plain meaning of this statutory provision requires the Commission to assess the available record evidence regarding the current prices of the subject merchandise, and based on current prices, make a reasoned prediction about the likely future effect of imports on domestic prices, *viz.*, whether the current prices of the imports that are entering will result in price depression and/or price suppression. Hence, the focus of this statutory provision is on actual current prices for predicting future price effects.

In this case, the Commission explicitly acknowledged that it lacked sufficient record evidence regarding the current prices at which subject imports "are entering" from which it could draw conclusions regarding any likely current effect on domestic prices, much less any likely future effect on domestic prices. Based on current prices, the Commission made the following statements in which it affirmatively asserted that it could not draw conclusions regarding the subject merchandise's likely current effect on domestic prices:

- "We cannot draw any conclusions regarding underselling from the questionnaire [pricing] data in these investigations." Final Determination at 33;
- "[D]espite our best efforts and those of parties to these investigations, we cannot determine based on this record, whether there has been significant underselling by subject imports." Final Determination at 33;
- "[T]he Commission was unable to confirm any of the nineteen lost sales or twenty-three lost revenue allegations contained in the petitions." Final Determination at 33, n.206; and

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- "[W]e cannot conclude from this record that the subject imports had a *significant* price effect during the period of investigation." Final Determination at 33, n. 206, Final Determination at 35.

Conceding that, based on current prices, it could not draw conclusions regarding the subject merchandise's likely current effect on domestic prices, the Commission did not attempt to draw any conclusions, based on current prices, regarding the subject merchandise's likely future effect on domestic prices. Rather than arriving at its conclusion that "subject imports from Canada are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices" based on the current prices of the subject merchandise, the Commission reached this conclusion based on (a) "likely significant increases in subject import volumes," and (b) its finding of "at least moderate substitutability between subject imports and domestic product." Final Determination at 43-44. As the Commission stated:

[A]dditional subject imports will increase the excess supply in the market, putting further downward pressure on prices. Given our finding of likely significant increases in subject import *volumes*, and our finding of at least *moderate substitutability* between subject imports and domestic product, we conclude that subject imports are likely to have a significant price depressing effect in the future. Therefore, we find that subject imports from Canada are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices
Final Determination at 43-44 (emphasis added)

Hence, the Commission reached its conclusion that "subject imports from Canada are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices," not based on current prices, but rather on its findings of significant increases in volumes and moderate substitutability. However, since the focus of this

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threat factor is on the prices at which imports are currently entering – and not volume and/or substitutability – we hold that the Commission's finding that the price threat factor indicates threat of material injury is not supported by substantial evidence.

Furthermore, even if the focus of this statutory threat factor was properly on volume and/or substitutability, we find that the Commission's conclusion that "subject imports from Canada are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices" would still not be supported by substantial evidence.

As to volume, as the CLTA correctly notes, the Commission made no finding, and based on the record evidence upon which the Commission relied, had no basis to find, that the increase in imports from Canada would outstrip the "strong and improving demand" that it found in the U.S. market.¹³³ As indicated by the Commission's present injury finding as to price effects, unless the increase in imports from Canada would outstrip the "strong and improving demand" in the U.S. market – *viz.*, unless the market share held by imports from Canada was likely to increase significantly – the future "significant price depressing effect" predicted by the Commission, (Final Determination at 43-44), would not occur.

In its *present* injury finding as to price effects, the Commission stated that "we cannot conclude from this record that the subject imports had a *significant* price effect during the period of investigation," even though "subject imports maintained a significant share of the U.S. market, accounting for at least one-third of apparent consumption in

¹³³ CLTA Initial Brief at 29 (citing Final Determination at 40).

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each year during the period of investigation . . . [and] . . . this substantial volume of subject imports has had some effect on prices." Final Determination at 35, 43. The Commission also noted that the market share held by Canadian imports during the period of investigation was "relatively stable." Final Determination at 35. Therefore, just as no significant *present* price effect occurred during the period of investigation while Canadian market share remained "relatively stable," no *future* significant price effect would be likely if the Canadian share continued at the same level, even if imports were to increase in absolute terms. At most, we find that there would be a preservation of the status quo.

Accordingly, even if the focus of the price threat factor was on volume, the Commission's lack of any finding that the increase in imports from Canada would outstrip the "strong and improving demand" that it found in the U.S. market renders the Commission's conclusion that "subject imports from Canada are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices" to be unsupported by substantial evidence.

As to substitutability, the Commission failed to consider whether, and to what extent, its predicted increase in imports from Canada would likely serve segments of the U.S. market where purchasers do not consider Canadian and U.S. lumber to be close substitutes, thereby possibly minimizing the potential for imports to cause significant price depression. The Commission itself found only "at least a moderate degree of substitutability," (Final Determination at 43), and there is considerable record evidence indicating that many purchasers do not consider Canadian and U.S. lumber to be close

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substitutes. For example, record evidence shows that so-called "Big Boxes" – the large retail stores such as The Home Depot and Lowe's – do not consider Canadian and U.S. lumber to be close substitutes. Stephen P. Conwell, Global Product Merchant, Lumber, for The Home Depot, so testified as follows:

*One type of lumber cannot be substituted for the other. Sales of Canadian lumber are not displacing sales of domestic lumber because the two types of lumber meet different needs. There is plenty of wood in the open market today. There is not plenty of our wood – the quality we need on a consistent basis. We require Canadian wood to provide that quality and consistent supply. (emphasis added).*¹³⁴

Further, we find the Commission's finding that "prices of different species affect the prices of other species," (Final Determination at 43) to be contradicted by the record evidence before us. The Commission relied on public pricing information from public sources such as Random Lengths to support this finding. Final Determination at 43, n. 273. Tellingly, the Commission conceded that such public pricing information did not yield valid comparisons among species. Final Determination at 33. The Commission acknowledged that this was the case because "[p]rices change frequently, as often as on an hourly basis, based on the grade and dimension, seasonal demand, access to timber supplies, weather, expected future market conditions, and the strength of competition among various softwood species within a particular region." Final Determination at 33.

In light of the Commission's finding of only "at least a moderate degree of substitutability," and the record evidence indicating that purchasers do not consider

¹³⁴ See Statement of Stephen P. Conwell, Global Product Merchant, Lumber, for The Home Depot, National Lumber and Building Materials Dealers Association/National Association of Home Builders' April 27, 2001, Post-Conference Brief at Exhibit 3. (emphasis added) (P.R. List 1 44).

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Canadian and U.S. lumber to be close substitutes, even if the focus of the price threat factor was on substitutability, the Commission's failure to consider whether, and to what extent, its predicted increase in imports from Canada would likely serve segments of the U.S. market where purchasers do not consider Canadian and U.S. lumber to be close substitutes, also makes the Commission's conclusion that "subject imports from Canada are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices" unsupported by substantial evidence.

