

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

In the Matter of:)
SOFTWOOD LUMBER)
FROM CANADA;)
)
DETERMINATIONS;)
(SOFTWOOD LUMBER INJURY))
)

Secretariat File No.
USA-CDA-2018-1904-03

NON-PROPRIETARY VERSION

Business Proprietary Information
contained on pages 3, 14, 39,
40, 41, 42, 95, 99, 100, 104, 109
has been deleted

INTERIM DECISION AND ORDER OF THE PANEL

PANEL MEMBERS:

Stephen Joseph Powell, Chair
Stephen J. Claeys
W. Jack Millar
Andrew Newcombe
James Ogilvy

APPEARANCES:

**On Behalf of the U.S. International Trade Commission (“ITC” “Commission” or
“Agency”)**

Dominic L. Bianchi
Andrea C. Casson
Jane C. Dempsey
Courtney McNamara
Office of the General Counsel
U.S. International Trade Commission

On Behalf of the “Canadian Parties” (the Government of Canada; the Governments of Alberta, British Columbia, Ontario, and Québec; Alberta Softwood Lumber Trade Council; British Columbia Lumber Trade Council; Canfor Corporation; J.D. Irving, Limited; and West Fraser Mills Ltd.):

Eric S. Parnes
Matthew R. Nicely
Hughes Hubbard & Reed LLP

On Behalf of Western Forest Products, Inc. (“Western”):

Myles S. Getlan
Jonathan M. Zielinski
Cassidy Levy Kent (USA) LLP

On Behalf of Resolute FP Canada Inc. (“Resolute”) and Conseil de l’industrie forestière du Québec and Ontario Forest Industries Association (collectively, “Central Canada”):

Elliot J. Feldman
John J. Burke
Michael S. Snarr
Mark B. Lenhardt
Jake R. Frischknecht
Lindita V. Ciko Torza
Baker & Hostetler LLP

On Behalf of the Committee Overseeing Action for Lumber Investigations or Negotiations (“COALITION” or “Petitioner”)

Lisa W. Wang
Picard Kentz & Rowe LLP

On Behalf of the National Association of Home Builders (“NAHB”) (*amicus curiae*, brief)

Kristin H. Mowry
Jeffrey S. Grimson
Jill A. Cramer
James C. Beaty
Mowry & Grimson PLLC

TABLE OF CONTENTS

I. INTRODUCTION	6
II. BACKGROUND.....	10
III. STATEMENT OF ISSUES	12
IV. STANDARD OF REVIEW.....	16
V. ANALYSIS.....	21
A. WHETHER THE ITC’S DETERMINATIONS THAT (A) CEDAR/REDWOOD AND (B) APPEARANCE-GRADE LUMBER, INCLUDING EASTERN WHITE PINE, ARE NOT SEPARATE LIKE PRODUCTS FROM STRUCTURAL LUMBER ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND IN ACCORDANCE WITH LAW	21
1. <i>Arguments of the Parties</i>	23
A. Western Forest Products as to Cedar/Redwood	23
B. Central Canada as to Eastern White Pine and Appearance Grade Lumber.....	25
2. <i>Opinion of the Panel</i>	31
B. WHETHER THE COMMISSION’S EXCLUSION OF [[]] AND [[]] FROM ITS DEFINITION OF THE DOMESTIC INDUSTRY IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND OTHERWISE IN ACCORDANCE WITH LAW	39
1. <i>Arguments of the Parties</i>	39
2. <i>Opinion of the Panel</i>	41
C. WHETHER THE COMMISSION’S DETERMINATIONS ACCOUNTED FOR THE U.S. SOFTWOOD LUMBER INDUSTRY’S PERFORMANCE IN THE CONTEXT OF THE BUSINESS CYCLE AND CONDITIONS OF COMPETITION DISTINCTIVE TO THE INDUSTRY	42
1. <i>Nature of the Business Cycle Distinctive to the Domestic Lumber Industry</i>	43
A. Arguments of the Parties	43
B. Opinion of the Panel.....	48
2. <i>Whether 2014 was an Aberrant Year for Comparison</i>	49
A. Arguments of the Parties	49
B. Opinion of the Panel.....	52
3. <i>2006 Softwood Lumber Agreement</i>	52
A. Arguments of the Parties	52
B. Opinion of the Panel.....	54

D.	WHETHER THE COMMISSION UNLAWFULLY RELIED ON NON-CURRENT DATA TO JUSTIFY ITS DECISION BY DISCOUNTING POST-PETITION DATA AND FAILING TO CONSIDER THIRD AND FOURTH QUARTER 2017 DATA	56
1.	<i>Arguments of the Parties</i>	56
2.	<i>Opinion of the Panel</i>	57
E.	WHETHER THE COMMISSION GAVE PROPER EFFECT TO THE LEGAL CONSEQUENCES OF THE 2006 SOFTWOOD LUMBER AGREEMENT	61
1.	<i>Background</i>	61
2.	<i>Arguments of the Parties</i>	62
A.	Do the SLA's Removal-of-Injury Provisions Have Continuing Effect?	62
B.	Is a Panel Decision on 2006 SLA's Legal Effect an Advisory Opinion?	65
C.	COALITION'S Support of Agency Position	66
3.	<i>Opinion of the Panel</i>	67
F.	WHETHER THE COMMISSION ERRED IN ITS FINDINGS OF RELATIVE SUBSTITUTABILITY AND ASSUMED PERFECT SUBSTITUTABILITY CONTRARY TO ITS OWN FINDINGS	70
1.	<i>Arguments of the Parties</i>	70
A.	Substitution Elasticity	73
2.	<i>Opinion of the Panel</i>	74
G.	WHETHER THE COMMISSION'S VOLUME ANALYSIS WAS SUPPORTED BY RECORD EVIDENCE AND IN ACCORDANCE WITH LAW	78
1.	<i>Arguments of the Parties</i>	78
A.	Historical Context and Business Cycle	79
B.	Substitutability	80
2.	<i>Opinion of the Panel</i>	82
A.	Third Party Imports	82
B.	Regional U.S. Demand and Supply	83
H.	WHETHER THE COMMISSION'S PRICE EFFECTS ANALYSIS WAS SUPPORTED BY RECORD EVIDENCE AND IN ACCORDANCE WITH LAW	84
1.	<i>Background</i>	84
2.	<i>The Commission's Determination with Respect to Price Underselling</i>	85
A.	Arguments of the Parties	85
B.	Opinion of the Panel	86
3.	<i>The Commission's Determination with Respect to Price Depression</i>	86
4.	<i>The Commission's Determination with Respect to Price Suppression</i>	87

A.	Volume.....	88
B.	Domestic Capacity.....	89
C.	Period of Review.....	91
D.	Different Softwood Species	92
E.	Evidence of “Overselling”	94
F.	Cost of Goods Sold and Pricing Trends.....	95
G.	Questionnaire Responses	99
I.	WHETHER THE COMMISSION’S IMPACT ANALYSIS WAS SUPPORTED BY RECORD EVIDENCE AND IN ACCORDANCE WITH LAW.....	102
1.	<i>Background</i>	102
2.	<i>Statutory Indicia of Industry Performance</i>	103
A.	Arguments of the Parties	103
B.	Opinion of the Panel.....	105
J.	WHETHER THE COMMISSION IDENTIFIED A CAUSAL RELATIONSHIP BETWEEN SUBJECT IMPORTS AND THE PERFORMANCE OF THE U.S. INDUSTRY.....	112
1.	<i>Arguments of the Parties</i>	113
2.	<i>Opinion of the Panel</i>	114
VI.	ORDER OF THE PANEL	115

I. Introduction

This Binational Panel has been established pursuant to Article 1904.2 of the North American Free Trade Agreement (“NAFTA”) to review the Affirmative Final Injury Determinations of the U.S. International Trade Commission in the Antidumping and Countervailing Investigations of Softwood Lumber from Canada, published in 82 Fed. Reg. 61,587 (Dec. 28, 2017). On January 19, 2018, the Joint Canadian Parties; Resolute; Tembec Inc. and Eacom Timber Corp.; and West Fraser Mills Ltd. (collectively, “Can. Parties”, “Canadian Parties” or “Complainants”) filed a First Request for Panel Review of this determination with the United States Section of the NAFTA Secretariat pursuant to Article 1904 of the NAFTA. The other entities listed above filed Notices of Appearance and briefs before this Panel.

The Panel convened a hearing in Washington, D.C., on May 7, 2019, during which counsel for the parties appeared and participated in oral argument. The Parties filed preliminary motions for extension of time and modification of the briefing schedule, each of which the Panel granted at the start of its hearing and by this Order confirms.¹

The NAHB filed a Notice of Appearance and Motion for Leave to Participate as *Amicus Curiae* on April 21, 2018 in support of the Complaint of the Joint Canadian Parties. By Order of March 25, 2019, the Panel granted NAHB’s motion to participate as *amicus curiae* on the brief only.

In accordance with NAFTA Article 1904.8, for reasons more fully set forth in Section V below (which shall be controlling in the event of conflict), and based upon the evidence in the administrative record, the applicable law, the written submissions of the Parties,

¹ Notice of Motion to Correct Errata in Certificate of Service filed on behalf of Western Forest; Partial Consent Motion for Extension of Time to file R. 41 filed by ITC; Notice of Motion for leave to file out of time filed by ITC; Consent Motion for Extension of Time and Leave to File Out of Time filed on behalf of GOC; and Joint Motion for Modification of the Schedule for Filing Remaining Briefs filed on behalf of ITC.

and oral argument at the Panel's hearing, the Panel remands the Commission's determinations as follows:

- A. With respect to the Business Cycle and Conditions of Competition in Section V (C),
 - 1. The Panel remands this issue to the Commission and directs the Commission to reconsider the record evidence in relation to the business cycle(s) distinctive to the U.S. lumber industry, and to apply its findings in its analysis of volume, price effects, impact, and causation.
- B. With respect to the use of Post-Petition data in Section V (D) below,
 - 1. The Panel remands the Commission's decision to reduce the weight it accorded to interim 2017 data and directs the Commission to provide a reasoned determination on whether or not to reduce the weight accorded to interim 2017 data;
 - 2. The Panel directs the Commission to clarify whether or not it is also reducing the weight accorded to third- and fourth-quarter 2017 data.
 - 3. If, upon reconsideration, the Commission decides to reduce the weight given to post-petition data, the Commission is further directed to clarify what weight, if any, it is giving to post-petition data and the reasons for this determination.
- C. With respect to the Substitutability conclusions in Section V (F) below,
 - 1. the Panel remands the matter to the Commission, and directs it to

reconsider its calculation of substitution elasticity, explaining how it reached its conclusion and demonstrating how that conclusion was applied in the Commission's analysis of volume, price effects, impact, and causation; and

2. demonstrate how, and to what extent, the limitations to substitutability implied in its conclusion that the goods were "at least moderately substitutable" factored into the Commission's analysis of volume, price effects, impact, and causation.

D. With respect to the Volume analysis in Section V (G),

1. The Panel remands this determination to the Commission and directs the Commission to consider all record evidence to demonstrate how, and to what extent, the limitations to substitutability implied in its conclusion that the goods were "at least moderately substitutable" factored into its conclusion that subject imports experienced significant gains in market share directly at the expense of the domestic industry. The Panel directs the Commission to further reconsider its volume analysis as the Commission determines appropriate.

E. With respect to the Price Effects analysis in Section V (H):

1. As to the Domestic Capacity aspect of the price suppression analysis in paragraph (4)(b), the Panel remands this determination to the Commission and directs the Commission to consider whether to take the more recent Forest Economic Advisors ("FEA") data into account in its domestic capacity analysis, explain its decision, and, if it decides to take the updated FEA data into account, reconsider its price effects analysis as it determines is appropriate.

2. As to the Different Softwood Species aspect of the price suppression analysis in paragraph (4)(d), the Panel remands this determination to the Commission and directs the Commission to reconsider its conclusion that the prices of different species closely track each other to take into consideration that price movements of one species “affect” prices of other species, the existence of a “great difference in price movement” of one species compared to another, and that prices for different species “generally track” each other, as well as any other record evidence, and to determine what effect such reconsideration has on its price suppression analysis.
3. As to the Cost of Goods Sold (“COGS”) and Pricing Trends aspect of the price suppression issue in paragraph (4)(f), the Panel remands this determination to the Commission and directs the Commission to reconsider its COGS and price trends analysis to take into account the Commission’s finding that subject imports and domestic products are at least moderately substitutable, and determine what effect such reconsideration has on its finding that subject imports prevented price increases which otherwise would have occurred to a significant degree.
4. With respect to the Questionnaire Responses aspect of the price suppression analysis in paragraph (4)(g), the Panel remands this determination to the Commission and directs the Commission to reconsider the record evidence, its conclusion that purchasers confirmed purchasing subject imports rather than domestic product solely due to their lower prices, and to determine what effect such reconsideration has on its price suppression analysis.

F. With respect to the Impact issue in Section V (I),

1. We find that the Commission's finding of adverse impact is lawful and supported by substantial evidence in light of its determinations regarding post-petition data, substitutability, volume, price effects, and the business cycle, which have been remanded elsewhere in this decision. If, in any of these remands, the Commission reaches a different finding or conclusion on the particular issue, then the Panel directs the Commission to determine and explain what effect such reconsideration has on its impact analysis.

G. With respect to the Causation issue in Section V (J),

1. We find that the Commission's finding of causation is lawful and supported by substantial evidence in light of its determinations regarding volume, price effect, and impact. If, after reconsideration, the Commission reaches a different finding or conclusion on any of these issues, then the Panel directs the Commission to determine and explain what effect such reconsideration has on its causation analysis.

II. Background

On November 25, 2016, the COALITION concurrently filed with the Commission and the U.S. Department of Commerce's International Trade Administration ("Commerce") antidumping ("AD") and countervailing duty ("CVD") (collectively, "AD/CVD") petitions alleging that imports of Softwood Lumber from Canada were being sold at less than fair value, were subsidized by the Governments of Canada, and that such imports materially injured or threatened material injury to an industry in the United States.² Effective that

² Petition, PR 1.

same day, the Commission instituted preliminary phase AD/CVD investigations of imports of Softwood Lumber from Canada.³

On January 13, 2017, the Commission published its affirmative preliminary determinations.⁴ Thereafter, on April 28, 2017 (CVD), and June 30, 2017 (AD), Commerce published its affirmative preliminary determinations, establishing average cash deposit rates of 19.88 percent (CVD) and 6.87 percent (AD).⁵ Importers of softwood lumber from Canada into the United States were required to deposit these estimated duty amounts with the U.S. Customs and Border Protection to better ensure collection of the duties ultimately determined by Commerce.

As required by the CVD statute, 19 U.S.C. 1671b(d), effective August 26, 2017, Commerce ended the preliminary duties that had been in effect for 120 days, resulting in a lowering of the cash deposits required of importers from the combined AD/CVD rate to the AD rate alone.⁶ The CVD duties were not reimposed until the Commission published its final affirmative injury determinations on December 28, 2017 (the Parties refer to these four months as “the CVD gap period”).⁷

Commerce's final determinations were issued on November 8, 2017, finding final average CVD duties of 14.25 percent and final average AD duties of 6.58 percent.⁸ Each of these determinations has separately been challenged before NAFTA binational panels.⁹

³ 81 Fed. Reg. 87,069 (Dec. 2, 2016).