To the extent that the Commission, in fact, reached its conclusion that "subject imports from Canada are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices," based on factors other than current prices of the subject merchandise, we hold that this conclusion is unsupported by substantial evidence for another reason, to wit: the Commission failed to address the significance of its own acknowledgement that there has been "substantial and increasing integration in the North American lumber market." Final Determination at 27. If considered by the Commission, this "substantial and increasing integration in the North American lumber market" may be found to have an impact on any threat of future price effects, and therefore, any threat of material injury. This is particularly so, since the Commission also found that "U.S. producers import or purchase a sizable volume of subject imports." Final Determination at 27. We also note in this regard that the Commission did not explain the significance of its own acknowledgement that there has been "substantial and increasing integration in the North American lumber market." Final Determination at 27.

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Finally, we reject the Commission's argument raised in its brief before this Panel that it relied on price trends in concluding that "subject imports from Canada are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices."¹³⁵ We find the Commission's argument here to be nothing more than a *post-hoc* rationalization. Nowhere in the Final Determination's discussion of the price threat factor is there any mention of price trends. The Commission simply did not rely on price trends in its discussion of the price threat factor. Rather, as stated above, the Commission reached its conclusion that "subject imports from Canada are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices" based on (a) "likely significant increases in subject import volumes," and (b) its finding of "at least moderate substitutability between subject imports and domestic product." Thus, volume and substitutability – not price trends – were the bases the Commission relied upon in reaching its conclusion that "subject imports from Canada are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices."

v. Inventories Threat Factor

The statutory threat factor regarding inventories requires that the Commission consider "inventories of the subject merchandise." See 19 U.S.C. Section 1677(F)(i)(V).

The Commission's consideration of this threat factor in its Final Determination amounted to the following statement:

While inventories generally are not substantial in the softwood lumber industry, Canadian producers' inventories as a share of production [a] increased and [b] were consistently higher than that reported by U.S. producers

¹³⁵ See Commission Brief at 121-22.

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during the period of investigation. Final Determination at 44.¹³⁶

Thus, the Commission in its Final Determination made two findings with regard to inventories: (1) Canadian producers' inventories as a share of production increased during the period of investigation; and (2) Canadian producers' inventories as a share of production were consistently higher than that reported by U.S. producers during the period of investigation. For the reasons explained below, the Panel finds that neither of these findings support the Commission's finding that the inventories threat factor indicates threat of material injury.

In terms of the finding that Canadian producers' inventories as a share of production increased during the period of investigation, the record indicates that Canadian producers' inventories as a share of production increased from 9.6 percent in 1999 to 10.6 percent in 2000.¹³⁷ From 2000 to 2001, however, Canadian producers' inventories as a share of production decreased from 10.6 percent to 10.2 percent.¹³⁸ Moreover, Canadian producers' inventories as a share of production were projected to decrease from 10.2 percent in 2001 to 9.3 percent in 2002, and again decrease from 9.3 percent in 2002 to 9.1 percent in 2003.¹³⁹ Thus, to the extent that the Commission did not find the increase in Canadian producers' inventories as a share of production from 1999 to 2000 sufficient to establish present material injury, the Commission should have,

¹³⁶ In a footnote, the Commission elaborates on this sentence, citing Tables III-16 and VII-2 of the Staff Report, by stating, "Canadian producers' reported inventories as a share of production were 9.6 percent in 1999, 10.6 percent in 2000, and 10.2 percent in 2001, compared to 6.4 percent, 7.0 percent, and 6.6 percent in the same years as reported by U.S. producers." See Final Determination at 44, n. 277.

¹³⁷ See Staff Report at Table VII-2.

¹³⁸ Id.

¹³⁹ Id.

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at minimum, explained how the projected decreases in Canadian producers' inventories as a share of production figure in its affirmative threat finding. Its failure to do so results in its consideration of the inventories threat factor being unsupported by substantial evidence.

In terms of the finding that Canadian producers' inventories as a share of production were consistently higher than that reported by U.S. producers during the period of investigation, the Commission does not explain the relevance of this comparison and why the slightly higher ratio of inventories to production in Canada *vis-à-vis* that in the United States during the period of investigation was rationally connected to its affirmative threat finding. This failure to do so again results in its consideration of the inventories threat factor as being unsupported by substantial evidence. While we do not understand the relevance of this comparison and why it matters to the threat analysis that Canadian producers' inventories as a share of production were higher than that reported by U.S. producers during the period of investigation, during which time there was no present material injury, it may well be that the comparison is in fact relevant. The Commission will have the opportunity to explain the relevance of the comparison, if any, upon remand.

The Panel holds that the Commission's finding that the inventories threat factor indicates threat of material injury is not supported by substantial evidence. We reach this conclusion based upon the Commission's failure to explain the relevance of projected decreases in Canadian producers' inventories, as a share of production, as well as the lack of explanation as to why the slightly higher ratio of inventories to production in Canada,

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vis-à-vis the United States, during the period of investigation, was rationally connected to its affirmative threat finding.

vi. Development and Production Threat Factor

The threat factor regarding U.S. development and production requires that the Commission consider "the *actual* and *potential* negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product." See 19 U.S.C. Section 1677(7)(F)(i)(VIII) (emphasis added).

The Commission's consideration of this threat factor in its Final Determination was set forth in the following statement:

Finally, a number of domestic producers reported actual and potential adverse effects on their development and production efforts, growth, investment, and ability to raise capital due to subject imports of softwood lumber from Canada. Final Determination at 44.

The Commission cites, in support for this statement, to Appendix G of the Staff Report which contains anecdotal comments of U.S. producers.

In terms of "actual" negative effects on the existing development and production efforts of the domestic industry, the Commission asked the following question in its questionnaire: "Since January 1, 1998, has your firm experienced any actual negative effects on its return on investment or its growth, investment, ability to raise capital, *existing development and production efforts (including efforts to develop a derivative or*

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more advanced version of the product), or the scale of capital investments as a result of imports of softwood lumber from Canada?"¹⁴⁰

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To the extent that the Commission did not find the responses to this question sufficient to establish present material injury, we question how the very same claims by the very same U.S. producers alleging the very same effects of subject imports are sufficient to support an affirmative threat finding.

In terms of "potential" negative effects on the existing development and production efforts of the domestic industry, the Commission asked the following question: "Does your firm *anticipate* any negative impact of imports of softwood lumber from Canada?"¹⁴¹

¹⁴⁰ See Staff Report at G-3.

¹⁴¹ See Staff Report at G-13. (Emphasis added)

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Accordingly, based on the foregoing, and the fact that the Commission stated in its brief before this Panel that it "chose not to rest its threat determination on this factor,"¹⁴² we find that the Commission's observation regarding this threat factor is entitled to little weight.

b) Other Threat Factors

A finding central to the Commission's affirmative threat determination was that "subject imports are likely to increase substantially." Final Determination at 40. The Commission based this finding on six factors. Two of the six factors (those related to capacity and volume) were considered above. See discussion of statutory capacity threat factor at Section IV(E)(3)(a)(ii) of this opinion and discussion of volume threat factor at Section IV(E)(3)(a)(iii) of this opinion. The remaining four factors (export orientation of Canadian producers to the U.S., effects of the expiration of the SLA, subject import trends during periods when there were no import restraints, and forecasts of strong and improving demand in the U.S. market) are considered below.