⁴ *Softwood Lumber Products from Canada, Lumber V*, Investigation Nos. 701-TA-566 and 731-TA-1342 (Preliminary), 82 Fed. Reg. 4418 (January 13, 2017).

⁵ 82 Fed. Reg. 19,657; 82 Fed. Reg. 29,833.

⁶ Commerce Memorandum Regarding Termination of Suspension of Liquidation, Aug. 29, 2017, Pub. Rec. 288.

⁷ 57(1) Brief of Can. Parties at 34.

⁸ 82 Fed. Reg. 51,814 and 51,806.

⁹ Panel Review Nos. USA-CDA-2017-1904-02 and USA-CDA-2017-1904-03.

The Commission's final determinations finding that the domestic lumber industry has been materially injured by reason of imports of softwood lumber from Canada determined by Commerce to be subsidized and dumped were published in the Federal Register on December 28, 2017.¹⁰

III. Statement of Issues

The Canadian Parties, Central Canada, Resolute, and Western assert the following errors on appeal (as excerpted from the parties' briefs):

1-10. Canadian Parties:

1. Whether the Commission acted contrary to law or without support of substantial evidence on the record by finding that the U.S. domestic softwood lumber industry, which has enjoyed unprecedented financial success during the period of the Commission's investigation, is experiencing current material injury by reason of softwood lumber from Canada?
2. Whether the Commission acted contrary to law or without support of substantial evidence on the record when it: (1) relied on an aberrational year (2014) as a benchmark for its analysis; (2) cited no record evidence to support its decision to discount interim 2017 data in its analysis; and (3) failed to address third- and fourth-quarter 2017 data at all in its analysis?
3. Whether the Commission acted contrary to law or without support of substantial evidence on the record by grounding its affirmative injury determination in periods covered by the 2006 SLA when the agreement expressly provides – with support from both the U.S. industry and the U.S. government – that it “remove(d)

¹⁰ Softwood Lumber Products from Canada: Determinations, 82 Fed. Reg. 61,587 (Int'l Trade Comm'n).

any alleged material injury or threat of material injury” under U.S. law while in effect?

4. Whether the Commission acted contrary to law or without support of substantial evidence on the record by failing to give any consideration to the 2006 SLA in its injury analysis, despite the Commission’s finding that the 2006 SLA is a “significant condition of competition”?
5. Whether the Commission acted contrary to law or without support of substantial evidence on the record by concluding that Canadian softwood lumber and U.S. softwood lumber are “at least moderately substitutable” when: (1) questionnaire responses and other record evidence demonstrate limited actual substitution between species; (2) the existing economic literature shows low elasticities of substitution between the species; and (3) the Joint Respondents’ expert economists produced an unrebutted report and identified published, peer-reviewed studies showing a range of elasticity well below the estimate of the Commission’s Staff, which was supported by no record evidence?
6. Whether the Commission further erred in analyzing the statutory injury factors based on the assumption that products from the two countries are perfectly fungible, notwithstanding the Commission’s own finding of “at least moderate substitutability”?
7. Whether the Commission acted contrary to law or without support of substantial evidence on the record in finding that softwood lumber from Canada had “significant” volume effects during the POI when the Commission failed to consider: (1) historical levels of softwood lumber volumes from Canada; (2) the apparent increase in imports from third countries during the POI; and (3) the effect of regional supply and demand issues?
8. Whether the Commission acted contrary to law or without support of substantial evidence on the record in finding that softwood lumber from Canada “prevented price increases . . . to a significant degree” during the POI when: (1) the

Commission ignored data from late in the POI that undermined its theory that prices for Canadian and U.S. product generally track one another; (2) the Commission's pricing data show that imports from Canada oversold U.S. shipments in 77.3 percent of price comparisons; and (3) the Commission relied on an unrepresentative smattering of questionnaire responses in support of its finding of price suppression?

9. Whether the Commission acted contrary to law or without support of substantial evidence on the record in concluding that the U.S. domestic industry is suffering adverse impact from Canadian softwood lumber when: (1) imports from Canada have not caused "significant" volume or price effects over the POI; (2) the industry as a whole has never performed better financially; (3) virtually all metrics for the domestic industry are trending upwards; and (4) any headwinds the domestic industry faces are not attributable to imports from Canada but rather domestic or other market factors, such as relatively scarce timber supply in the U.S. West?
10. Whether the Commission failed to develop or render its determination on the basis of an adequate record when it refused to adopt proposed modifications to its draft final questionnaires that would have elicited critical information on species preference and usage; and excluded [[]] companies from the definition of the "domestic industry," notwithstanding that no party requested such treatment and the Commission failed to analyze how [[]] accrued a substantial benefit from its importation of softwood lumber from Canada?

11-13 Central Canada:

11. Whether the ITC's finding that EWP is not a separate like product was not supported by substantial record evidence and was not otherwise in accordance with law when the Commission failed to investigate and collect the relevant data regarding EWP, including a list of EWP products sold in the United States, and pricing information when prompted to do so in comments to draft questionnaires.

12. Whether the ITC's finding that EWP is not a separate like product was not supported by substantial record evidence and was not otherwise in accordance with law when the record lacks any evidence that, during the applicable investigation period, EWP is sufficiently similar to the construction-grade softwood lumber that is the focus of the underlying investigation under the Commission's six factor test.
13. Whether the Commission erred by ignoring substantial evidence in the record establishing a clear bright line between appearance-grade lumber, such as EWP, and construction-grade lumber such as SPFSYP.

14-16. Western:

14. Whether the ITC's separate like product determination is supported by substantial evidence when the ITC failed to consider significant record evidence of bright line differences between Cedar/Redwood and structural, grade-stamped lumber.
15. Whether the ITC's separate like product determination is in accordance with law when the ITC failed to apply its previously used standard for like product analysis that permits some level of overlap between different products.
16. Whether the ITC's injury determination is supported by substantial evidence and is in accordance with law when, based on its unlawful finding that Cedar/Redwood is not a separate like product, the ITC failed to separately consider whether cedar imports from Canada harmed the domestic Cedar/Redwood industry.

17. Resolute:

17. The data the ITC collected for its investigation into whether unfairly traded imports of softwood lumber from Canada caused material injury to a domestic

industry portrayed an industry in nearly unprecedented prosperity. Yet the Commission found material injury.

The only way the Commission could make such a finding was by finding that the imposition of provisional measures following the petition yielded “a significant change in data.” The Commission asserted that higher prices in the United States for softwood lumber in 2017 were the product of the petition, provisional duties, and the investigation itself. It offered no evidence for this assertion because it had none. To the contrary, prices were way up after the export restrictions of the 2006 SLA had expired, and during the gap period interrupting duty deposit collections. According to the Commission, the industry’s prosperity depended upon restrictions and threats of restrictions on trade, yet in the absence of restrictions, the industry prospered perhaps more than ever before.

The industry could not control itself from boasting about its commercial success. Yet, the ITC ignored both the data and the pride of the industry. The Commission’s final determination was therefore unsupported by substantial evidence and contrary to law.

IV. Standard of Review

This Panel’s authority to review the Commission’s injury determination derives from Chapter 19 of the NAFTA. Pursuant to NAFTA Article 1904.3, “the Panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing party would otherwise apply to a review of a determination of the competent investigating authority.” When reviewing the determination of the investigating authority, the Panel must apply the standard of review and general legal principles established by the courts of that country.¹¹

¹¹ Annex 1911 of NAFTA.

In a NAFTA chapter 19 review, the Panel adjudicates in lieu of the United States Court of International Trade (“U.S. CIT” or “CIT”). The Panel is bound by the same precedent, substantive law, and standard of review as that Court. As a result, this Panel must apply the standard of review set out in § 516A(b)(1)(B) of the Tariff Act of 1930, which establishes that U.S. Courts “shall hold unlawful any determination, finding, or conclusion found...(1) to be unsupported by substantial evidence on the record, or (2) otherwise not in accordance with law.”¹²

An administrative agency’s determination must be supported by substantial evidence on the record considered as a whole. When reviewing whether an administrative agency’s determination was based on substantial evidence in the record, such review must be confined to “the (administrative) record...”¹³ More specifically, this Panel’s review must be limited to the “information presented to or obtained by (the Commission)...during the course of the administrative proceeding,...a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.”¹⁴ Therefore, such determinations can only be judged on the grounds and findings actually stated in the pertinent determination, not on the basis of any *post hoc* arguments or acts presented by counsel for the investigative agency.¹⁵ The agency’s decision must have a reasoned basis in the record.¹⁶

The substantial evidence standard requires “more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a

¹² 19 U.S.C. § 1516a(b)(1)(B)(i); see also NAFTA Annex 1911 “standard of review” (b).

¹³ 19 U.S.C. § 1516a(b)(2)(A).

¹⁴ *Id.*

¹⁵ See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (consideration of “what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate”); *USX Corp. v. Director, Office of Workers’ Comp. Progs.*, 978 F.2d 656, 658 (11th Cir. 1992) (no deference to agency’s litigating position absent prior interpretation).

¹⁶ *Dastech Int’l Inc. v. U.S. Int’l Trade Comm’n*, 963 F. Supp. 1220, 1222-23 (Ct. Int’l Trade 1997) (“The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia.”)

conclusion,” “when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the (agency’s) view.”¹⁷ Thus, the Panel must consider the ITC’s reasons for its conclusions and determine whether there is a rational connection between the facts found on the record and the determination made by the agency.¹⁸

Although the Agency enjoys broad discretion to select the correct methodology and to interpret the statute under which it operates, the Commission’s discretion is not unfettered. It must engage in reasoned decision-making as to all material facts and issues and must not leave the reviewing body to guess as to the Agency’s findings and reasons.¹⁹

Courts and binational panels must consider “the record in its entirety, including the body of evidence opposed to the (Agency’s) view.”²⁰ However, courts or binational panels are thus not enabled to “reweigh” the evidence or substitute their judgment for that of the original finder of fact.²¹ As stated by the Court of Appeals for the Federal Circuit:

A party challenging (an agency’s) determination under the substantial evidence standard has chosen a course with a high barrier to reversal. *Mitsubishi Heavy Indus., Ltd. v. United States*, 275 F.3d 1056, 1060 (Fed. Cir. 2001). We have explained that “even if it is possible to draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent (the) determination from being supported by substantial evidence.” *Amer. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001). Accordingly, the question for the Court of International Trade was, and for this court is “not whether we agree with

¹⁷ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

¹⁸ *Bando Chem. Indus. v. United States*, 16 Ct. Int’l Trade 133, 136-37, 787 F. Supp. 224, 227 (1992) (citing *Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974)).

¹⁹ *Greater Boston Television Corp. v. Fed. Comm’n’s Comm’n*, 444 F.2d 841, 851 (D.C. Cir. 1970).

²⁰ *Universal Camera*, *supra* note 17.

²¹ *Id.* at 488.

the . . . decision, nor whether we would have reached the same result . . . had the matter come before us for decision in the first instance.” (*United States Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed.Cir.1996)). Rather, “we must affirm (an agency’s) determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from the . . . conclusion. *Altx, Inc. v. United States*, 370 F.3d 1108, 1121 (Fed. Cir. 2004) (internal quotation marks omitted). In short, we do not make the determination; we merely vet the determination.”²²

Therefore, if the Commission’s determination is supported by the substantial evidence in the record, this Panel may not, “even as to matters not requiring expertise... displace the (Agency’s) choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.”²³

NAFTA Chapter 19 Panels must also follow the same standards of review and general legal principles followed by the U.S. courts when reviewing whether an administrative agency’s determination was in accordance with law.²⁴

The statute governing the burden of proof in the CIT provides, importantly, that

in any civil action commenced in the Court of International Trade under section 515, 516, or 516A of the Tariff Act of 1930, the decision of the Secretary of the Treasury, the administering authority, or the International Trade Commission is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision.²⁵

Moreover, the Panel must be aware that “the Commission need not address every piece of evidence presented by the parties; absent a showing to the contrary, the court

²² *Nippon Steel Corp. v. United States*, 458 F. 3d 1345, 1352 (Fed. Cir. 2006).

²³ *Universal Camera*, *supra* note 17 at 488.

²⁴ 19 U.S.C. § 1516a(b)(1)(B)(i); *see also* NAFTA Annex 1911.

²⁵ 28 U.S.C. § 2639(a)(1) (2018).

presumes that the Commission has considered all of the record evidence.”²⁶ To similar effect, “federal courts have consistently recognized that challengers must satisfy a high burden in order to rebut the presumption that agency officials have adequately considered the issues in making a final decision, including their reading and understanding of the record evidence.”²⁷

As the Canadian Parties remind us, these presumptions may be overcome; they are rebuttable by a clear showing that the matter presumed is incorrect.²⁸ For example, the CIT remanded to the Commission after finding that “regardless of any presumption in its favor, the Commission is in no way absolved . . . of its responsibility to explain or counter salient evidence that militates against its conclusions.”²⁹

The agency’s determination must not only be supported by substantial evidence, but will fail if it is “not otherwise in accordance with law.”³⁰ A Panel reviews the agency’s conclusions of law *de novo*, without deference.³¹ With respect to interpretations of the statutes under which it operates, the U.S. Supreme Court has established that, in the absence of a clear intent of Congress, federal courts must defer to the reasonable interpretation made by the agency charged with administration of a statute.³² Thus, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s determination is based on a permissible construction of the statute.³³

²⁶ *Siemens Energy, Inc. v. United States*, 992 F. Supp. 2d 1315, 1324 (Ct. Int’l Trade 2014), *aff’d* 806 F.3d 1367 (Fed. Cir. 2015).

²⁷ *Taiwan Semiconductor Industry Ass’n v. United States*, 105 F. Supp. 1363, 1367 (Ct. Int’l Trade 2000) (the presumption holds “in the absence of clear evidence to the contrary.”).

²⁸ 57(3) Reply Brief of Can. Parties at 10.

²⁹ *Usinor v. United States*, 26 CIT 767, 783 (Ct. Int’l Trade 2002).

³⁰ § 516A(b)(1)(B)(i) of the Tariff Act of 1930.

³¹ *Allegheny Ludlum Corp. v. United States*, 287 F. 3d 1365, 1369 (Fed. Cir. 2002).

³² *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

³³ *Id.* See also *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992) (the panel may not substitute its own judgment for that of the agency when there are two legitimate alternative views); *National R.R. Passenger Corp. v. Boston &*

The Canadian Parties also accurately point out that the Commission may not act arbitrarily, for example, by failing to engage in even handed decision-making, including not acting consistently with its past practice, unless it articulates a reasoned explanation for departing from that practice.³⁴

Accordingly in this matter, the Panel must uphold the determination of the Investigating Authority if it is supported by substantial evidence on the record and is not contrary to law, even if the Panel would have made a different determination had it been the initial trier of fact or interpreter of the statute. Nonetheless, the Panel need not defer to decisions premised on inadequate analysis or faulty reasoning that precludes meaningful Panel review.