¹⁴² Commission Brief at 151.

i. Export Orientation of Canadian Producers To The U.S.

A factor that the Commission cited in support of its finding that "subject imports are likely to increase substantially," was "the export orientation of Canadian producers to the U.S. market." Final Determination at 40. However, the Commission's finding as to the export orientation of Canadian producers to the U.S. market was limited to a single sentence in the body of the Final Determination. This sentence reads:

Canadian producers are predominantly export-oriented toward the U.S. market, with exports to the United States accounting for 68 percent of their production in 2001. Final Determination at 41.

The footnote accompanying this sentence cites Tables VII-2 and VII-7 of the Staff Report, and notes that "exports to the United States increased from 13,021 mmbf in 1999 to 13,041 mmbf in 2000, and to 13,546 mmbf in 2001, and are projected to increase to 13,660 mmbf in 2002, and 13,954 mmbf in 2003." Final Determination at 41, n. 258. Based on these figures, exports to the United States were projected to increase 0.84 percent from 2001 to 2002 (from 13,546 mmbf to 13,660 mmbf), and increase 2.15 percent from 2002 to 2003 (from 13,660 mmbf to 13,954 mmbf).¹⁴³ In addition, the footnote accompanying this sentence notes that as a share of total Canadian shipments, Canadian exports to the United States were projected to decrease from 60.9 percent in 2001 to 58.8 percent in 2002, and decrease from 58.8 percent in 2002 to 58.5 percent in 2003. Final Determination at 41, n. 258.

¹⁴³ See Table VII-2 of the Staff Report.

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While the record reflects the historical export orientation of the Canadian producers to the U.S. market, clearly, the export data do not indicate any "substantial" increase in the export orientation of Canadian producers to the U.S. market. At most, the record indicates a minimal increase in absolute Canadian exports to the United States. The Commission, however, failed to explain how projected minimal increases in absolute Canadian exports to the United States, combined with projected decreases in the percentage of total Canadian shipments that were exported to United States, taking into account "the export orientation of Canadian producers to the U.S. market," provides support for its finding that "subject imports are likely to increase *substantially*." As a result, we conclude that the Commission's observation regarding "the export orientation of Canadian producers to the U.S. market" fails to advance its finding that "subject imports are likely to increase substantially."

ii. Effects of the Expiration of the Softwood Lumber Agreement

Another factor that the Commission cited in support of its finding that "subject imports are likely to increase substantially," was "the effects of expiration of the SLA."

Final Determination at 40. As to the effects of expiration of the SLA, the Commission stated:

Each year during the pendency of the SLA, *Canadian producers used* all of their fee-free quota, *all of their \$50 fee quota*, and imported some softwood lumber with \$100 fees, suggesting that in the absence of the SLA they would have shipped more, given the near prohibitive level of the \$100 fee. Even as demand leveled off during the period of investigation and prices declined substantially, subject imports continued to enter the U.S. market in quantities above the fee-free quota, incurring additional fees of \$50 to \$100 per mbf. But the SLA *appears* to have restrained the

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volume of subject imports from Canada *at least to some extent* as subject imports only increased by 8.8 percent and market share remained relatively constant while apparent consumption increased by 13.1 percent from 1995 to 2001. *Moreover, during the pendency of the SLA, shipments from non-covered provinces to the United States more than doubled.* Finally, *anecdotal information reported to the Commission* by importers of subject merchandise and Canadian producers regarding the effects of the SLA also supports a conclusion *that it had some restraining effect on the volume of subject imports.* Final Determination at 41 (emphasis added).

We conclude that the Commission's finding that "the effects of expiration of the SLA" advanced its ultimate finding that "subject imports are likely to increase substantially," to be unsupported by substantial evidence for the following reasons: (a) the Commission offered no explanation how the removal of a restraint that only "appears" to have restrained the volume of subject imports from Canada would be likely to result in a substantial increase in subject imports from Canada; (b) the Commission conceded that it incorrectly found that Canadian producers used "all of their \$50 fee quota"; (c) the Commission failed to explain the consequences of its finding that "during the pendency of the SLA, shipments from non-covered provinces to the United States more than doubled" ; and (d) the Commission failed to consider anecdotal information on the record that "the effects of the expiration of the SLA" was a redistribution of imports from Canada as between covered and exempt provinces, and not a substantial increase in imports from Canada.

Each of these reasons is examined below.

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- a) The Commission Offered No Explanation As To How The Removal of a Restraint That Only "Appears" To Have Restrained The Volume Of Subject Imports From Canada Would Be Likely To Result In A Substantial Increase In Subject Imports From Canada

The Commission did not find that the SLA, in fact, restrained subject imports from Canada, so that the removal of the SLA would be likely to result in a substantial increase in subject imports from Canada. Rather, the Commission found that the SLA "appears" to have restrained the subject imports from Canada. Specifically, the Commission found that the SLA "appears to have restrained the subject imports from Canada at least to some extent as subject imports only increased by 8.8 percent and market share remained relatively constant while apparent consumption increased by 13.1 percent from 1995 to 2001." Final Determination at 41.¹⁴⁴ The Commission never explains how the removal of a restraint that only "appears" to have restrained the volume of subject imports from Canada would be likely to result in a substantial increase in subject imports from Canada.¹⁴⁵ Without such an explanation, we find that the Commission's finding that "the effects of expiration of the SLA" advanced its finding that "subject imports are likely to increase substantially," to be unsupported by substantial evidence.

- b) The Commission Conceded That It Incorrectly Found That Canadian Producers Used "All of Their \$50 Fee Quota"

In its Final Determination, the Commission found that Canadian producers used "all of their \$50 fee quota." Final Determination at 41. The Commission used this

¹⁴⁴ The Commission does not cite to the record evidence with respect to this data.

¹⁴⁵ CLTA Initial Brief at 16.

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finding to support its conclusion that "in the absence of the SLA they [Canadian producers] would have shipped more [to the United States]." Final Determination at 41.

However, in its brief before this Panel, the Commission conceded that it erred in finding that the Canadian producers used "all of their \$50 fee."¹⁴⁶ Nevertheless, the Commission argues in its brief before this Panel that this error does not negate its conclusion that "in the absence of the SLA they [Canadian producers] would have shipped more [to the United States]. "

We reject the Commission's argument. The Commission's conclusion that "in the absence of the SLA they [Canadian producers] would have shipped more [to the United States]" is based, at least in part, on its finding that the Canadian producers used "all of their \$50 fee quota." Since the finding that Canadian producers used "all of their \$50 fee quota" is incorrect, the Commission, based on the correct facts, must explain whether its conclusion that "in the absence of the SLA they [Canadian producers] would have shipped more [to the United States]" is valid. This is particularly so, since the record evidence indicates that Canadian producers in 2000-2001 used only 31.4 percent of their \$50 fee quota, a far cry from the 100 percent that the Commission found in its Final Determination.¹⁴⁷ Since the Commission's conclusion that "in the absence of the SLA they [Canadian producers] would have shipped more [to the United States]," is based on an incorrect finding, we hold that the Commission's finding that "the effects of the expiration of the SLA" advanced its ultimate finding that "subject imports are likely to increase substantially," to be unsupported by substantial evidence.

¹⁴⁶ See Commission Brief at 113.

¹⁴⁷ See DFAIT Website (updated March 31, 2001, contained in record at CLTA Post-Conference Brief, Vol. II at Ex. 30 (P.R. List 1 47)).

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- c) The Commission Failed To Explain The Consequences Of Its Finding That "During The Pendency of the SLA, Shipments From Non-covered Provinces To The United States More Than Doubled"

In its Final Determination, the Commission found that "during the pendency of the SLA, shipments from non-covered provinces to the United States more than doubled." Final Determination at 41. As support for this proposition, the Commission notes in a footnote that "imports from the Maritime Provinces increased from 931 mmbf in 1996 to 2,130 mmbf in 2000, before declining to 1,841 mmbf in 2001. Thus, the subject imports from the Maritime Provinces increased by 129 percent from 1996 to 2000, and by 98 percent from 1996 to 2001." Final Determination at 41, n. 262 (citing Staff Report at Table IV-3).

The Commission, however, failed to explain how this dramatic increase in imports during the period of the SLA had some restraining effect on the overall volume of imports from Canada, so that the expiration of the SLA would result in a substantial increase in subject imports. We find that the Commission was required to tender such an explanation in light of record evidence indicating that the effect of the SLA was to redistribute imports from Canada from provinces covered by the SLA to provinces exempt from the SLA, without affecting the overall level of imports.¹⁴⁸

Without such an explanation, we find that the Commission's finding that "the effects of expiration of the SLA" advanced its ultimate finding that "subject imports are likely to increase substantially," to be unsupported by substantial evidence.

¹⁴⁸ See CLTA Prehearing Brief, Volume 2 Economic Report, at Figure 1-2, citing Natural Resources Canada, CLTA Hearing Exhibit at the ITC Final Hearing (March 26, 2002) (P.R. List 1 296).

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- d) The Commission Failed To Consider Anecdotal Information On The Record That "The Effects Of The Expiration Of The SLA" Was a Redistribution of Imports From Canada Between The Covered And Exempted Provinces, And Not A Substantial Increase In Imports From Canada

In its Final Determination, the Commission concluded that "anecdotal information reported to the Commission by importers of subject merchandise and Canadian producers regarding the effects of the SLA also supports a conclusion that it had some restraining effect on the volume of subject imports." Final Determination at 41. The anecdotal information that the Commission relied upon for support of this conclusion is contained in Appendix E to the Staff Report. Final Determination at 41, n. 263. An examination of this anecdotal information reveals that much of it supports the proposition that the SLA did lead to a redistribution of imports among Canadian provinces, and that its expiration was returning provincial trade patterns to their pre-SLA state, while having no effect on overall import volumes from Canada. For example, **APO INFORMATION DELETED** asserted:

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See Confidential Staff Report at E-31.

Likewise, **APO INFORMATION DELETED** asserted:

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Id. at E-25-26.

Moreover, **APO INFORMATION DELETED** asserted:

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Id. at E-32.

Furthermore, **APO INFORMATION DELETED** asserted:

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Id. at E-28.

From the record before us, it is apparent that the Commission failed to address this anecdotal information supporting the proposition that the SLA led to a redistribution of imports among Canadian provinces, and that its expiration was returning provincial trade patterns to their pre-SLA state, while having no effect on overall import volumes from Canada. By failing to do so, we hold that the Commission's finding that "the effects of the expiration of the SLA" advanced its ultimate finding that "subject imports are

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likely to increase substantially," to be unsupported by substantial evidence.

Based on the foregoing reasons, we conclude that the Commission's finding that "the effects of expiration of the SLA" advanced its ultimate finding that "subject imports are likely to increase substantially," to be unsupported by substantial evidence.

iii. Subject Import Trends During Periods When There Were No Import Restraints

Another factor that the Commission cited in support of its finding that "subject imports are likely to increase substantially," was "subject import trends during periods when there were no import restraints." Final Determination at 40. As to this factor, the Commission stated in the body of its determination:

The evidence further demonstrates that imports of softwood lumber from Canada have increased during periods in which there were no restraints on their entry into the U.S. market, *i.e.*, prior to the SLA between 1994 and 1996, and the period immediately after the SLA expired and before suspension of liquidation in these investigations. Subject imports from Canada held a 27.5 percent share of the U.S. softwood lumber market in 1991 when the Memorandum of Understanding (MOU) regarding softwood lumber from Canada that had been in effect since December 30, 1986 expired. During the ensuing CVD investigation before the Commission and the appeals of the affirmative determination before the U.S.-Canada Free Trade Agreement ("CFTA") panels, subject imports market share continued to increase. In August 1994, the appeals were terminated and imports of softwood lumber from Canada were not subject to any trade restraining measure until the SLA took effect in April 1996. The evidence shows that the subject import market share increased from 27.5 percent in 1991 to 35.9 percent in 1996. With the SLA in effect, the market share for softwood lumber from Canada declined to 34.3 percent in 1997 and remained fairly stable within a range of 2.7 percentage points. Finally, subject import increased during the period immediately after the SLA expired (April 2001) and before suspension of liquidation (August 2001). Subject imports of softwood lumber by volume for the period of April to August 2001 were higher than the comparable April-August period in each of the preceding three years (1998-2000) by a range of 9.2 percent to 12.3 percent. Final Determination at 42.

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As the Commission notes, there were two periods of no import restraints. One period was "prior to the SLA between 1994 and 1996" (August 1994 to April 1996). The other period was "immediately after the SLA expired and before suspension of liquidation in these investigations" (April 2001 to August 2001). Final Determination at 42.

We conclude for the following reason that the Commission's finding that "subject import trends during periods when there were no import restraints" advanced its ultimate finding that "subject imports are likely to increase substantially," to be unsupported by substantial evidence: (a) the Commission failed to undertake an analysis of market conditions for the August 1994 to April 1996 period in using such import data to draw inferences about the likely future import trends after the period of investigation; (b) the August 1994 to April 1996 import data fail to support the inference that imports from Canada increased at a greater rate during the August 1994 to April 1996 "no restraint" period, than in periods with import restraints in place; and (c) the Commission failed to undertake an analysis to determine whether the increase in imports from April 2001 to August 2001 represents (1) a fair measure of the allegedly higher level of imports that would occur absent any restraint, or (2) a shift in timing of imports that otherwise would have been shipped to the United States.

Each of these reasons is examined below.