V. Analysis

A. Whether the ITC's Determinations that (A) Cedar/Redwood and (B) Appearance-Grade Lumber, Including Eastern White Pine, are Not Separate Like Products from Structural Lumber are Supported by Substantial Evidence and In Accordance with Law

The Commission defined a single domestic like product consisting of softwood lumber coextensive with the scope of the investigations. The ITC thereby rejected WFP's argument that Cedar/Redwood is a separate like product and Central Canada's contention that Eastern White Pine ("EWP")—and appearance-grade lumber in general—are also separate like products.³⁵

Marine Corp., 503 U.S. 407, 417 (1992) (when considering whether or not a decision is "in accordance with law," the panel must defer "to reasonable interpretations by an agency of a statute that it administers..."); *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-620 (1966) ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.").

³⁴ 57(3) Reply Brief of Can. Parties at 15 (citing *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1328 (Fed. Cir. 2009)).

³⁵ Views of the Commission, Final at 12-21.

The statute defines the term “domestic like product” as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation.”³⁶ This definition of “like product” obviously leaves much to the discretion of the implementing authorities.³⁷

As noted by the ITC, the determination of the “like product(s)” by the Commission serves to delimit the subject of its injury investigation, because the governing statute defines the domestic industry whose injury parameters are being investigated as “producers as a whole of the domestic like product.”³⁸

The Commission’s practice in defining the like product(s) is to evaluate six factors: 1. Physical characteristics and end uses; 2. Interchangeability; 3. Channels of distribution; 4. Customer and producer perceptions of the product; 5. Common manufacturing facilities, production processes, and employees; and, where appropriate, 6. Price.³⁹ No single factor is dispositive and the Commission may consider other factors it deems relevant to the facts of a particular investigation.⁴⁰

In an investigation such as the present one, where domestic merchandise consists of a continuum or spectrum of similar products, the Commission considers the grouping as a whole to constitute the like product absent “clear dividing lines” between particular products in the group, disregarding minor variations among products.⁴¹ However, as

³⁶ 19 U.S.C. §1677(10).

³⁷ Marco Bronckers & Natalie McNelis, *Rethinking the Like Product Definition in WTO Antidumping Law*, 33 J. World Trade 73, 79 (1999).

³⁸ 57(2) Rebuttal Brief of ITC at 33; 19 U.S.C. § 1677(4)(A).

³⁹ *Nippon Steel Corp. v. United States*, 19 C.I.T. 450, 455 n.4 (1995).

⁴⁰ *Changzhou Trina Solar Energy Co., Ltd. v. U.S. Int’l Trade Comm’n*, 100 F. Supp.3d 1314, 1321 (Ct. Int’l Trade 2012).

⁴¹ 57(2) Rebuttal Brief of ITC at 34; *Hitachi Metals, Ltd. v. United States*, Consol. Ct. No. 17-00140, Slip Op. 18-137 at 6 (Ct. Int’l Trade 2018).

Western points out, “the ITC does not require a complete lack of overlap when considering the six factors.”⁴²

The determination of the domestic like product is a case-by-case factual determination as to which the courts accord the ITC substantial deference, noting that the Commission has “broad discretion in determining whether a particular difference or similarity is minor.”⁴³

1. Arguments of the Parties

A. Western Forest Products as to Cedar/Redwood

Western states that cedar/redwood, consisting mostly of Western Red Cedar,⁴⁴ is rarely used in construction because it is not like the structural, grade-stamped lumber that is the focus of the ITC’s investigation: it is not structurally strong and building codes do not allow such use. Cedar/redwood, Western contends, is a premium *appearance* product used almost exclusively as outdoor, high-end decorative products priced substantially above structural species such as Spruce-Pine-Fir (“SPF”) and Southern Yellow Pine (“SYP”).⁴⁵ Cedar/redwood’s higher price has been stable for a substantial period, unlike structural lumber, establishing to Western that it operates in a separate market as a separate like product.⁴⁶

⁴² 57(1) Brief at 10; *NEC Corp. v. DOC & ITC*, 36 F. Supp. 2d 380 (Ct. Int’l Trade 1998) (*aff’g* ITC’s separate like product determination for vector and non-vector computers despite overlap in several factors).

⁴³ *NEC Corp. supra* note 42 at 384.

⁴⁴ In the preliminary investigation, WFP argued that Western Red Cedar is a separate like product, a contention that the Commission rejected in finding a single like product. For the final investigation, Western modified its argument in a timely manner to contend that the broader category of Cedar/Redwood is a separate like product. Views of the Commission, Final at 10; Preliminary at 12-16.

⁴⁵ 57(1) Brief of Western at 6-7.

⁴⁶ *Id.* at 8.

Western claims that the ITC overlooked “specific and robust” evidence that Cedar/Redwood is a separate like product, including numerous questionnaire responses from U.S. Cedar/Redwood producers and importers, as well as several industry publications, all of which agreed that Cedar/Redwood occupies a distinct product grouping in price, processing methods, and employee skill, as well as channels of distribution. Although, according to Western, the Commission pointed to isolated bits of information in the record that showed overlap with other softwood lumber in arriving at “its ill-founded conclusion,” the Agency failed to consider the “the bulk of the record” as a whole, including—as required—record evidence that fairly detracts from its conclusions.⁴⁷

The Commission contends that Western presents a selective view of the evidence, concentrating on softwood lumber purchasers and omitting responses of U.S. producers and importers, which, the ITC claims, “show a more mixed response on the comparability of cedar/redwood with other softwood products.”⁴⁸

Regarding physical characteristics and uses, the Commission found that cedar/redwood has several physical characteristics that may distinguish types of cedars and redwood from each other and from all other softwood lumber products, including coloring, fragrance, and natural insect resistance.⁴⁹ As to end uses, the ITC finds that cedar/redwood lumber is not used as a framing lumber in general construction, unlike other softwood lumber. It has “a superior appearance, making it suitable” for a variety of non-structural uses, so the grading process for appearance grade lumber, including cedar/redwood, is different from other lumber that is “generally graded on characteristics such as strength, durability, utility, and/or appearance.” The Commission goes on to state that, “nevertheless, many softwood lumber species also have higher-

⁴⁷ 57(1) Brief of Western at 9; 57(3) Reply Brief of Western at 5 (citing *Shijiazhuang Goodman v. United States*, 172 F. Supp. 3d 1363, 1374 (Ct. Int’l Trade 2016)).

⁴⁸ 57(2) Rebuttal Brief of ITC at 39 (citing the Confidential Staff Report at Table I-5 (CD564)).

⁴⁹ Views of the Commission, Final at 13-14.

end appearance grades in addition to lower structural/strength grades,” citing as an example SYP in grades Nos. 1 and 2 Prime, which are recommended where appearance *and* strength are prime considerations.⁵⁰

The Commission applies this same counter argument with respect to the five other like-product factors--interchangeability; manufacturing facilities, production processes, and employees; channels of distribution; producer and customer perceptions; and price. In each case, Western offers a strong opposing view of the manner in which the ITC treated the voluminous evidence it had gathered during the final investigation.⁵¹

As the ITC’s Brief points out, the Commission acknowledged that the evidence was mixed, but found that, after considering the evidence as to each of the six like-product factors, on balance, there was not a clear dividing line between cedar/redwood and other softwood lumber.⁵² In Western’s view, “the record includes substantial evidence of bright line differences... The ITC acknowledged some of these differences, but for each factor, disqualified the differences because of one or two indicators of minor or superficial overlap. . .”⁵³

B. Central Canada as to Eastern White Pine and Appearance Grade Lumber

Central Canada raises two principal arguments. First, that the Commission ignored its comments on the draft final questionnaires requesting the Agency to gather information that would prove that EWP is a separate like product from other softwood lumber. Second, that the ITC has misapplied four of the six factors in arriving at its conclusion

⁵⁰ Exh. 50 to Petitioners’ Post-hearing Brief; Views of the Commission, Final at 14 (citing AMERICAN SOFTWOODS (2015), *Pressure-Treated Southern Yellow Pine*).

⁵¹ See 57(1) Brief of WFP at 19 (end uses), 22-23 (interchangeability), 25-27 (channels of distribution), 30-32 (producer and customer perceptions), and 39-40 (price, as to which the ITC mostly agrees that cedar/redwood shows differences from other softwood products).

⁵² 57(2) Rebuttal Brief of ITC at 38.

⁵³ 57(1) Brief of WFP at 44.

that EWP is not a separate like product from the structural grade lumber that is the focus of the investigation.

As to the first issue, Central Canada's comments on the draft final questionnaires were entitled "Distinct Like Products: Species, Grade, and Price," and asked the Commission to collect information from producers of EWP detailing the "products they produce with EWP and, for the Canadian producers, which of those products they export to the United States . . . and the prices at which they sell these EWP products in the United States."⁵⁴ These comments followed its request and arguments during the preliminary phase that EWP be treated as a separate like product. The Central Canada group had, in fact, raised the same claim for separate like-product treatment for the broader product group of White Pine using similar arguments in the 2002 *Lumber IV* case ("*Lumber IV*").⁵⁵

The request by Central that the Commission gather additional information for its final determination was a response to what it viewed as the Agency's insufficient record in the Preliminary Determination. In that determination, the ITC used information admitted into the record of the present case from its *Lumber IV* investigation in situations where the evidence gathered for the present case was deficient.⁵⁶ The ITC found, nonetheless, that there were both similarities and differences as to physical characteristics and uses; that there were similarities as to interchangeability, manufacturing facilities, production processes, and employees; similarities as to

⁵⁴ WFP explains that "(t)his subset of questions will enable the Commission to recognize products that do not compete with products in the United States and that are sold at prices that would prevent them from being substitutable with the subject merchandise (construction-grade softwood lumber). All such products would be distinct from the subject merchandise and recognized as not intentionally included by the petition; 57(1) Brief of Can. Parties at 6.

⁵⁵ Views of the Commission, Final at 19, n. 50; Views of the Commission, Preliminary at 12-14.

⁵⁶ 57(2) Rebuttal Brief of ITC at 57; Views of the Commission, Preliminary at 10, n. 26.

channels of distribution; differences as to customer and producer perceptions; and differences as to price.⁵⁷

Central Canada argues that the Commission's failure to gather the requested information for the Final Determination renders its like product decision defective, arguing that because the requested questions were not added to the final questionnaires, "the Commission found no new information to question its Preliminary finding."⁵⁸

The Commission argues before the Panel that Central Canada's comments on the draft final questionnaires went "to the question of the substitutability of subject imports with the domestic product, not to the question of how to define the domestic like product. Central Canada did not ask the Commission to collect six-factor information. . . The only arguable piece of like product-related information that Central Canada asked the Commission to collect was price information for EWP . . . that would be applicable to other aspects of the Commission's analysis, such as the price effects analysis."⁵⁹

Central Canada also complains that, in addition to disregarding its request that the Agency gather additional information for its final determination, the ITC also ignored relevant evidence already in the record that supports a clear dividing line between EWP—and other appearance-grade lumber—and construction-grade lumber.

With respect to physical characteristics and uses, Central Canada cites to the Commission's own brief to support its contention that EWP is substantially different as to physical characteristics and end uses. The Commission's counsel noted that the Agency found EWP to be a lightweight softwood used for furniture, toys, window

⁵⁷ Views of the Commission, Preliminary at 16-20.

⁵⁸ 57(3) Brief of Central Canada at 13.

⁵⁹ 57(2) Rebuttal Brief of ITC at 37.

frames, and other items that do not bear substantial loads.⁶⁰ The Commission notes that other softwoods, such as sugar and ponderosa pine, have similar end uses.⁶¹

Central notes. . . (that) Western Pines are also species, like EWP, that are appearance grade, not structural lumber.⁶² Rather than “ignoring or downplaying the evidence of overlapping uses,” as argued by the Commission,⁶³ Central Canada has pointed out EWP’s overwhelming differences in physical characteristics and uses from the softwood lumber that is the focus of the underlying proceeding, differences that the Commission itself has documented in its Final Views and Rule 57(2) brief.⁶⁴

In this regard, Central Canada noted that the Commission recognized in its Preliminary Views that “the cost and physical characteristics of white pine may make it unsuitable for the general construction uses of other softwood lumber species such as sugar pine, ponderosa pine, and Idaho pine.”⁶⁵

In terms of interchangeability, Central Canada sees no serious dispute.⁶⁶ The Commission recognizes that, while most softwood lumber is used in general structural construction, EWP’s softness, fairly low resistance to impact, appearance, and weakness make it unsuitable for such use and instead particularly suited for use as window sashes and frames, molding and millwork, doors, cabinetwork, shelving, and other items that require dimensional stability but do not bear substantial loads.⁶⁷

The ITC argues, however, that the Commission’s further finding that such softwood lumber products can also be made from sugar pine, ponderosa pine, Idaho pine, and

⁶⁰ *Id.* at 57.

⁶¹ *Id.* at 58.

⁶² 57(3) Brief of Central Canada at 15.

⁶³ 57(2) Rebuttal Brief of ITC at 58.

⁶⁴ 57(3) Brief of Central Canada at 15.

⁶⁵ Views of the Commission, Preliminary at 16-17.

⁶⁶ 57(3) Brief of Central Canada at 16.

⁶⁷ Views of the Commission, Preliminary at 18-19.

spruce shows the similarities between these species and white pine.⁶⁸ Central Canada does not dispute that EWP could be interchangeable with other *appearance grade* products.⁶⁹ To this argument, the Commission responds that Central Canada failed to make a timely request that the Agency consider whether *appearance grade* lumber should be treated as a separate like product. Central Canada calls this claim “demonstrably false,” and details a series of interactions with the Commission beginning soon after the petitions were filed. In Central Canada’s view, it was advocating before the Agency for separate like product treatment of appearance grade lumber such as EWP and the Western Pines, citing to the OFIA Post-Conference Brief.⁷⁰

As to channels of distribution, there is very little actual evidence. Other than the unsupported statement by the COALITION (“COALITION” or “Petitioner”) that EWP and other softwood lumber are distributed in the same manner, and the unsupported argument from Central Canada that EWP is most often delivered directly to furniture, window, and other specialty product manufacturers, whereas softwood lumber is delivered to retailers or distribution centers, the data consists of a table prepared by the Commission (during *Lumber IV*) from responses to questionnaires.⁷¹

Using this table, Central Canada notes that more than 73 percent of white pine is distributed through wholesalers/distributors, whereas only 40 percent of other softwood lumber trades through that channel. Moreover, nearly 10 percent of softwood lumber is distributed through what the Commission’s chart designates as “pro-builder outlets,” while no white pine was sold through that distribution channel. Central Canada concludes from this information that “the Commission’s own evidence does not support a finding that EWP and other softwood lumber have similar distribution channels.”⁷² The

⁶⁸ 57(2) Rebuttal Brief of ITC at 59; Views of the Commission, Preliminary at 18-19.

⁶⁹ 57(3) Brief of Central Canada at 16-17.

⁷⁰ OFIA Post-Conference Brief (Dec. 21, 2016) at 2, P.R. 63; Transcript of Hearing at 195, P.R. 346 (Sept. 12, 2017); Central Canada’s Comments on Draft Questionnaires for the Final Phase (June 9, 2017), P.R. 139.

⁷¹ 57(2) Rebuttal Brief of ITC at 60, n. 228, citing Table II-1, and Views of the Commission, Preliminary, at 18 & n.66.