- a) The Commission's Analysis of the August 1994 to April 1996 Time Period

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In its Final Determination, the Commission relied on import data from the period August 1994 to April 1996 stating, "the evidence also shows that during the seven quarters between August 1994 and April 1996, subject imports market share increased from 32.6 percent in 3^d quarter 1994 to 37.4 percent in 1st quarter 1996." Final Determination at 42, n. 268. This Panel notes that the CLTA is correct in stating that the Commission cited no legal authority for the propriety of its reliance on 6-8 year old data well beyond the period of investigation to project the likely level of imports in the future.¹⁴⁹ Indeed, this flies in the face of decisions that have held that threat determinations must be based on *current* trends. See, e.g., Fresh, Chilled or Frozen Pork from Canada, USA-89-1904-11 at 18 (January 22, 1991) (noting that threat determinations must be based on "'identifiable and current trends' . . . to avoid a finding of threat based on 'conjecture and speculation.'"). In any event, the Commission failed to examine market conditions in the August 1994-April 1996 period. Without this examination, this Panel simply cannot accept the notion that just because there were no import restraints in the August 1994-April 1996 period, and imports increased from 32.6 percent to 37.4 percent during this period, it necessarily follows that imports are likely to increase substantially after the period of investigation.

In light of the above, the Panel finds the Commission's reliance on import data during the August 1994-April 1996 period to draw inferences about the likely future import trends after the period of investigation is unsupported by substantial evidence.

¹⁴⁹ See CLTA Initial Brief at 21.

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We note that even if the August 1994-April 1996 import data could be used to draw inferences about the likely future import trends after the period of investigation, we find that such data fail to support the inference that imports from Canada increased at a greater rate during the August 1994 to April 1996 "no restraint period," than in periods with import restraints in place. Indeed, the inferences in the record before the Commission point to the contrary inasmuch as such data show that the increase in imports during the August 1994-April 1996 period is merely a continuation of a growth trend observed over the 1991-1994 period, during which imports from Canada were restrained first by the Memorandum of Understanding and subsequently by the bonding and cash deposit requirements imposed in the prior Canadian lumber countervailing duty proceeding.

Specifically, the Commission relies on two documents to support its proposition that "[t]he evidence further demonstrates that imports of softwood lumber from Canada have increased during . . . [the period] . . . prior to the SLA between 1994 and 1996." Final Determination at 42, n. 264. One of these documents depicts the quarterly Canadian share of the U.S. market from the first quarter of 1994 through the second quarter of 2001,¹⁵⁰ and the second depicts Canadian share of the U.S. market on an annual basis from 1985 to 2001.¹⁵¹ When the document depicting the quarterly Canadian share of the U.S. market from the first quarter of 1994 through the second quarter of 2001 is extended back to 1991, however, and the vertical axis is rescaled to start at zero (instead of at 30 percent), it is apparent that the Canadian market share increase over the

¹⁵⁰ See Coalition Pre-Hearing Brief at Exhibit 65, (P.R. List 1 235).

¹⁵¹ See Petition at Exhibit I-B-18.

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1994-1996 period was a continuation of a trend observed over the 1991-1994 period.¹⁵² As pointed out by the CLTA, the document depicting the Canadian share of the U.S. market on an annual basis from 1985 to 2001 also shows that the Canadian market share increase over the 1994-1996 period was a continuation of a trend observed over the 1991-1994 period.¹⁵³

Accordingly, the record evidence reflects that the continuing growth in import market share during the August 1994-April 1996 "no restraint period" was a continuation of growth from the 1991-1994 period, a period with import restraints in place. We, therefore, find that the August 1994-August 1996 import data fail to support the inference that imports from Canada increased at a greater rate during the August 1994 to April 1996 "no restraint period," than in periods with import restraints in place. Consequently, for this reason, too, the Panel also finds the Commission's reliance on import data during the August 1994-April 1996 period to draw inferences about the likely future import trends after the period of investigation is unsupported by substantial evidence.

b) The Commission's Analysis of the April 2001 to August 2001
Time Period

In its Final Determination, the Commission found that "[s]ubject imports of softwood lumber by volume for the period of April to August 2001 were higher than the comparable April-August period in each of the preceding three years (1998-2000) by a range of 9.2 percent to 12.3 percent." Final Determination at 42. However, the

¹⁵² See Petitioner Pre-hearing Brief, Vol. II at Ex. 65 (P.R. List 1 235).

¹⁵³ See Petition at Exhibit I-B-18.

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Commission did not explain whether the increase in imports from April 2001 to August 2001 represents (1) a fair measure of the allegedly higher level of imports that would arrive absent any import restraint, or (2) a shift in the timing of imports that otherwise would have been shipped to the United States because importers knew well in advance when the SLA would expire and when suspension of liquidation would begin, and had every incentive to delay or accelerate imports to avoid both SLA export fees and bonding requirements.¹⁵⁴ Without this analysis, this Panel cannot conclude that the increase in imports from April 2001 to August 2001 does, in fact, represent a fair measure of the allegedly higher level of imports that would occur absent any import restraint. This is particularly so, since record evidence does suggest that the increase in imports from April 2001 to August 2002 represents a shift in the timing of imports that otherwise would have been shipped to the United States because importers knew well in advance when the SLA would expire and when suspension of liquidation would begin, and had every incentive to delay or accelerate imports to avoid both SLA export fees and bonding requirement.¹⁵⁵

Accordingly, absent the Commission's analysis to determine the cause of the increase in imports from April 2001 to August 2001, the Panel finds the Commission's reliance on import data during the April 2001-August 2001 period to draw inferences about the likely future import trends after the period of investigation is unsupported by substantial evidence.

Based on the foregoing reasons, we conclude that the Commission's finding that "subject import trends during periods when there were no import restraints" advanced its

¹⁵⁴ See CLTA Initial Brief at 25.

¹⁵⁵ See, e.g., CLTA Pre-Hearing Brief, Volume 3 at Exhibit 35 (P.R. List 1 228); CLTA Initial Brief at 25-26; Exhibit 14.

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ultimate finding that "subject imports are likely to increase substantially," to be unsupported by substantial evidence.

iv. Forecasts of Strong and Improving Demand in the U.S. market

Another factor that the Commission cited in support of its finding that "subject imports are likely to increase substantially," was "forecasts of strong and improving demand." Final Determination at 40. As to this factor, the Commission's discussion was limited to the following statement:

Demand for softwood lumber is forecast to remain relatively unchanged or increase slightly in 2002, followed by increases in 2003 as the U.S. economy rebounds from recession. Industry forecasts suggest slight growth in U.S. housing starts in 2002 and further increases in 2003. Thus, the United States will continue to be an important market for Canadian producers. Final Determination at 42-43.

The Commission fails to explain how strong and improving demand advances its finding that "subject imports are likely to *increase substantially*." Final Determination at 40. (emphasis added). This Panel cannot conclude, without further explanation from the Commission, how the Commission's finding that "the United States will continue to be an important market for Canadian producers" leads to its finding that "subject imports are likely to *increase substantially*." Final Determination at 40, 43 (emphasis added). Accordingly, we conclude that the Commission's finding that "forecasts of strong and improving demand" establishes its finding that "subject imports are likely to increase substantially," to be unsupported by substantial evidence.

F. Whether The Commission Ensured That The Threatened Injury Is "By Reason Of" Subject Imports, And That It Did Not Attribute To Subject Imports Threatened Injury From Other Sources In Finding That Subject Imports Threaten To Cause Material Injury

The Commission's evaluation of the mandatory threat factors set forth above is only the first step in its analysis in determining whether there exists a threat of material injury. The second step requires that the Commission ensure that, pursuant to 19 U.S.C. Section 1677(7)(F)(ii), the threatened injury is "by reason of" subject imports. As the Court of International Trade acknowledged in NEC Corp. v. Department of Commerce, 36 F.Supp.2d 380, 392 (Ct. Int'l Trade 1998), "after considering all relevant economic factors in making a determination of whether further dumped imports are imminent, the Commission must make an analytically distinct determination to comply with the 'by reason of' standard." See also SAA, *reprinted in* H.R. Doc. No. 103-316, at 851-52 (1994) ("[T]he Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports."). As set forth below, we find that the Commission, in this case, failed to make this statutorily mandated "analytically distinct determination." We, therefore, remand this case for the Commission to make this determination, and ensure that the threatened injury is, in fact, "by reason of" subject imports.

In this case the record indicates that there were five factors that were identified which may have had a negative impact on the domestic industry that were entirely unrelated to the subject imports. Such potential factors were (1) the domestic industry

itself; (2) third-country imports; (3) the growth of engineered wood products ("EWPs"); (4) constraints on domestic production/insufficient timber supplies in the U.S.; and (5) the cyclical nature of the softwood lumber industry. As we discuss below, for none of these potential factors did the Commission undertake an analysis to distinguish between the contribution to threat of injury caused by the dumped and subsidized goods and these potential factors unrelated to the subject imports.

1. The Commission's Lack Of Consideration of the Domestic Industry Itself

The Commission failed to undertake an analysis to distinguish between the contribution to threat of injury caused by the dumped and subsidized imports and the contribution to threat caused by the domestic industry itself. In its negative *present* injury analysis, the Commission noted that the price declines during the period of investigation were the result of a supply/demand imbalance, and "that both subject imports and *the domestic producers* contributed to the excess supply, and thus the declining prices." Final Determination at 34-35 (emphasis added). However, the Commission failed to analyze the domestic producers' contribution to the alleged threat of injury in reaching its affirmative threat finding. Indeed, in reaching its affirmative threat finding, the Commission ignored entirely the role of the domestic industry in its evaluation of future market conditions.¹⁵⁶ The Commission attempts to relieve itself of the obligation to analyze the role of the domestic industry in its threat of material injury discussion by asserting in its negative present material injury discussion that it found that the oversupply by domestic producers generally was curbed after 2000, but continued to

¹⁵⁶ See CLTA Initial Brief at 48-49.

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be a problem for Canadian producers into 2001.¹⁵⁷ In footnote 217 of its Final Determination, the Commission quotes a Bank of America publication, "Wood and Building Products," at 11 (November 2001), stating:

The U.S. industry was widely criticized in years passed *for lumber overproduction This behavior has been curbed considerably here*, but remains a problem in Canada, where Provincial forestry officials must also protect pulp mill employment, which is the lifeblood of many small towns. However, as the Canadian softwood lumber industry ships 65% of its output to the U.S., its general failure to manage production to new order volumes and its capacity growth in its eastern provinces have both undermined prices in recent years. (emphasis added).

An analysis of the source document that the Commission quotes, however, discloses that what the Commission omitted by way of ellipses undermines its position that "oversupply by domestic producers generally was curbed after 2002." Without the ellipses, the relevant portion of the quoted material from "Wood and Building Products," states:

The U.S. industry was widely criticized in years passed *for lumber overproduction in order to secure wood chips for pulp and paper manufacturing. This behavior has been curbed considerably here*, but remains a problem in Canada, where Provincial forestry officials must also protect pulp mill employment, which is the lifeblood of many small towns.¹⁵⁸

In reviewing the complete language in this part of the administrative record, what was "curbed considerably" by domestic producers was overproduction in order to secure

¹⁵⁷ See Commission Brief at 155, citing Final Determination at footnote 217.

¹⁵⁸ See Coalition's Posthearing Brief at Appendix H, Exhibit 2 at 11 (emphasis added).

wood chips for pulp and paper manufacturing, and not the oversupply of softwood lumber for uses other than pulp and paper manufacturing.

When the record is correctly considered, footnote 217 of the Final Determination does not excuse the Commission from its obligation to analyze the role of the domestic industry in its discussion of threat of material injury.

2. The Commission's Lack Of Consideration of Third-Country Imports

Based upon the administrative record before us, this Panel finds that the Commission failed to undertake an analysis to determine whether third-country imports "may have such a predominant effect in producing the harm as to . . . prevent the [subject] imports from being a material factor" of threat of injury. Altx, Inc. v. United States, 2002 WL 1560884, at *18 (Ct. Int'l Trade July 12, 2002). In its negative present injury analysis, the Commission noted that although third-country imports were present in the U.S. market during the period of investigation, they never exceeded three percent of apparent domestic consumption during the period of review, and that they accounted for 6.9 percent of total U.S. imports of softwood lumber in 2001. Final Determination at 25, n. 152. However, the Commission failed to analyze the third-country imports contribution to threat of injury in reaching its affirmative threat finding. Instead, in reaching its affirmative threat finding, the Commission ignored entirely the likely future role of third-country imports and their potential contribution to threat of injury to the domestic industry.¹⁵⁹ The fact that third-country imports never exceeded three percent of apparent domestic consumption during the period of investigation, and the fact that they

¹⁵⁹ See CLTA Initial Brief at 50.

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accounted for only 6.9 percent of the total U.S. imports of softwood lumber in 2001, did not excuse the Commission from analyzing the role of third-country imports in its threat of material injury discussion. This is particularly so since record evidence indicates that third-country imports have increased substantially in relation to U.S. production and to subject imports.¹⁶⁰ Table IV-2 of the Staff Report indicates that third-country imports rose dramatically through the 1990's, and more than doubled from 1998 to 2001 – rising from 647 million board feet in 1998 to 1,378 million board feet in 2001. Table IV-2 of the Staff Report indicates that the increase in third-country imports during the period of investigation – of 441 million board feet – approximately equaled the incremental increase in Canadian imports over the period of investigation, which increased 500 million board feet. Since, in the Commission's view set forth in its consideration of the threat factor regarding price, discussed above, it was the likely future incremental increase in imports from Canada that was likely to cause price depression, the Commission was required, in light of the record evidence, to analyze the role of third-country imports in its *threat* of material injury discussion.

3. The Commission's Lack Of Consideration of The Growth of Engineered Wood Products ("EWPs")

Based upon the administrative record before us, this Panel also finds that the Commission failed to undertake an analysis to distinguish between the contribution to threat of injury caused by the dumped and subsidized imports and the contribution to threat caused by the growth of engineered wood products ("EWPs").

¹⁶⁰ See Staff Report at Tables IV-1 and IV-2.