⁷² 57(3) Brief of Central Canada at 17.

Commission's only findings on channels of distribution is that EWP is more frequently sold through wholesalers/distributors than is softwood lumber generally (73 percent vs. 40 percent) and that "there is no information in the record that distribution patterns for domestically produced EWP products have changed materially since *Lumber IV*," where the ITC, despite the 30 percent greater distribution of EWP through wholesalers/distributors and the fact that 10 percent of other softwood lumber is distributed through pro-builder outlets where EWP is absent, found similarities between EWP and other species of softwood lumber in terms of channels of distribution.⁷³

As to manufacturing facilities, production processes, and employees, the Commission found that no evidence undercut the record in *Lumber IV*, which "demonstrated that the same or similar production facilities, equipment, and employees were used for white pine lumber production as for other softwood lumber."⁷⁴ The Commission admits that "there is some evidence, however, that the production process for EWP lumber as well as other premium products is more labor-intensive than other softwood lumber."⁷⁵

With regard to customer and producer expectations and price, the ITC acknowledges that "the Commission found that there are differences between EWP and other softwood lumber in terms of customer and producer perceptions and price."⁷⁶

⁷³ Views of the Commission, Preliminary at 18 & n. 66; *Softwood Lumber from Canada*, Inv. Nos. 701-TA-414 and 731-928 (Final), USITC Pub. 3942 (May 2002) ("*Lumber IV*") (*internal citations omitted*). "Information from Commission questionnaire responses indicates that 40.3 percent of shipments of U.S. produced softwood lumber was distributed through wholesaler/distributor channels in 2001 compared to 73.2 percent of domestically produced white pine lumber. CR/PR at Table 11-1. The retailers' channel was the second most used channel of distribution for white pine, accounting for 18.9 percent of shipments of U.S. produced white pine lumber, and third ranked channel used for softwood lumber, accounting for 15.1 percent in 2001." *Lumber IV* at 12, n. 50. From this data, the Commission concluded that "{t}he data from Commission questionnaire responses indicate that wholesalers/distributors are the largest channel of distribution for both white pine and all softwood lumber." *Lumber IV* at 12.

⁷⁴ Views of the Commission, Preliminary, at 17-18.

⁷⁵ USITC Pub. 3509 at 12 and I-28 (citing CR at I-31; PR at I-22; Conf. Tr. at 147, and OFIA's Post conference Brief at 9-12).

⁷⁶ 57(2) Rebuttal Brief of ITC at 57, n. 214 (citing Views of the Commission, Preliminary, at 19-20).

In its brief, the Agency argued that Central Canada “tried to rehash its arguments from *Lumber IV*” and pointed out that “the Commission had the discretion to give weight to evidence from *Lumber IV* that was submitted to the record of these investigations, to the extent the information was still accurate.”⁷⁷

2. Opinion of the Panel

The imported articles under investigation are harvested from about two dozen different “softwood” species of cone-bearing trees, such as the pines, spruces, firs, larches, hemlocks, and cedars.⁷⁸ The softwood lumber covered by the scope of the investigation includes a wide range of products, from siding, flooring, boards, planks, timbers, landscaping ties, shims, fence pickets, and bed-frame components to studs and dimensional lumber (“2x4s,” for example). The latter two items are used predominantly in structural construction applications and comprise the great majority of the imported merchandise under investigation.⁷⁹

Members of the U.S. softwood lumber industry have contested the consistency of Canadian lumber imports with U.S. antidumping and countervailing duty AD/CVD laws for 40 years with four prior cases (the present case is *Lumber V*), in each of which the Commission has determined that the imported merchandise consists of a single domestic like product coextensive with the scope of the investigation, that is, that none of these wide-ranging species and products describes a clear dividing line from other softwood lumber.⁸⁰

⁷⁷ *Id.* at 57, n. 213.

⁷⁸ Staff Report at I-21, ns. 48-50.

⁷⁹ Staff Report at I-22 (Aug. 28, 2017).

⁸⁰ Views of the Commission, Final, at 9; 57(1) Brief of Can. Parties at 2.

As discussed in Section IV above, ITC decisions are presumed to be correct and, as the factual findings of an expert tribunal, are entitled to a considerable degree of deference. In addition, “(t)he substantial evidence standard takes into account that where a record is large and complex, a decision maker necessarily makes judgments as to which facts are most significant.”⁸¹

The determination of the domestic product(s) that is “like” the imported articles under investigation, as with some other Commission determinations, involves the weighing and balancing of voluminous, and often conflicting, evidence with respect to several factors, making the decision to some degree subjective in nature and, thus, even less amenable to exacting judicial oversight. Moreover, the Congress has made clear that it approves of this narrow judicial review by leaving in place C.I.T. decisions such as that in *NEC Corp. v. Dept. of Commerce & ITC*,⁸² which held that the ITC is vested with broad discretion in determining whether a particular difference or similarity in its six-factor test is minor when performing its “like product” analysis: “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.”⁸³

As to Cedar/redwood

Having expressly requested in its comments on the final draft questionnaires that the ITC gather further information on the six factors, WFP’s concern with the ITC’s like product finding is solely whether the Agency properly weighed the results of that further inquiry and other evidence of record.⁸⁴

⁸¹ 57(2) Rebuttal Brief of ITC at 27 (citing *Copperweld Corp. v. United States*, 12 C.I.T. 148, 156, 682 F. Supp. 552, 562 (1988) (quoting S. Rep. No. 96-249 at 88: “neither the presence nor the absence of any factor . . . can necessarily give decisive guidance with respect to whether an industry is materially injured, and the significance to be assigned to a particular factor is for the ITC to decide.”))

⁸² *NEC Corp.* *supra* note 42.

⁸³ *Id.* at 384.

⁸⁴ See 57(2) Rebuttal Brief of ITC at 38.

As to physical characteristics and uses, the Commission found the evidence to be mixed. The physical characteristics leaned toward differences between cedar/redwood and other softwood lumber. As to end uses, while cedar/redwood is not used for structural applications and generally is found in high-end exterior applications and specialty products favoring its superior appearance, the ITC found that other species of softwood lumber are used in some of the same applications, such as decks, fencing, and siding.⁸⁵

Much of the disagreement between Western and the Commission involves interpretation of questionnaire responses by lumber purchasers, importers, and U.S. producers. For example, the Parties disagree whether an answer that the two kinds of lumber are “somewhat comparable” means they are only a “little” comparable or “more or less” comparable.⁸⁶ The Panel views this type of disagreement as one that falls squarely within the description of “weighing” of the evidence, a task forbidden to the reviewing court or panel.⁸⁷

With regard to interchangeability, the same disagreement arises as to the meaning of “somewhat” interchangeable in the questionnaire responses. In addition, the Agency and Western offer different interpretations of an undergraduate paper studying decking.⁸⁸ Again, these are the types of disputes that the courts leave to the expert Agency to assess.

On channels of distribution, the Commission points out that there is no disagreement that marketing channels are similar for cedar/redwood and other softwood lumber.⁸⁹ Western’s argument here is that distribution of cedar/redwood has a different *focus*—on specially trained distributors—that provides the clear dividing line between

⁸⁵ *Id.* at 41-42.

⁸⁶ *Id.* at 42.

⁸⁷ *United States Steel Group v. United States*, 96 F.3d 1352, 1357, 1362-65 (Fed. Cir. 1996).

⁸⁸ 57(2) Rebuttal Brief of ITC at 45-46.

⁸⁹ *Id.* at 47.

cedar/redwood and other softwood lumber.⁹⁰ It is the task of the Commission, not the Panel, to decide what weight such a subjective qualifier as a particular *focus* provides to the finding of a clear dividing line.

Even with respect to producer and customer perceptions, despite the fact that cedar/redwood's price and physical characteristics often result in the perception that cedar/redwood is a high-end specialty product, the Agency finds that other types of premium softwood products that have been treated in order better to withstand the elements are viewed "by many customers as non-premium alternatives to cedar/redwood for decking and fencing applications."⁹¹ On balance, however, the Commission found that "this factor showed *differences* between cedar/redwood and other softwood lumber." While Western disagrees with particular findings in respect of this factor, overall the two Parties are in agreement on the conclusion.

In respect of manufacturing facilities, production processes, and employees, Western's argument is that, although cedar/redwood is produced in the same facilities, using similar production processes, and by the same employees, production of cedar/redwood is substantially more labor-intensive. The focus, WFP notes, is on value, not volume, with plastic-coated chains, handling by expert graders, and highly-trained sawyers.⁹² As the ITC notes, there is little disagreement on the facts in respect of this factor; the difference is on the weight accorded to the similarities in manufacturing facilities, production processes, and employees, and the differences in labor intensiveness. This is not a disagreement that the Panel may resolve without weighing the importance to the overall factors of the value component.

Finally, with respect to price, there is substantial agreement between the ITC and Western that cedar/redwood follows different pricing trends and is sold at a premium. Nonetheless, the Commission also finds that EWP and old-growth Douglas Fir sell at

⁹⁰ 57(1) Brief of WFP at 27.

⁹¹ 57(2) Rebuttal Brief of ITC at 49.

⁹² *Id.* at 34-36.

the higher end of the price spectrum. Western's answer here is that the similarity in pricing of these two other softwood types is overwhelmed by the differences in pricing of cedar/redwood.⁹³

The Commission did not deem the evidence sufficient to support a finding of clear dividing lines between cedar/redwood and other softwood lumber. For the reasons stated, the Panel finds that this conclusion is supported by substantial evidence of record and is in accordance with law.

Eastern White Pine, White Pine, Appearance-Grade Softwood Lumber Products

Even if the Commission might have been on notice that the comments directed by Central Canada to the draft final questionnaire were aimed at establishing EWP as a separate like product, the ITC is correct that Central Canada's comments stood in stark contrast to those of WFP (as to cedar/redwood), which "specifically ask(ed) the Commission to collect (six-factor) information related to the domestic like product determination."⁹⁴ In the midst of a complex investigation such as the present one, we understand the reason that the ITC requires Parties to be specific as to what further information is required, and why that is so.⁹⁵ Central Canada's comments on the draft final questionnaires left much to be desired in this respect, including why it was necessary for questionnaire respondents to bear the additional burden of answering separate inquiries as to EWP.

Nonetheless, the Commission had gathered extensive six-factor information central to the EWP like product issue in the four prior investigations of softwood lumber from Canada and in the preliminary phase of the present investigations; the ITC found "the Commission's prior like product findings useful in our analysis in these investigations."⁹⁶ Given this extensive record, we cannot conclude, as has Central Canada, that the

⁹³ 57(1) Brief of WFP at 52.

⁹⁴ See 57(2) Brief of ITC at 37.

⁹⁵ See 19 C.F. R. 207.20(b); 57(2) Brief of ITC at 66.

⁹⁶ Views of the Commission, Preliminary at 10, n. 26.

Agency “failed to act in accordance with its governing statutes and rules (by) not develop(ing) the evidence as it was required to do, and therefore could not base its final determination on substantial evidence in the record.”⁹⁷ In this instance, although we do not understand why the Commission chose not to ask Central Canada its intent in making the admittedly confusing comments on final draft questionnaires, the existence of other, useful, six-factor information in the record regarding EWP and White Pine renders Central’s complaint about insufficient evidence unavailing.

As to physical characteristics and end uses, EWP’s lower resistance to impact and lower strength-to-weight ratio make it unsuitable for strength applications and better suited for furniture, toys, floors, and cabinetry.⁹⁸ However, even though structural lumber represents the majority of the softwood lumber imported from Canada,⁹⁹ the question is not whether EWP is like studs and 2x4s, but whether EWP is like any of the species or products of softwood lumber that are within the continuum of domestically-produced softwood lumber. The Commission answers this question in the affirmative, finding that EWP has overlapping end uses with the Western Pines (sugar pine, ponderosa pine, and Idaho pine).¹⁰⁰ Central Canada’s retort is that the Western Pines are also appearance-grade, not structural, lumber.¹⁰¹ We determine that the Commission’s finding—that Central failed to raise on a timely basis the question whether appearance-grade lumber is a separate like product—is based on substantial evidence and is in accordance with law.

In respect of interchangeability, the Commission takes the same approach as with physical characteristics and uses (and, incidentally, with respect to Cedar/Redwood). After agreeing with Central Canada that EWP’s softness, appearance, and weakness make it unsuitable for structural use, the Commission points out that other softwood lumber products, such as spruce, Idaho pine, ponderosa pine, and sugar pine can also

⁹⁷ 57(3) Brief of Central Canada at 13.

⁹⁸ Views of the Commission, Preliminary at 16-17.

⁹⁹ Staff Report at I-22.

¹⁰⁰ Views of the Commission, Preliminary at 16-17.

¹⁰¹ 57(3) Brief of Central Canada at 15.

be used for the molding, millwork, and shelving products to which EWP is primarily directed. Thus, the Agency concludes, EWP is similar in terms of interchangeability to other softwood lumber products.¹⁰²

Central Canada's argument that these other lumber species are appearance-grade lumber, as in EWP, must meet the same fate as in the case of physical characteristics and uses, that is, Central failed to make its case--that all appearance-grade lumber should be a separate domestic like product--on a timely basis.

With respect to channels of distribution, we are presented with minimal explanation of the ITC's reasoning in concluding that the similarities outweigh the differences in the distribution patterns of EWP as compared with other softwood lumber. Central Canada as much as concedes that it failed to support its claims in this respect (for example, that EWP is "most often delivered directly to furniture, window, and other specialty product manufacturers") with additional evidence, instead relying on the interpretation of data collected by the Commission 17 years ago in *Lumber IV*.¹⁰³ More specific six-factor comments on the ITC's draft final questionnaires might have remedied the limited data in this respect.

To find error in the Commission's conclusion here would require the Panel to determine whether the seemingly substantial differences in the *Lumber IV* chart reproduced in the ITC's 57(2) Brief,¹⁰⁴ (30 percent more "other softwood lumber" than EWP distributed through wholesalers/distributors) outweigh the similarities shown by that chart (40 percent of both EWP and other softwood lumber distributed to wholesalers/distributors); and whether, in any event, accounting for the other five factors would change the result. As explained in the Standard of Review Section IV above, re-weighting evidence is not an action within the Panel's purview.

¹⁰² Views of the Commission, Preliminary at 18-19.

¹⁰³ 57(2) Brief of Central Canada at 17; see 57(2) Rebuttal Brief of ITC at 60-62.

¹⁰⁴ 57(2) Rebuttal Brief of ITC at 60-61, n. 228.

As to manufacturing facilities, production processes, and employees, the Agency and Central Canada hardly could disagree more. The ITC cites to *Lumber IV* for the proposition that “the same or similar production facilities, equipment, and employees were used for white pine lumber production as for other softwood lumber.”¹⁰⁵ Central Canada counters that there is no evidence in the present record that EWP and other softwood lumber are even produced in the same mills, much less with the same equipment or the same employees.¹⁰⁶

In this regard, the Commission in *Lumber IV* cited to the fact that “of the eight producers reporting that they produced white pine lumber, four produced both white pine lumber and other softwood lumber, and four produced only white pine lumber.”¹⁰⁷ Central Canada replies that the Northeast Lumber Manufacturer’s website shows extremely limited overlap between companies that produce EWP and those that produce SPF lumber.¹⁰⁸

This conflicting interpretation of the evidence of record continues as to the respective size of EWP and dimensional lumber mills, the expertise required of EWP versus dimensional lumber sawyers, and other aspects of lumber production. The Commission concedes only that there is some evidence that the production process for EWP, as well as for other premium lumber products, is more labor intensive than for other softwood lumber.

Although we believe that Central Canada’s position may be more logical than the Agency’s in regard to this factor, we may reach this point only by according greater weight to some evidence than did the Commission. As noted, we may not as a Panel take this fact-finding role from the expert Agency.

¹⁰⁵ Views of the Commission, Preliminary at 17-18.

¹⁰⁶ 57(3) Brief of Central Canada at 18 & n. 30.

¹⁰⁷ *Lumber IV* Final at 12.

¹⁰⁸ 57(3) Brief of Central Canada at 19. In its brief, the Agency faults Central Canada’s use of this website because the website also includes two additional species that it suggests could have been produced in the same mills as those producing EWP. 57(2) Rebuttal Brief of ITC at 63.

Regarding price and customer and producer expectations and preferences, as noted, the Commission agrees with Central that there are differences in these two factors between EWP and other softwood lumber.

Accordingly, in light of the Commission's considerable discretion to determine the domestic like product and its careful analysis of the evidence as to the six like-product factors, we find that the Commission's conclusion that there are not clear dividing lines between cedar/redwood and the numerous species and products that comprise the range of softwood lumber products, nor between EWP and such other species and products, is supported by substantial evidence on the record and in accordance with law.

B. Whether the Commission's Exclusion of [[]] and [[]] from its Definition of the Domestic Industry is Supported by Substantial Evidence and Otherwise in Accordance with Law

1. Arguments of the Parties

The Canadian Parties argue that the Commission's definition of the domestic industry is unsupported by substantial evidence and is otherwise not in accordance with law because the Commission determined, on its own initiative, to exclude both [[]] and [[]] from the domestic industry.¹⁰⁹ Although the Canadian Parties acknowledge that the Commission has the statutory power to exclude a producer from the domestic industry in appropriate circumstances, the Canadian Parties emphasize that the U.S. CIT has recognized that "(t)he most significant factor considered by the Commission in making the 'appropriate circumstances' determination is whether the domestic producer accrued a substantial benefit from its importation of the subject merchandise."¹¹⁰ The

¹⁰⁹ 57(1) Brief of Can. Parties at 193.

¹¹⁰ *Id.* at n. 664 (citing *Allied Mineral Prod. Inc. v. United States*, 28 C.I.T. 1861, 1864 (2004), citing *Empire Plow Co. Inc. v. United States*, 11 C.I.T. 847, 675 F. Supp. 1348, 1353 (Ct. Int'l Trade 1987)).

Canadian Parties argue that the Commission's decision to exclude both [[]] and [[]] from the domestic industry was done without any real analysis of how either company accrued a substantial benefit from importation.¹¹¹

In response, the Commission affirms that the exclusion of producers is within the Commission's discretion based on the facts presented in each case and that the Commission generally examines five factors in exercising such discretion:

- (1) the percentage of domestic production attributable to the importing producer;
- (2) the reason the U.S. producer has decided to import the product subject to investigation (whether to benefit from unfair trade practice or to enable them to continue production and compete in the domestic market);
- (3) whether inclusion or exclusion of the importing producer will skew the data for the rest of the industry;
- (4) the ratio of import shipments to U.S. production for the importing producer; and
- (5) whether the primary interest of the importing producer lies in domestic production or importation.¹¹²

The Commission relies on *Changzhou Trina Solar Energy Co., Ltd.*, in which the U.S. CIT affirmed that the Commission is not required to make findings as to each specific factor.¹¹³ In the Commission's view, the Canadian Parties do not suggest that the

¹¹¹ 57(1) Brief of Can. Parties at 193-194.

¹¹² 57(2) Rebuttal Brief of ITC at 72; see also Conf. Views at 22 n. 59.

¹¹³ 57(2) Rebuttal Brief of ITC at 72 (citing *Changzhou Trina Solar Energy Co. Ltd. v. United States Int'l Trade Comm'n*, 100 F. Supp. 3d 1314, 1329 (Ct. Int'l Trade 2015)).

Commission applied the wrong factors and are effectively asking the Panel to reweigh the Evidence.¹¹⁴

2. Opinion of the Panel

The Panel recalls that Section 771(4)(B) of the *Tariff Act of 1930*¹¹⁵ provides that “(i) (if a producer of a domestic like product and an exporter or importer of the subject merchandise are related parties ... the producer may, in appropriate circumstances, be excluded from the industry.” The Commission found that [[]] and [[]] are related parties and the Canadian Parties do not challenge this finding. The Commission referenced the five primary factors that it examines¹¹⁶ in making this determination, then determined there were “appropriate circumstances” for exclusion. With respect to [[]], the Commission found that a consistently large volume of imports (both quantitatively and relative to [[]] domestic production) indicates that [[]] “principal interest lies in importation rather than in domestic production.”¹¹⁷ With respect to [[]], the Commission found that, based on the large ratio of [[]] imports relative to its domestic production, “its principal interest lies in importation rather than in domestic production.”¹¹⁸ Accordingly, for both companies, the Commission relied on evidence of a high ratio of import shipments to U.S. production and found that the primary interest of the importing producer lies in importation rather than domestic production.

The Canadian Parties argue that the Commission's analysis is flawed because it failed to analyze whether either company accrued a substantial benefit from importation.¹¹⁹ To that end, the Canadian Parties point to facts suggesting there were no such benefits.¹²⁰

¹¹⁴ *Id.* at 73.

¹¹⁵ 19 U.S.C. § 1677(4)(B) (2019).

¹¹⁶ Conf. Views of the Commission, Final, at 22 n. 59.

¹¹⁷ *Id.* at 25.

¹¹⁸ *Id.* at 26.

¹¹⁹ 57(1) Brief of Can. Parties at 193-194.

¹²⁰ *Id.* at 195-196.

In the Panel's view, the Canadian Parties are asking the Panel to reweigh the evidence. In *Changzhou*, the U.S. CIT confirmed that the Commission is not required to make findings as to each specific factor.¹²¹ The language of the statute, which states that "the producer may, in appropriate circumstances, be excluded from the industry", makes it clear that exclusion determinations are committed to the Commission's discretion. The Commission is not required to make a specific determination whether the domestic producer in question accrued a "substantial benefit" from importation. Here, the Commission provided a reasoned decision focusing on evidence that both companies imported much more than they produced domestically. In these circumstances, the Panel finds that the Commission's determinations as to the exclusion of [[]] and [[]] from the domestic industry are supported by substantial evidence and in accordance with law.

C. Whether the Commission's Determinations Accounted for the U.S. Softwood Lumber Industry's Performance in the Context of the Business Cycle and Conditions of Competition Distinctive to the Industry

In its injury analysis, the Commission is required to consider the relevant economic factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."¹²²

In their 57(1) Brief, the Canadian Parties claim that the ITC failed to show its "analysis of how the domestic industry's performance during the POI relates to the business cycle or conditions of competition."¹²³ They argue that, "(e)ven though the Commission was legally required to consider the context of the business cycle in its analysis, it largely ignored the current and historical evidence on the record when addressing volume, price, and impact..."¹²⁴

¹²¹ 57(2) Rebuttal Brief of ITC at 72 (citing *Changzhou Trina Solar Energy Co. v. United States*, 100 F. Supp. 3d 1314, 1329 (Ct. Int'l Trade 2015)).

¹²² 19 U.S.C. § 1677 (7)(C)(iii).

¹²³ 57(1) Brief of Can. Parties at 54.

¹²⁴ *Id.* at 64.

1. Nature of the Business Cycle Distinctive to the Domestic Lumber Industry

A. Arguments of the Parties

The Canadian Parties assert that financial performance of domestic producers is affected by the “cyclical nature” of the industry, which responds to supply and demand, which are themselves affected by production capacity, raw material supply, and other factors (supply), and by residential construction, itself dependent on population growth and other factors (demand). They further state that “(t)he length and magnitude of the industry’s demand cycles vary over time and by product, generally reflecting changes in macroeconomic conditions and levels of industry capacity.”¹²⁵

In their 57(3) Reply Brief, the Canadian Parties make explicit their view that business cycles are multi-year phenomena:

Where, as here, the business cycle undeniably spans a timeframe beyond the artificial confines of the Commission’s three-year POI, the Commission cannot comply with its statutory obligation ... if it ignores record evidence from outside of the POI.¹²⁶

The Canadian Parties go on to state that they have

emphasized that the Commission made no effort to evaluate the condition of the industry in the context of the business cycle or to assess where in the business cycle the three years of the POI fell.¹²⁷

The Canadian Parties, while noting that the Commission “acknowledged that there is a business cycle and recognized its statutory obligation to conduct its evaluation in (that) context...,” argue that the Commission “refused to address what the business cycle

¹²⁵ *Id.* at 58.

¹²⁶ 57(3) Reply Brief of Can. Parties at 18.

¹²⁷ *Id.* at 20.

was, how it operated, or how it affected analysis of the economic factors. In doing so, the Commission abdicated its statutory duty.”¹²⁸

During the Panel hearing, the Canadian Parties emphasized that the lumber market responds to the boom-and-bust cycles of the housing market. They argued that “the overall boom cycles are lengthy multi-year cycles. They aren’t 3-year cycles, they’re 10 plus year cycles,” and referred to “looking at the full cycle from peak-to-peak.”¹²⁹ In response to Panel questions, the Canadian Parties noted that both they and the COALITION had indicated the importance of the business cycle, and argued that the Commission’s “failure to understand why a 2014 to 2016 analysis was faulty all comes back to this question of the business cycle.”¹³⁰ The Canadian Parties go on to say “the point was to share with the Commission how important and how lengthy the business cycle was.”¹³¹ When questioned on why they had not defined the business cycle in specific terms, the Canadian Parties replied that “in large measure because it was understood that the business cycle is the period of growth, or lack, or contraction in a market.”¹³²

The Commission’s Brief is silent on what constitutes a business cycle or how the Commission’s understanding of the business cycle in relation to the POI might have affected its determinations on the impact of subject imports. However, the Commission argues that its approach was consistent with that used in other investigations, as it collected and used data from each of the three full years of 2014-2016 plus interim 2017. Its examination of “the relevant conditions of competition indicated that apparent

¹²⁸ *Id.* In their Panel submissions, the Canadian Parties presented graphs drawn from the record to support their contention that the Commission was required to look outside the POI to understand the business cycle. These show the trend in housing starts and the related consumption of softwood lumber. In the former instance, the period covered is 2000-2016 (including projections for 2015 and 2016), and in the latter, 1990-2021 (including projections for the years 2018-2021).

¹²⁹ Transcript of Panel Hearing at 90, USA-CDA-2018-1904-03 (May 7, 2019).

¹³⁰ *Id.* at 93 - 94.

¹³¹ *Id.* at 95.

¹³² *Id.* at 96.

U.S. consumption increased steadily”¹³³ during the POI and that the domestic industry’s capacity “fluctuated annually and was relatively flat from 2014 to 2016.”¹³⁴ The Commission further states that “there was no agreement or request by the parties for the Commission to consider pre-POI data.”¹³⁵

In response to questioning at the Panel’s oral hearing, counsel for the Commission defended the characterization of the business cycle as a seasonal or annual phenomenon, but was unable to point to any analysis of the matter in the Commission’s Determination that took into account the positions of the Parties indicating a multi-year cycle, and did not provide analysis that would support its dismissal of that concept. The Commission argued that there was no “compelling reason” to consider pre-POI data, and that “most market participants defined the business cycle to be an annual one.”¹³⁶ The Commission also acknowledged that there existed “the smaller annual business cycle as well as this larger macro ... economic cycle.”¹³⁷

In its questionnaires,¹³⁸ the Commission had asked U.S. producers, importers, and purchasers: “(i)s the softwood lumber market subject to business cycles (other than general economy-wide conditions)...?”¹³⁹ The response options offered in the questionnaire were “No” and “Yes-Business cycles (e.g. seasonal business).”¹⁴⁰ Foreign producers were not asked these questions. In their responses, some questionnaire respondents checked “Yes” but did not expand on their answers, although provided with the opportunity to do so.

¹³³ 57(2) Rebuttal Brief of ITC at 106.

¹³⁴ *Id.* at 107.

¹³⁵ *Id.* at 108.

¹³⁶ Transcript, *Lumber V*, *supra* note 129 at 196-197 *et seq.*

¹³⁷ *Id.* at 200.

¹³⁸ U.S. producers question IV-15, importers question III-15, and purchasers question III-10.

¹³⁹ The parenthetical phrase appears only in the questionnaires, not in the legal framework.

¹⁴⁰ Questionnaires *supra* note 138.

Although the COALITION does not directly address the matter of the business cycle in its 57(2) Reply Brief, its analysis of supply and demand relative to the 2006 SLA depends on data from as early as 2006. Specific references to the “Great Recession” and its aftermath during the period 2009-2013 provide a basis for its views on the circumstances prevailing during the POI.¹⁴¹

On the written record, the COALITION refers to softwood lumber as “a highly cyclical industry ... in which periods of profitability in up markets are essential for ... survival through periods of losses in down markets.”¹⁴² Against the backdrop of the Great Recession of 2008-2009, the COALITION situates the POI “at the high point of the business cycle,” and provides performance figures for comparison as far back as 2005.¹⁴³ In its pre-hearing brief to the Commission, the COALITION states that the industry needs “sufficient returns during the high point of the business cycle to justify making the capital investments needed to remain competitive over the long term.”¹⁴⁴

Both the COALITION and the Canadian Parties, in other written submissions to the Commission, referred to business cycles in a manner that implies their importance and their extent beyond the variations encountered in a single year. Neither party defined the term “business cycle” or specified what they viewed as its timespan, but numerous references on the record to cyclical patterns in the market (*e.g.*, the ebb and flow of housing starts year to year) provide indications of their magnitude.¹⁴⁵

In the Commission’s oral hearing, the many references to the business cycle included numerous statements by witnesses for both the COALITION and the Canadian Parties implying that they considered the cycle to be a multi-year phenomenon.¹⁴⁶

¹⁴¹ 57(2) Reply Brief of COALITION, at 75-88.

¹⁴² Petitioner’s Pre-Hearing Brief at 80.

¹⁴³ *Id.* at 81.

¹⁴⁴ *Id.* at 80-81.

¹⁴⁵ See *e.g.*, Petitioner’s Post-Hearing Brief at 2, 11-12, 13, Appendix A Question 2 (A-17 – A-25); Joint Respondents’ Post-Hearing Brief at 1, 4-7, 61, 67.