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In its negative present injury analysis, the Commission noted that although EWPs may substitute for softwood lumber and have "increased in importance over the last few years," they still account "for a small share of the market traditionally utilizing softwood lumber." Final Determination at 23-24. Because the Commission concluded that EWPs account "for a small share of the market traditionally utilizing softwood lumber," the Commission failed to analyze the growth of EWP's contribution to threat of injury in reaching its affirmative threat finding. Instead, in reaching its affirmative threat finding, the Commission ignored entirely record evidence reflecting the likely growth of EWPs and their potential contribution to threat of injury to the domestic industry.¹⁶¹ The fact that the Commission found in its present injury analysis that EWPs account "for a small share of the market traditionally utilizing softwood lumber," does not excuse the Commission from analyzing the growth of EWPs in its threat of material injury discussion. This is especially so since record evidence indicates that EWPs have experienced substantial growth, and it is predicted that the growth in EWPs will continue into the future. For example, between 1992 and 2000, EWP production grew 150 percent, and this trend is predicted to continue for the foreseeable future.¹⁶² The record indicates rapid growth in the use of EWPs such as wooden I-joists, glued laminated lumber, and laminated veneer lumber and that such growth will continue at least until 2005.¹⁶³

¹⁶¹ See Canadian Parties Initial Brief at 23.

¹⁶² See ECE/FAO Forest Products Annual Market Review, 1999-2000, Engineered Wood Products – Production, Trade, Consumption and Outlook, A. Schuler, Research Economist, Northeast Forest Experiment Station, USDA Forest Service at 144 (Exhibit 21 to CLTA ITC Pre-hearing Brief) ("ECE/FAO Forest Products Annual Market Review" heretofore); See also Engineered Wood Takes More Market Share, Random Lengths, Yardstick, Vol. 12, Issue 1 (January 2002) at 1-2 (Exhibit 22 to CLTA ITC Pre-hearing Brief).

¹⁶³ See ECE/FAO Forest Products Annual Market Review at 139-143, 144.

In light of this record evidence that indicates the recent growth in EWPs and the projected growth in EWPs in the future, the Commission should have analyzed the growth of EWPs in its *threat* of material injury discussion.

4. The Commission's Lack Of Consideration of Constraints On Domestic Production/Insufficient Timber Supplies in the U.S.

In reaching its negative *present* material injury finding, the Commission found that "[a]pparent domestic consumption exceeds domestic production capabilities." Final Determination at 24. However, in its threat analysis, we find, based upon the record before us, that the Commission failed to analyze the record evidence that insufficient domestic production capabilities – resulting from insufficient timber supplies in the United States – apparently constrain the U.S. producers' ability to supply the U.S. market. The Panel considers this to be an important factor inasmuch as the effect of continued insufficient timber supplies would appear to insulate the U.S. producers from a threat of future injury.

5. The Commission's Lack Of Consideration Of The Cyclical Nature of the Softwood Lumber

Finally, based upon the administrative record before this Panel, we find that the Commission failed to undertake an analysis to distinguish between the potential contribution to threat of injury caused by the dumped and subsidized imports and the contribution to threat caused by the cyclical nature of the softwood lumber industry, which is primarily a function of housing construction cycles. In its negative *present* injury analysis, the Commission alluded to the cyclical nature of the softwood lumber industry, stating:

Demand for softwood lumber is derived primarily from demand for construction uses, including new home construction, repairs and remodeling, and commercial construction These end use demands for softwood lumber are determined by such factors as the general strength of the overall U.S. economy (measured by the growth of GDP), with residential construction also affected by the level of long-term and home mortgage interest rates. During the period of investigation, domestic softwood lumber consumption remained relatively level, and housing starts declined overall but remained at historically high levels despite low mortgage rates and continued increases in real GDP. Final Determination at 23.

In its threat analysis, however, the Commission failed to analyze the cyclical nature of the softwood lumber industry. Although the Commission notes in its threat analysis that "[i]ndustry forecasts suggest slight growth in U.S. housing starts in 2002 and further increases in 2003," Final Determination at 42, as the Canadian Parties assert, the Commission does not distinguish between the contribution to threat of injury caused by

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the dumped and subsidized imports and the potential contribution to threat caused by the cyclical nature of the softwood lumber industry.¹⁶⁴

6. Conclusion to Sections E & F

The Panel is particularly troubled by the extensive lack of analysis undertaken by the Commission of the factors applicable to a determination of whether there is a threat of material injury to the domestic softwood lumber industry. This has inexorably led us to the opinion that the Commission did not exercise "special care" in making its threat determination in this case. To the contrary, the Commission made its threat determination on the basis of considerable speculation and conjecture, the result of which conflicts not only with the agency's statutory mandate, but also with the rationale underlying its present material injury determination, as well as the record evidence. See 19 U.S.C. Section 1677(7)(F)(ii); SAA, reprinted in H.R. Doc. No. 103.

The Commission, both in its briefs to this Panel and its presentation at the hearing in this matter, frequently invoked Dastech Int'l, Inc. v. USITC, 963 F. Supp. 1220 (Ct. Int'l Trade 1997) for the proposition that "the ITC is presumed to have considered all the evidence in the record." Id. at 1226. We take a dim view of the Commission's consistent reliance upon Dastech in the face of the challenges to the many aspects of its threat determination which did not acknowledge, much less discuss, evidence specifically brought to its attention by an interested party. The following excerpt from the Court of International Trade's opinion in Usinor et al. v. United States, 2002 WL 1998315 (Ct.

¹⁶⁴ See Canadian Parties Initial Brief at 22.

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Int'l Trade July 19, 2002); Slip Op. 2002-70 resonates with the Panel's view of the Commission's threat determination in this case:

Regardless of any presumption in its favor, the Commission is in no way absolved under *Dastech* of its responsibility to explain or counter salient evidence that militates against its conclusions. The court is troubled by the repeated generic invocation of *Dastech* as a shield against examination of the Commission's failure to present required analysis of the record evidence. *Dastech* prefaces its entire discussion of this presumption with the requirement that the ITC present a "reviewable, reasoned basis" for its determinations and added that "[e]xplanation is necessary, of course, for this court to perform its statutory review function." *Dastech Int'l*, 21 CIT at 475, 963 F. Supp. at 1226 (quoting *Bando Chem Indus., Ltd. v. United States*, 17 CIT 798, 799 (1993)). Moreover, *Dastech* cited *Granges Metallverken AB*, 716 F. Supp. 17, 13 CIT at 478, which states that "it is an abuse of discretion for an agency to fail to consider an *issue* properly raised by the record evidence" though there is no statutory requirement that the Commission respond to each piece of evidence presented by the parties. *Id.* (emphasis added) (citing *Timken Co., v. United States*, 10 CIT 86, 97, 630 F. Supp. 1327, 1337-38 (1986), *rev'd in part*, *Koyo Seiko Co. v. United States*, 20 F. 3d 1156 (Fed. Cir. 1994)). *Dastech* also cites *Roses, Inc. v. United States*, 13 CIT 662, 720 F. Supp. 180 (1989), which indicates that the presumption the agency has considered all the evidence is rebuttable and that "the burden is on the plaintiff to make a contrary showing." *Id.* at 668 (citations omitted).

Moreover, the Commission's responsibility to answer to evidence that undermines the Commission's findings and conclusions has recently been reiterated by the court in *ALTX, Inc. v. United States*, 167 F. Supp.2d 1353 (Ct. Int'l Trade 2001). In that case, the Commission was made aware of certain key evidence, but declined to discuss it,

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instead including only superficial mention of that evidence in its final determination.