¹⁴⁶ *Lumber V. E.g.*, “the normal downturn of the business cycle,”; “both stages of the business cycle” (counsel for Petitioner), *id.* at 22; “since the bottom

Further, counsel for the COALITION reminded the Commission of its legal obligation:

The Respondents ... completely neglect the context of where we are in the business cycle and what that means in this industry. But the Commission cannot ignore this context. In fact, under the statute the Commission considers material injury in light of the full business cycle.¹⁴⁷

Although the Commission responds in part to the Canadian Parties' concern by asserting that it "properly evaluated all relevant economic factors ... within the context of the business cycle and conditions of competition ... *within the confines of the period of investigation*,"¹⁴⁸ it does not indicate that it looked at a larger context. This is despite its acknowledgment in the Panel's oral hearing, as noted above, of the existence of "this larger macro ... economic cycle."¹⁴⁹

of the cycle in 2009,"(counsel for Petitioner), *id.* at 30; "Unfairly subsidized lumber from Canada has historically kept us from generating a sustained margin over the business cycle / Canadian imports destabilize the market, force closures during economic downturns, and hold profits that are needed in strong markets to sustain operations through the business cycle." (Weyerhaeuser witness), *id.* at 35; "(P)rofitability is up at this point in the business cycle." (Rex witness), *id.* at 40; "[W]e need fair markets throughout the business cycle when times are good and when times are difficult." (Potlach witness) *id.* at 48; "{T}he software [sic] lumber agreement expired ... at a relatively higher point in the business cycle." (counsel for the Petitioner), *id.* at 79; ("{T}he earlier [lumber] cases were at a different point in the business cycle ... in the context of the full business cycle, things are certainly not as strong as they could be, or should be, or need to be at this stage of the business cycle." (counsel for the Petitioner), *id.* at 84-85; "[T]he U.S. housing market ... is nowhere near recovering from the effects of the Great Recession. As a result, the industry is nowhere near the top of the business cycle." (counsel for Joint Respondents), *id.* at 154-155; "This is clearly not an industry that can claim to be injured or threatened as a result of an oncoming downturn in the business cycle because there is no oncoming downturn." (counsel for Joint Respondents), *id.* at 157; "The housing market, and by extension the lumber industry, is cyclical. ... We are nowhere near the top of the current cycle." (NAHB witness), *id.* at 174.

¹⁴⁷ *Id.* at 66.

¹⁴⁸ 57(2) Reply Brief of ITC at 106 (*emphasis supplied*).

¹⁴⁹ Transcript of Panel Hearing *supra* note 129 at 200.

B. Opinion of the Panel

In its Final Views, the Commission noted that a significant majority of the U.S. industry “reported that the softwood lumber market is subject to business cycles or conditions of competition”¹⁵⁰ and highlighted factors from the questionnaires that in large part referred only to seasonal fluctuations that resulted from changes in the weather, seasonal building patterns, and such other influences as forest fires. Although in its determination the Commission explicitly recognized the existence of business cycles, it provided no indication, with respect to this particular industry, that it took into account their extent in time as understood by both the COALITION and Canadian Parties, that it had analysed their nature in this light or that it had used such understanding in conducting its injury analysis. Despite its acknowledgment that the Great Recession of 2008-2009 had had a negative effect on housing starts,¹⁵¹ the Commission’s analysis of changes in the market remained within the POI.

As noted in the Standard of Review Section IV above, the CIT has stated that “regardless of any presumption in its favor, the Commission is in no way absolved . . . of its responsibility to explain or counter salient evidence that militates against its conclusions.”¹⁵² Basing its understanding of business cycles exclusively on Questionnaire responses, the Commission failed to “explain or counter” significant evidence on the record, as a whole, which runs contrary to its conclusions. In the view of the Panel, the Commission analysis did not adequately establish the context required for its later injury analysis under 19 U.S.C. § 1677(7)(C)(iii)) to consider the relevant economic factors “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”¹⁵³ The failure to do so renders

¹⁵⁰ Views of the Commission, Final at 39.

¹⁵¹ *Softwood Lumber Products from Canada*, Inv. No. 701-TA-566 and 731-TA-1342, Final Conf. Det., Pub. 4749, Dec. 2017, at n.10 at 40.

¹⁵² *Usinor*, *supra* note 29 at 783 (Ct. Int’l Trade 2002).

¹⁵³ Transcript of ITC Hearing, *Lumber V* at 200, *et seq.*; 19 U.S.C. § 1677(7)(C)(iii))

the Commission's determinations not supported by substantial evidence and in accordance with law.

The Panel therefore remands this issue to the Commission and directs the Commission to reconsider the record evidence in relation to the business cycle(s) distinctive to the U.S. lumber industry, and to apply its findings in its analysis of volume, price effects, impact, and causation.

2. Whether 2014 was an Aberrant Year for Comparison

A. Arguments of the Parties

In a related matter, the Canadian Parties argue that “reliance on 2014 as a baseline. . . contradicts all contextual evidence from both the historical business cycle and conditions of competition....”¹⁵⁴ They refer to 2014 as an aberrant year for the Commission to use as a benchmark for its injury analysis, and argue that the U.S. CIT jurisprudence shows this to be inappropriate. They state that 2014 “was an aberrational year in terms of high prices and industry profitability relative to the level of housing starts and lumber demand.”¹⁵⁵ The Canadian Parties allege that, by consistently using in its analysis the comparison between the performance of the domestic industry in 2014 and its performance in 2015-16, the Commission “divorced its analysis of the statutory factors – volume, price and impact – from the context of the business cycle and conditions of competition.”¹⁵⁶

In support of their arguments specific to the Commission's use of the year 2014 as a benchmark, the Canadian Parties argue that, given that prices and profits were “extraordinarily high” during a time of “relatively modest demand,” the year 2014 was an

¹⁵⁴ 57(1) Brief of Can. Parties at 53.

¹⁵⁵ *Id.* at 68.

¹⁵⁶ *Id.* at 65.

“unrepresentative outlier in the context of the business cycle and conditions of competition.”¹⁵⁷ They argue that what made 2014 aberrant in particular was the unusual elevation in prices and the fact that, in 2013 and 2014 alone, those prices did not track demand; and further, that in those two years, the domestic industry’s operating margin was uncharacteristically high and well out of proportion to operating margins for many years prior.¹⁵⁸

The Canadian Parties express the view that the pre-POI data “reveal a temporary imbalance between demand and supply relative to the business cycle, which manifested in aberrationally high prices and industry profitability during 2014 (and 2013).”¹⁵⁹ They assert that in arguing that the Commission erred in relying on 2014 as a benchmark they were not claiming that the POI should be expanded, but that the Commission “made no effort to evaluate the condition of the industry in the context of the business cycle or to assess where in the business cycle the three years of the POI fell.”¹⁶⁰

The Commission, although acknowledging the Canadian Parties’ reference to “extraordinarily high” prices, does not offer rebuttal to this specific point, instead stating that it “did not find anything aberrational about supply and demand ... that required it to discount the industry’s data for 2014 as a benchmark.”¹⁶¹ It examines the period and concludes that the volume of imports and the continuing erosion of the domestic industry’s market share through 2014 and subsequent years of the POI signalled the presence of injury despite the industry’s success in the form of high prices and strong margins.

While the jurisprudence is not entirely clear on what might constitute a test for aberrancy, Merriam-Webster’s *Online Dictionary*, 2019, provides a common meaning of

¹⁵⁷ *Id.* at 71.

¹⁵⁸ *Id.* at 70 (Fig. 7); 71 (Fig. 8).

¹⁵⁹ 57(3) Brief of Can. Parties at 19.

¹⁶⁰ *Id.* at 19-20.

¹⁶¹ 57(2) Rebuttal Brief of ITC at 107.

the word “aberrant” as “1. Deviating from the natural or usual type 2. straying from the right or normal way,” and it offers as a synonym “atypical.”¹⁶² This would suggest that the threshold for a time period to be found aberrant is not particularly high. Minor deviations from the norm could therefore technically render a year aberrant, a circumstance that calls for a determination as to whether aberrancy exists and, if so, whether the degree of aberrancy is great enough to warrant a change in approach to the analysis of injury.

The Canadian Parties note that historically the Commission has given consideration to the question of aberrancy¹⁶³ and previously made a decision to review case materials from well before the POI in order to overcome distortions created by a year at the beginning of that POI that it deemed aberrant. However, the Commission points out that the fact situations are quite different, the circumstances of *JMC Steel Group* involving a collapse in demand for the product. That is clearly not the case here, as demand continued to grow through the year in question. In the present instance the Commission rejects the idea of aberrancy with regard to 2014. It demonstrates that it was cognizant of the question and gave it serious consideration, concluding that it “did not find anything aberrational about supply and demand in the U.S. market that required it to discount the industry’s data for 2014 as a benchmark.”¹⁶⁴

Although making a financial point, the Canadian Parties’ argument is based on volume, in the form of increasing demand in late 2013 and in 2014 and the response within the industry. It is therefore not surprising that the Commission would counter with its own reference to supply and demand as the matter on which aberrancy turns.

¹⁶² “aberrant”. Merriam-Webster’s Online Dictionary. 2019. <https://www.merriam-webster.com/dictionary/aberrant>(accessed 21 Aug. 2019).

¹⁶³ For example, the Canadian Parties cite to *JMC Steel Group v. United States*, in which the CIT upheld the Commission’s decision to refer to pre-POI material in its analysis of injury on the grounds that the first year of the POI was “a highly aberrational year for the domestic industry.” In that instance, the Court refers to the material reviewed as consisting of previous staff reports and investigations. *JMC Steel Group v. United States*, 24 F.Supp.3d 1290 (Ct. Int’l Trade 2014).

¹⁶⁴ 57(2) Rebuttal Brief of ITC at 107.

B. Opinion of the Panel

The Commission's conclusion on aberrancy links to the question of whether the Commission dealt appropriately with the business cycle, and that broader issue is dealt with above in this Section. On the narrower point of aberrancy, the Panel concludes that the Commission's decision was based on substantial evidence and in accordance with law.

3. 2006 Softwood Lumber Agreement

As the Canadian Parties explain, while *Lumber IV* proceedings were still pending in a number of fora, the two countries brought an end to the lengthy challenges over softwood lumber from Canada by negotiating the 2006 Softwood Lumber Agreement between the Government of the United States and the Government of Canada ("2006 SLA," "SLA" or "Agreement"). The Agreement was signed on October 12, 2006, and expired on October 12, 2015, after a two-year extension.¹⁶⁵ Under the Agreement, Commerce terminated ongoing antidumping ("AD") and countervailing duty ("CVD") administrative reviews and revoked AD and CVD orders on softwood lumber from Canada that were in place at the time the 2006 SLA took effect.¹⁶⁶

A. Arguments of the Parties

In their Rule 57(1) Brief, the Canadian Parties allege that the Commission, although acknowledging the 2006 SLA as a "significant condition of competition," did not treat it as "significant or even relevant in any of its substantive analyses," contrary to its statutory mandate. According to the Canadian Parties, the Commission overlooked the

¹⁶⁵ 2006 Softwood Lumber Agreement between the Government of the United States and the Government of Canada (Sept. 12, 2006), Rule 57.4 App., Treaties and Legislative Materials 1 (Dec. 20, 2018); 57(2) Rebuttal Brief of ITC at 5; 57(1) Brief of Can. Parties at 29.

¹⁶⁶ 57(2) Rebuttal Brief of ITC at 5; 2006 SLA.

distinction between conditions of competition during the period the SLA was in force and those in the period after it had expired; disregarded the legal consequences of the plain language of the SLA, which “precludes a finding that the ... industry suffered injury ... while the SLA was in effect;” and failed to account for the relevance of the terms of the SLA in its volume, price, and impact analyses.¹⁶⁷

The Canadian Parties further argue that the expiry of the Agreement in October 2015 “provides a dividing line in the POI between a period of managed trade (January 2014 through September 2015) and a period of free trade (October 2015 through April 2016).”¹⁶⁸ They regard this as an opportunity for the Commission “to evaluate the effect of imports from Canada with and without trade restraints,”¹⁶⁹ but state that the Commission did not do so. They note that in its analysis of impact, the Commission acknowledged the existence of the 2006 SLA, but argue that reference is not analysis. While acknowledging that the volumes and market share of subject imports increased, they point out that the domestic industry’s performance in the areas of prices, domestic volume indicia (shipment, production, and capacity utilization), and financial performance all improved after the expiry of the Agreement. They argue that the Commission should have incorporated these changing factors into its analysis.

In the Commission’s 57(2) Rebuttal Brief, the Commission notes that it recognized the 2006 SLA as a significant condition of competition, and states that it treated it so in its injury analysis. The Commission claims that its treatment of the 2006 SLA as a condition of competition was reasonable on several grounds, including that the SLA was no longer in effect; the Commission had an independent obligation to investigate the actual facts and legal arguments in the record of its investigations; and the Commission did recognize that the existence of the SLA during a part of the POI was a condition of

¹⁶⁷ 57(1) Brief of the Can. Parties at 93-109.

¹⁶⁸ *Id.* at 95.

¹⁶⁹ *Id.* at 96.

competition. It argues that its findings are supported by substantial evidence and in accordance with law.¹⁷⁰

In its Final Determination, the Commission acknowledged the 2006 SLA as a significant condition of competition and provided a brief summary of the Agreement's terms, together with their view of the position of the Canadian Parties, who "argue that (price and volume) baselines provide a reasonable, common-sense standard against which to assess whether the U.S. industry can credibly claim to suffer injury under conditions that it previously agreed were not injurious."¹⁷¹ It noted the Petitioner's view that the Commission had properly found, in the preliminary determination, that the Non-injury letters by domestic producers, forming the basis of the Agreement, were not dispositive in the present action, "given the Commission's independent obligation to investigate actual facts and legal arguments."¹⁷²

The Petitioner argues that as a result of sufficiently high prices, "the voluntary restraints of the 2006 SLA were not in effect at all for 2014" and further, that "(t)here were no restrictions on Canadian exporters under the 2006 SLA for most of the period from January 2013 onwards."¹⁷³ As for the impact of the expiry of the Agreement, the Petitioner adopts the view of an economist as predicting "little market impact from the formal expiration ... because it had practically ceased to have market effects."¹⁷⁴

B. Opinion of the Panel

Much of the Canadian Parties' argument is based on the idea that the conditions established by 2006 SLA survive its expiry, a matter that is dealt with in our legal

¹⁷⁰ 57(2) Rebuttal Brief of ITC at 17-18, 77-84. The Commission adds, "{a}s the [CIT] explained ... there must exist 'a present, live controversy ... to avoid advisory opinions on abstract propositions of law.'" There was no live controversy here pertaining to the 2006 SLA because it already expired prior to the initiation of the investigations." *Id.* at 80.

¹⁷¹ Views of the Commission, Final at 37-38.

¹⁷² *Id.*

¹⁷³ 57(2) Rebuttal Brief of COALITION at 74.

¹⁷⁴ *Id.* at 85.

analysis in Section V (E) below and will not be discussed further here. The focus of the present section is on the Canadian Parties' argument that revolves around the Agreement being in place in the early part of the POI, the expiry of the Agreement, and the implications of that event for the Commission's analysis of injury.

The Panel accepts the Commission's conclusion that the 2006 SLA, having been in force during part of the POI, clearly constitutes "a significant condition of competition," as it contributed to the market environment that affected the early part of the POI in that roughly the first half of the POI was subject to the conditions set by the Agreement. Under the 2006 SLA, the relationship between volumes and prices was subject to certain controls, which constituted a condition under which the competition between domestic and subject goods took place.

The evidence demonstrates that 2006 SLA had a specific impact on subject imports during the middle part of the POI. Restrictions under the SLA had been in place from its inception in 2006 until the end of 2012; the mechanisms were triggered again during the POI only in April 2015, and they remained in place until the expiry of the Agreement in October of that year.¹⁷⁵

While its potential to affect competition theoretically ended with its expiry, the Commission did not explicitly analyse this change in circumstances. There is little indication in the Final Determination, apart from the gathering of detailed statistical information from the period affected, of the manner in which the 2006 SLA contributed to the Commission's analysis of injury, or the degree to which it affected that analysis. The question remains as to whether, and how, the Commission incorporated the Agreement into its final analysis of injury.

¹⁷⁵ Final Det., supra note 151 at n. 205; Petitioner's Post-hearing Brief at A-9 – A-10.

Through its questionnaires and other evidence on the record, the Commission had at its disposal, financial and other evidence from every period in the POI to use in its analysis, and to gauge the realities of the market during the time that the 2006 SLA was in force. With respect to the months during the POI when the Agreement remained in place, we see the Commission's act of drawing on data from that portion of the POI as a valid gathering of "actual facts." The market represented by the data gathered by the Commission for the period before expiry was informed by the existence of, and adherence to, the 2006 SLA; the result being that any influence on the market would be captured in the data from that period. Similarly, the market represented by the data gathered by the Commission after expiry would be captured in the figures from the post-expiry period.

While the Commission does not offer an explicit analysis of changes in the market that were occasioned by expiry of 2006 SLA, it nevertheless weaves into its injury analysis the data from all periods of the POI, both prior to and after the expiry, including the evidence gathered for the first 15 months of the POI when SLA restraints were suspended. As a result, the Panel finds that the Commission considered the relevant economic factors within the context of 2006 SLA, as required by statute.

The Panel therefore finds the Commission's treatment of 2006 SLA, specifically as a condition of competition, to have been based on substantial evidence and in accordance with law

D. Whether the Commission Unlawfully Relied on Non-Current Data to Justify its Decision by Discounting Post-Petition Data and Failing to Consider Third and Fourth Quarter 2017 Data

1. Arguments of the Parties

The Canadian Parties argue that the Commission's decision to discount interim 2017 data and disregard third- and fourth-quarter 2017 data (both "post-petition data"), on the

basis that higher softwood lumber prices in 2017 were a result of the pendency of the investigations, was contrary to law and unsupported by substantial evidence.¹⁷⁶ According to the Canadian Parties, the Commission provides no analysis regarding its decision to discount and disregard post-petition data and the only support for its decision is the Petitioner's Final Comments.¹⁷⁷ According to this argument, as a result, the Commission failed to provide a reasonable explanation for its decision and its decision is not based on substantial evidence. The Canadian Parties point to evidence on the record demonstrating that price increases were not linked to the pendency of the investigation but to other market factors--namely, increasing demand and supply constraints--and that 2017 price increases followed the same trends as other building materials not subject to trade remedy investigations.¹⁷⁸

The Commission argues that it reasonably exercised its statutory discretion to attach less weight to post-petition data, relying on the record.¹⁷⁹ The Commission highlights that the U.S. CIT has recognized that the Commission has a broad discretion to consider whether "any change" is related to the pendency of the investigations.¹⁸⁰ The Commission highlights that lumber prices in 2017 were higher than those at the beginning of the period of investigation and cites to evidence suggesting higher prices were the result of the pendency of the investigations.¹⁸¹

2. Opinion of the Panel

The Panel finds that the Commission failed to provide a reasoned basis for its determination to discount interim 2017 data and that, accordingly, the Commission's determination was unsupported by substantial evidence and otherwise not in accordance with law.

¹⁷⁶ 57(1) Brief of Can. Parties at 84-93; 57(3) Brief of Can. Parties at 39-49; 57(1) Brief of Resolute at 13-17; and 57(3) Brief of Resolute at 8-11.

¹⁷⁷ Petitioner's Final Comments at 4, Pub. Rec. 357.

¹⁷⁸ 57(1) Brief of Can. Parties at 87-88.

¹⁷⁹ 57(2) Rebuttal Brief of ITC at 109.

¹⁸⁰ *Id.* at 109, (*LG Elecs., Inc. v. U.S. Int'l Trade Comm'n*, 26 F. Supp. 3d 1338, 1353 (Ct. Int'l Trade 2014)).

¹⁸¹ *Id.* at 110.

Under 19 U.S.C. § 1677(7)(I), the Commission exercises a statutory discretion to decide whether or not to reduce the weight accorded to post-petition information:

Consideration of post-petition information. The Commission shall consider whether any change in the volume, price effects, or impact of imports of the subject merchandise since the filing of the petition in an investigation under part I or II of this subtitle is related to the pendency of the investigation and, if so, the Commission may reduce the weight accorded to the data for the period after the filing of the petition in making its determination of material injury ...

The Commission purported to exercise this discretion in its decision, stating explicitly:

We find the higher prices in 2017 were a result of the pendency of these investigations. See, e.g., Petitioners' Final Comments at 4 and 13-15. We therefore reduce the weight we are according to the volume, price effects, and impact of subject imports for interim 2017, pursuant to 19 U.S.C. § 1677(7)(1).¹⁸²

On the one hand, the Canadian Parties and Resolute point to evidence of various supply and demand factors that they say resulted in the 2017 price increases and the fact that other building products not subject to trade litigation closely tracked softwood lumber prices post-petition.¹⁸³ On the other hand, the Commission and the COALITION point to evidence that higher lumber prices in 2017 were the result of the pendency of the investigations.¹⁸⁴

The Commission's stated reason in its decision for reducing the weight accorded to interim 2017 data leaves much to be desired—it is contained in one sentence in a footnote.¹⁸⁵

¹⁸² Conf. Views at 55 n. 203, referenced again at 57 n. 209 with respect to the impact of increased prices on industry revenues.

¹⁸³ 57(1) Brief of Can. Parties at 86-88, 57(3) Brief of Canadian Parties at 43, 57(1) Brief of Resolute at 13-17, and 57(3) Brief of Resolute at 8-11.

¹⁸⁴ 57(2) Rebuttal Brief of ITC at 110-111 and 57(2) Brief of COALITION at 28-31.

¹⁸⁵ Id.

First, the Commission fails to discuss the conflicting evidence on this point and simply refers to the Petitioner's Final Comments that argue that post-petition effects have been significant, with citations to evidence to support that proposition. The Canadian Parties and Resolute argue that the 2017 price increases and improved domestic industry performance simply followed existing trends apparent in 2016. Further, the same price trends occurred in building supplies not subject to the investigations. For the Canadian Parties and Resolute, it is clear that price increases and improved domestic industry performance were not the result of the pendency of the investigations, but rather were caused by other market factors.

Second, the Commission's decision fails to clarify whether the Commission was invoking a presumption that changes were related to the pendency of the investigation, which it is entitled to do as set out in the SAA,¹⁸⁶ or whether it was making a factual finding, after weighing the evidence on the record, that higher prices in 2017 were the result of the pendency of the investigations.

Third, although the Commission's decision says that it "reduces" the weight given to interim 2017 data, the decision fails to discuss what weight, if any, should be given to interim 2017 and in what circumstances it would rely on interim 2017. The Canadian Parties argue that the Commission relied on interim 2017 data selectively—citing data that supported its conclusions and disregarding data that did not.¹⁸⁷

Fourth, the Commission's decision only expressly refers to reducing the weight of interim 2017 data and does not expressly address the treatment of third- and fourth-

¹⁸⁶ Statement of Admin. Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1 at 854.

¹⁸⁷ 57(1) Brief of Can. Parties at 40. This is not entirely the case. In the Commission's impact analysis, it references improvements in the domestic industry's gross profit, net income, and operating income in interim 2017: "We recognize that as a result of the pendency of these investigations, all three indicators were higher in interim 2017 than in interim 2016, reflecting higher sales values and higher quantities sold for the industry." Conf. Views of the Comm'n at 59.

quarter 2017 data and whether data from these different time periods should be treated differently. The Canadian Parties argue that the Commission should have analyzed data and trends during the CVD gap period,¹⁸⁸ because lumber prices continued to rise despite the reduction in duties faced by Canadian producers.¹⁸⁹ The fact that there were higher prices during the CVD gap period is said to refute the Commission's determination that high prices were due to the pendency of the investigation.¹⁹⁰

The Panel begins by noting that the U.S. CIT has confirmed in *LG Elecs., Inc. v. U.S. Int'l Trade Comm'n* that the "(t)he language of the statute grants broad discretion to the Commission to consider whether "any change" is "related to the pendency of the investigation."¹⁹¹ In exercising this discretion, however, the Commission must base its determination on substantial evidence and reasoned analysis.¹⁹² With respect to the interim 2017 data, the Commission has simply stated a conclusion referencing Petitioners' Final Comments without demonstrating any weighing of evidence or providing any analysis. As the Panel highlighted in its discussion of the standard of review, "the Panel need not defer to decisions premised on inadequate analysis or faulty reasoning that precludes meaningful Panel review."¹⁹³ With respect to third- and fourth-quarter 2017 data, the Commission failed to make any clear determination about the basis on which it was disregarding this data, thus rendering its decision unlawful under the substantial evidence standard.

The Panel remands the Commission's decision to reduce the weight it accorded to interim 2017 data and directs the Commission to provide a reasoned determination on whether or not to reduce the weight accorded to interim 2017 data.

¹⁸⁸ See Section II, Background, *supra*, text at n.7.

¹⁸⁹ 57(1) Brief of Canadian Parties at 90-91.

¹⁹⁰ *Id.* at 91.

¹⁹¹ *LG Elecs.*, *supra* note 180 at 1353.

¹⁹² *Bando Chem. Indus. v. United States*, 16 Ct. Int'l Trade 133, 136-37, 787 F. Supp. 224, 227 (1992) (citing *Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974)).

¹⁹³ *Id.*

With respect to third- and fourth-quarter 2017 data, we accept the Canadian Parties' submission that this data was properly in the record as the Commission granted the Canadian Parties' request to supplement the record.¹⁹⁴ It is a reasonable inference that the Commission's reference to the interim 2017 data being affected by the pendency of the investigations also applies to third- and fourth-quarter 2017 data. In making its decision to discount interim 2017 data, the Commission referenced the Petitioner's Final Comments dated 4 December 2017, which reference evidence from both interim 2017 and the third- and fourth-quarter 2017. However, the Commission failed to make a clear determination with respect to third- and fourth-quarter 2017 data. The Panel directs the Commission to clarify whether or not it is also reducing the weight accorded to third- and fourth-quarter 2017 data.

If, upon reconsideration, the Commission decides to reduce the weight given to post-petition data, the Commission is further directed to clarify what weight, if any, it is giving to post-petition data and the reasons for this determination.

E. Whether the Commission Gave Proper Effect to the Legal Consequences of the 2006 Softwood Lumber Agreement

1. Background

As part of the 2006 SLA, a majority of U.S. producers signed "No-injury" letters effectively waiving their right to pursue AD or CVD investigations on softwood lumber from Canada while the Agreement was in effect and for one year after its expiration. These letters also represented that while the SLA was in effect, it "removes any alleged material injury or threat of material injury, within the meaning of" the U.S. AD/CVD laws. In return, the Government of Canada agreed to impose export restrictions – a

¹⁹⁴ See 57(1) Brief of Canadian Parties at 90, 57(3) Brief of Canadian Parties at 48 and 57(2) Brief of COALITION at 35; Commission Letter Granting Request to Supplement the Record, Pub. Rec. 337.

combination of export taxes and quotas that varied by region – when Canadian exports reached a certain level or lumber prices dropped below a specified level.¹⁹⁵

The Commission treated the 2006 SLA as a condition of competition, rejecting arguments by the Canadian Parties that the 2006 SLA established baselines for price and volume that should have been used as a standard against which to assess whether the softwood lumber industry suffered injury.¹⁹⁶

2. Arguments of the Parties

The Canadian Parties emphasize three ways in which the Commission failed to give proper effect to the SLA. First, having accepted the Agreement as a condition of competition, it offered no explanation of how the SLA affected its analysis. Second, having been presented with “critical context” of the conditions the United States and a majority of its domestic industry agreed would remove any injury from subject imports, the Commission completely disregarded this context.¹⁹⁷ Third, because the parties to the 2006 SLA agreed that its operation eliminated injury during its term, a finding of injury based on the condition of the U.S. industry during the 21 months of the POI that preceded the SLA’s expiration in 2015 is rendered unlawful.¹⁹⁸ We addressed the first two of these arguments above in Section V(C).

A. Do the SLA’s Removal-of-Injury Provisions Have Continuing Effect?

As to the third argument of the Canadian Parties, the Commission believes it rightly found that the 2006 SLA was not dispositive of the question of material injury in a

¹⁹⁵ 57(2) Rebuttal Brief of ITC at 5-6; 2006 SLA at Annexes A & B.

¹⁹⁶ 57(2) Rebuttal Brief of ITC at 6; Views of the Commission, Final at 36-37 (CD582).

¹⁹⁷ 57(3) Reply Brief of Can. Parties at 1, 50.

¹⁹⁸ *Id* at 50.

subsequent investigation of the 21 months of the POI during which the Agreement was operative, given the Commission's independent statutory obligation to investigate the actual facts and legal arguments during the POI.¹⁹⁹

The Canadian Parties respond that the United States and Canada went to great lengths to craft an agreement to "remove any alleged material injury by reason of softwood lumber from Canada."²⁰⁰ By failing in its injury analysis to account for the SLA, the Commission "retroactively deprive(s) Canada of the benefit it received pursuant to the SLA's central bargain."²⁰¹

Their position is that the No-injury letters necessarily preclude the Commission from evaluating the data during that part of the POI when the 2006 SLA was in effect. They assert that the 2006 SLA removed any alleged injury while it was in effect, and yet the Commission's determination of material injury was premised on alleged injury sustained predominantly in 2015, during which year the Agreement was in effect for nine months.²⁰² Said differently, the Canadian Parties argue that the Commission is prohibited from conducting its own analysis of the facts on the record and must instead consider *per se* that there was no material injury for a portion of the POI.

The Canadian Parties point out that although the Commission did at least concede that "the metrics set (out) in the 2006 SLA included agreed-upon measures to 'ensure there (was) no material injury or threat thereof to an industry in the United States' while the agreement was in effect," the Commission then protested that "(t)hese baselines were not commensurate with the analysis the Commission undertakes under the statute, but rather were quite different."²⁰³ The Canadian Parties disagree, maintaining that Annexes

¹⁹⁹ 57(2) Rebuttal Brief of ITC at 81.

²⁰⁰ 57(1) Brief of Can. Parties at 100, quoting from the first paragraph of Annex 5B.

²⁰¹ *Id.* at 104.

²⁰² *Id.* at 93-106.

²⁰³ 57(3) Reply Brief of Can. Parties at 60, n. 196; 57(2) Rebuttal Brief of ITC at 82.