This court ultimately found the determination unsupported by substantial evidence:

The Final Determination merely cites to record evidence containing data on subject import indicators throughout the POI. This off-handed reference to annual data cannot, by itself, constitute an acknowledgement of Plaintiff's arguments, much less a reasoned explanation for discounting them, as the statute requires. Furthermore, whatever discretion the Commission may have to reject deliberately the conclusions found in the agency's Staff Report, *it may not through its silence simply ignore a Staff Report analysis that contradicts the Commission's own conclusions where an interested party has specifically brought the possibly conflicting evidence to the agency's attention.*

Id. at 1359 (emphasis added).

While the ITC need not address every argument and piece of evidence, it must address significant arguments and evidence which seriously undermines its reasoning and conclusions. When considered individually, every discrepancy discussed here might not rise to the level of requiring reconsideration of the overall disposition, but taken as a whole, the court finds that the ITC decision is not substantially supported and explained.

Id. at 1373 (emphasis added) (footnotes omitted).

Usinor at *14.

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That being said, the Panel is especially mindful of the considerable deference that it must accord the Commission in its deliberations underlying the Final Determination. Nonetheless, we are not "powerless", nor will we be "passive" in our "study of the record" and evaluating whether the Commission "has exercised a reasoned discretion." See Dastech, 963 F. Supp. at 1222-1223.

Based on the foregoing, we conclude that the Commission's holding that the domestic softwood lumber industry is threatened with material injury by reason of allegedly subsidized imports and allegedly dumped imports from Canada is unsupported by substantial evidence and not in accordance with law.

Accordingly, the Commission is instructed to undertake the remand based on the evidence in the administrative record in accordance with this Panel's holdings set forth above, and is further instructed as follows:

(1) The Commission should consider in its analysis of whether there is a threat of material injury to the domestic softwood lumber industry all of the information and data that it considered in its present material injury determination.

(2) The Commission should consider in its threat analysis the potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product.

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(3) The Commission should undertake an analysis to distinguish between the contribution to threat of injury caused by the dumped and subsidized imports and the contribution to threat caused by the domestic industry itself.

(4) The Commission should undertake an analysis to determine whether third country imports "may have such a predominant effect in producing the harm as to . . . prevent the [subject] imports from being a material factor" of threat of injury.

(5) The Commission should undertake an analysis to distinguish between the contribution to threat of injury caused by the dumped and subsidized imports and the contribution to threat caused by engineered wood products.

(6) The Commission should undertake an analysis of the fact that there are constraints on domestic production of softwood lumber in order to distinguish between the contribution to threat of injury caused by the dumped and subsidized imports and the contribution to threat of injury caused by the fact that there are insufficient timber supplies in the United States.

(7) The Commission should undertake an analysis to distinguish between the threat of injury caused by the dumped and subsidized imports and the potential contribution to threat caused by the cyclical nature of the softwood lumber industry.

IV. CONCLUSION

Applying the standard of review as set forth in this opinion, the Panel's conclusions are summarized in the following remands and affirmances. All remands shall be conducted based on the evidence in the administrative record.

A. REMANDS

(1) The Commission's threat of material injury determination is hereby remanded and on remand the Commission should consider, in its analysis of whether there is a threat of material injury to the domestic softwood lumber industry, all of the information and data that it considered in its present material injury determination.

In the course of its analysis, the Commission is also directed to:

(a) Consider in its threat analysis the potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product.

(b) Undertake an analysis to distinguish between the contribution to threat of injury caused by the dumped and subsidized imports and the contribution to threat caused by the domestic industry itself.

(c) Undertake an analysis to determine whether third country imports "may have such a predominant effect in producing the harm as to . . . prevent the [subject] imports from being a material factor" of threat of injury.

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(d) Undertake an analysis to distinguish between the contribution to threat of injury caused by the dumped and subsidized imports and the contribution to threat caused by engineered wood products.

(e) Undertake an analysis of the fact that there are constraints on domestic production of softwood lumber in order to distinguish between the contribution to threat of injury caused by the dumped and subsidized imports and the contribution to threat of injury caused by the fact that there are insufficient timber supplies in the United States; and

(f) Undertake an analysis to distinguish between the threat of injury caused by the dumped and subsidized imports and the potential contribution to threat caused by the cyclical nature of the softwood lumber industry.

(2) The Panel remands the Commission's holdings that square-end bed frame components and flangestock are part of the single domestic like product for the continuum of species that comprise softwood lumber and instructs the Commission on remand to consider, based on the existing record evidence, all six like product factors to determine whether square-end bed frame components and flangestock are part of a continuum of softwood lumber products defined as a single domestic like product.

(3) The Panel remands the Commission's decision to cross-cumulate in the context of a threat of material injury determination and instructs the Commission to reconsider its interpretation of the statute with respect to cross-cumulation in the context of a threat determination and, applying the fresh interpretation, reach an appropriate conclusion. In

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revisiting the questions of how to interpret and apply the statute, the Commission should consider the relevant arguments of the parties and should reach a reasoned conclusion.

B. AFFIRMANCES

1) In light of the fact that the Commission analyzed all six like product factors, in light of the record evidence, the Commission's considerable discretion to determine the domestic like product, and the fact that there is substantial evidence on the record to support the Commission's holdings that WRC and EWP are part of the single domestic like product for the continuum of species that comprise softwood lumber, the Panel affirms the Commission's holdings as to WRC and EWP.

2) The Panel finds that the Commission's interpretation of the statute with respect to the Maritime Provinces is reasonable, supported by substantial evidence and otherwise in accordance with law, and affirms its finding that it did not have authority to treat the Maritime Provinces as a "country" entitled to a separate injury determination.

3) The Panel concludes that, as a matter of United States law, in finding threat of material injury, the Commission was not required to determine that the threat of material injury was caused through the effects of subsidies or of dumping.

4) The Panel concludes that the introductory language of Section 1677(F)(i), directing the Commission to consider "[the] relevant economic factors" in assessing a threat of material injury case, imposes on the Commission an obligation to consider any pertinent information concerning the nature of the subsidy and its likely effects that is presented to it, whether by Commerce or the parties. The Panel finds that the

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Commission did “consider” the nature of the subsidy and its likely trade effects and affirms that the Commission fulfilled its statutory burden in this regard.

The Commission is directed to report its Determination on Remand within one hundred (100) days from the date of this decision. Any participant thereafter wishing to challenge the Determination on Remand shall file such challenge within the time prescribed in Rule 73 of the *Rules of Procedure for Article 1904 Binational Panel Reviews*, and further proceedings, if necessary, shall be conducted in accordance with said Rule 73.

Donald S. Affleck, Q.C.

Donald S. Affleck, Q.C.

Mark R. Joelson

Mark R. Joelson

Louis S. Mastriani

Louis S. Mastriani

M. Martha Ries

M. Martha Ries

Wilhelmina K. Tyler (Chair)

Wilhelmina K. Tyler (Chair)

Dated: September 5, 2003