5A and 5B “are clearly keyed to the injury provision of the Tariff Act” by making specific reference to 19 U.S.C. § 1677(7).²⁰⁴

In further support of its position, the Commission seeks to convince us that, although the SLA contained export restrictions on softwood lumber from Canada--through a combination of export taxes and quotas that varied by region--when prices fell below a certain level, the Agreement recognized that the trigger prices and volume restraints did not take into account the “various market conditions that prevail[ed] in both countries” for its duration.²⁰⁵

This scenario creates the basis for the Commission’s position that “neither the injury-removing intent of the 2006 SLA nor the trigger prices and volume baselines set out in the” No-injury letters “were binding upon the Commission’s analysis of whether the domestic industry was materially injured or threatened with material injury by reason of the imports under investigation.” Instead, the Commission relies upon its “independent obligation to investigate the facts and arguments in the investigation” by focusing its analysis on “the (actual) available data concerning the industry’s performance during the period of investigation.”²⁰⁶

²⁰⁴ 57(3) Reply Brief of Can. Parties at 60, n. 194.

²⁰⁵ 57(2) Rebuttal Brief of ITC at 82; Petition Ex. 3 (2006 SLA) at Annex 5A (No-injury letter) and Art. VII (export restraints). Paragraph 3 of the sample No-injury letter states: Company A represents that the SLA 2006 removes any alleged material injury or threat of material injury, within the meaning of 19 U.S.C. § 1677(7), to the U.S. softwood lumber industry from imports of Softwood Lumber Products from Canada. This representation is made, taking into account all relevant facts, including possible changes in market conditions, and the consequences that the representations will have for the term of the SLA 2006, including the intentions of the U.S. Department of Commerce (Commerce), described in paragraph [4]. *The representation is also made with an understanding of the possible effects of the provisions of the SLA 2006 while it remains in force, given the various market conditions that may prevail in both countries during that time. (emphasis supplied).*

²⁰⁶ 57(2) Rebuttal Brief of ITC at 83.

B. Is a Panel Decision on 2006 SLA's Legal Effect an Advisory Opinion?

In addition, the Agency argues that the 2006 SLA was explicit that it was not to have any force or effect after the SLA expired. At the time the Commission initiated the investigation, the ITC notes, the SLA was no longer in effect, as the one year “standstill” period had run after the expiration of the SLA on October 12, 2015.²⁰⁷ Thus, the Commission’s view is that the Canadian Parties are asking the Panel to render an advisory opinion by seeking a Panel determination as to the meaning of the terms of the 2006 SLA itself. Pursuant to U.S. law, which controls this action, the mootness doctrine dictates that a court’s jurisdiction is limited to an actual “case or controversy” in accordance with Article III of the U.S. Constitution.²⁰⁸

As a result, the Commission continues, neither the Commission nor the Panel has the authority to offer an opinion on the meaning of the Agreement. The Commission relies on *American Spring Wire Corp. v. United States*,²⁰⁹ in which the U.S. CIT explained that to satisfy the case or controversy requirement, there must be a “present, live controversy...to avoid advisory opinions on abstract propositions of law.”²¹⁰ As the Supreme Court has put it, “(the) controversy among the parties had ceased to be “definite and concrete” and no longer “touch(ed) the legal relations of parties having adverse legal interests.”²¹¹ As a result, the outcome would have been the same regardless of what the Court ruled.²¹²

Distinguishing *American Spring Wire Corp.*, the Canadian Parties explain that the present meaning of the SLA does indeed present a live case, the outcome of which has

²⁰⁷ *Id.* at 78, 81.

²⁰⁸ NAFTA Article 1904.2.

²⁰⁹ *American Spring Wire Corp. v. United States*, 569 F. Supp. 73 (1993).

²¹⁰ *Id.* at 74-75.

²¹¹ *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41 (1937).

²¹² *American Spring Wire Corp.*, *id.* at 75.

significant consequences to the Parties.²¹³ The Canadian Parties also dispute the Agency's conclusion that the SLA commitments have expired, noting that the Commission only considers the representations of the No-injury letters and ignores the commitments of the Department of Commerce in Annex 5(B).

C. COALITION'S Support of Agency Position

The COALITION believes the Commission properly found that the No-injury letters submitted were not dispositive of the question of material injury in a subsequent investigation. The COALITION echoes the Commission's argument that the Commission has "an independent obligation to investigate the actual facts and legal arguments in the investigation."²¹⁴

The COALITION argues that the circumstances of the 2006 SLA support the Commission's findings, explaining that a majority of U.S. producers signed No-injury letters as a *quid pro quo* for Canada's voluntary imposition of certain export restraints. The COALITION further explains that the No-injury letters were made on the assumption that if a petition were filed "while the SLA 2006 was in force" involving softwood lumber from Canada, Commerce would treat the letters as "conclusive evidence of an insufficient allegation of material injury or threat thereof and will dismiss the petition."²¹⁵ In addition, the letters expressly stated that the representations contained therein "shall have no force or effect after the 2006 SLA is terminated or expired."²¹⁶ In the COALITION's view, the No-injury letters do not prejudice whether material injury did or did not occur during the period of the Agreement or afterwards.

²¹³ 57(3) Reply Brief of Can. Parties at 60, n. 196, where they describe this ITC argument as "a nonsensical *post hoc* red herring."

²¹⁴ 57(2) Rebuttal Brief of COALITION at 71; Views of the Commission, Final at 38.

²¹⁵ 57(2) Rebuttal Brief of COALITION at 73.

²¹⁶ *Id.*

Therefore, the COALITION concludes, the Commission did not err in determining for itself the actual facts that obtained during the POI.²¹⁷

3. Opinion of the Panel

We disagree with the Commission that there is no case or controversy. Interpretation of the present effect of the No-injury letters and of Commerce's commitments have meaningful effect on the outcome of this appeal. How the Commission views half of the POI turns on the interpretation before the Panel. This effect meets the *American Springwire Test* because it does indeed have an "impact on the current interests of the parties to this litigation." We further agree with the Canadian Parties that the Commission's actions with respect to the SLA constitute an interpretation of its legal effect, one that we review *de novo*.²¹⁸

The "No-Injury" letters from domestic lumber industry producers and unions represent that "the SLA 2006 removes any alleged material injury or threat of material injury, within the meaning of 19 U.S.C. § 1677(7), to the U.S. softwood lumber industry from imports of Softwood Lumber Products from Canada."²¹⁹ They continue, however, by setting a condition on this commitment, that "the representations and commitments contained in this letter shall have no force or effect after the SLA 2006 is terminated or expires..."²²⁰

In addition, Article II of the SLA provides that the U.S. Department of Commerce finding and commitment in Annex 5B is "*based on* the letters in Annex 5A."²²¹ Specifically, the "U.S. Department of Commerce has reviewed these (No Injury-Letter) representations

²¹⁷ *Id.*

²¹⁸ *Acrilos v. Regan*, 617 F. Supp. 1082, 1086 (Ct. Int'l Trade 1985); *Gross v. German Foundation Indus. Initiative*, 549 F.3d 605, 611 (3d Cir. 2008). As noted in Section IV on Standard of Review, a Panel reviews the agency's conclusions of law *de novo*, without deference. *Allegheny Ludlum Corp. v. United States*, 287 F. 3d 1365, 1369 (Fed. Cir. 2002).

²¹⁹ Petition, Exh. 3 (2006 SLA) at Annex 5B.

²²⁰ *Id.* at Annex 5(A).

²²¹ 2006 SLA, Article II(1)(h) (*emphasis supplied*).

and finds that, if a petition is filed with respect to imports of Softwood Lumber Products from Canada under Title VII of the Act *while these representations are in effect*, in determining whether the petition meets the requirements of 19 U.S.C. § 1671a or § 1673a, these representations will constitute conclusive evidence of an insufficient allegation of material injury or threat of material injury and Commerce will dismiss the petition.” While operative, these co-reliant provisions were significantly more than “simply a tool by which the U.S. industry provided the assurances required by the Canadian parties as the *quid pro quo*” for Canada’s commitments, as Petitioner maintains.²²²

We agree with the Canadian Parties that the relevant question “is whether the Commission may base a finding of current material injury on injury that the domestic industry purportedly suffered during the term of the 2006 SLA.”²²³ We believe, however, that this question properly has two aspects. First, the economic conditions that obtained during the period of the Agreement are indeed facts that the expiration of the Agreement cannot affect one way or the other. Denying the status of economic circumstances and the financial situation of the industry during the operative period of the SLA would indeed be “rewriting history.”

The second aspect of the question, however, is whether the representations by U.S. industry members and Commerce of the legal effect of these economic conditions under AD/CVD law survived the Agreement’s expiration. In our view, they did not. Commerce’s commitment that it would not initiate an investigation was expressly based on the continuing effectiveness of the No-injury letters. The letters themselves proclaimed their ineffectiveness in the absence of an operative Agreement. In fact, other than the Duration clause itself, Art. XVIII, the only references in the SLA to its expiration are in Annexes 5A and 5B, addressing the No-injury Letters and Commerce’s commitments.

²²² 57(2) Rebuttal Brief of COALITION at 73.

²²³ 57(3) Reply Brief of Can. Parties at 60.

Nor do we see the difference in this respect between the industry representations in the No-injury letters and the Commerce commitment that the Canadian Parties urged was different at the Panel Hearing and in its written materials.²²⁴ The actual language is different, of course, but their repeated cross-references to each other and their singular emphasis on their dependence upon the Agreement's continuing life establish their co-reliant meaning, that is, that both expire when the SLA does.

We find these facts to be compelling proof of the care taken by the drafters to connect the expiration provision to the legal representations of the industry's No-injury Letters and Commerce's commitments.

The Commission's treatment of the 2006 SLA also is consistent with its practice with respect to suspension agreements entered into under the Tariff Act of 1930, where the Commission has "uniformly not viewed various voluntary export arrangements and suspension agreements under the statute as being legally dispositive of the question of whether a domestic industry is materially injured or threatened with material injury by reason of subject imports."²²⁵

We thus agree with the Commission that the representations of the industry in the No-injury letters and of Commerce in its commitments have expired and have no part to play in the Agency's investigations.

²²⁴ *Id.* at 65; Transcript, *Lumber V*, *supra* note 129 at 123-24.

²²⁵ *Softwood Lumber from Canada*, USITC Pub. 3426 at 13, n.59 (*Lumber IV* Preliminary Det.), *citing Uranium from Kazakhstan*, Inv. No. 73 1-TA-539A (Final), USITC Pub. 3213 at 12-13 (July 1999) (suspension agreement under section 734(1)); *Honey from China and Argentina*, Inv. No. 701-TA-402 and & 731-TA-892-893 (Final), USITC Pub. 3470 at 17 (Nov. 2001) (suspension agreement with China).

F. Whether the Commission Erred in its Findings of Relative Substitutability and Assumed Perfect Substitutability Contrary to its Own Findings

1. Arguments of the Parties

In their 57(1) Brief, the Canadian Parties allege that the Commission erred in that its finding of “at least moderate” substitutability is unsupported by the record and reflects the ITC’s misunderstanding of economic substitutability as it relates to injury analysis; and its quantification of elasticity was unsupported and contrary to the evidence. The Canadian Parties further allege that the Commission failed to apply its own finding of “at least moderate” substitutability and its conclusions on elasticity and assumed perfect substitutability, thus exaggerating the effect of the imports.²²⁶

The Commission argues that its finding that domestic and imported products were “at least moderately substitutable”²²⁷ was supported by substantial evidence and lawful, in that its findings were based on questionnaire responses and a survey by NAHB, which provided ample evidence of substitutability by application. Further, the Commission argues that: its conclusion of substantial overlap was supported by evidence; the domestic and imported products are used for the same applications; to the extent there were species differences, the Commission had accounted for them in its conclusion not that products were highly substitutable but that they were “at least moderately substitutable”; it accurately represented the record; and it was justified in rejecting the Canadian Parties’ proposal to collect additional information on substitutability in the questionnaires.²²⁸

In its Rebuttal Brief, the COALITION supports the Commission, arguing that the Commission’s substitutability finding was supported by evidence regarding Q3 and Q4

²²⁶ 57(1) Brief of Can. Parties at 111-130, *ad passim*.

²²⁷ Views of the Commission, Final at 45.

²²⁸ 57(2) Rebuttal Brief of ITC at 85-106.

of 2017;²²⁹ the Commission's conclusion on substitutability was based on evidence that, notwithstanding species differences, the products "are used in the same application;"²³⁰ the ITC found that prices closely track each other across species, supporting the ITC finding that there are no clear dividing lines between species; and the statute does not require perfect substitutability.²³¹

During its investigation, the Commission examined conditions of competition, soliciting information in its questionnaires from domestic producers, importers and purchasers, and receiving testimony at its oral hearing.²³² In the summary of its substitutability analysis,²³³ the Commission made three principal points regarding species.

First, it stated that domestic and Canadian production of softwood lumber breaks down into different proportions among species, but with numerous species that are produced in both countries; species common to both accounted for approximately 41 percent of U.S. production and 95 percent of Canadian production in 2015.²³⁴

Second, the Commission acknowledged that, whereas the Petitioner held that different species are highly interchangeable and therefore overlap significantly, the Respondents

²²⁹ 57(2) Rebuttal Brief of COALITION at 37-39.

²³⁰ *Id.* at 89-90. The COALITION is quoting Views of the Commission at 46.

²³¹ *Id.*

²³² Transcript of ITC Hearing, *Lumber V.*, e.g., "(A)ny differences [between spruce and SYP] are minor (Rex Lumber witness), *id.* at 40; "(D)ifferent mills and species are substitutable" (Pleasant River Lumber Company witness), *id.* at 56; "(P)roducts are highly interchangeable across uses and completely interchangeable regarding specie [sic]." (Stimson Lumber Company witness), *id.* at 144; "(T)here is limited substitution between Canadian & U.S. softwood lumber in response to price changes." (witness for Cornerstone Research), *id.* at 170; "For a commercial construction, there is little substitution between lumber species because the structural engineers require certain materials for certain applications. ... With residential construction there isn't much substitution because of what I call the tribal knowledge." (witness for NAHB), *id.* at 176-177; SYP "does not compete directly with and indeed is complimentary [sic] to the SPF lumber we produce in Canada." *id.* at 181.

²³³ Views of the Commission, Final, at 43-44.

²³⁴ U.S. production is 53% SYP, 24% DF, 10% hem-fir and 5% SPF, whereas Canadian production consists of 87% SPF, 4% WRC, 3% DF, and 1% hem-fir (all 2015 figures). *Id.* at 44.

argued that there are distinctions based on the appropriateness of species for particular application, region, and builder preference, and that overlap is further reduced by the distinction between green and kiln-dried DF and the fact that much SYP is pressure treated.

Third, the Commission stated that questionnaire responses and survey results show that SPF, SYP, DF, and hem-fir are used in the same construction applications for floor joists, wall studs, roof rafters and roof trusses.

The Commission's Staff Report further states in its detailed substitutability analysis²³⁵ that, according to the questionnaires, producers generally saw products as always or frequently interchangeable, while most importers and purchasers saw them as always, frequently, or sometimes interchangeable. Staff noted that, while purchasers saw high comparability between Canadian and U.S products on a set of 20 factors, the most significant factor limiting interchangeability related to species performance in different applications; the majority of purchasers indicated they would "need to change construction techniques or the volume of softwood lumber they used" if they substituted species in a given application.²³⁶

In its *amicus curiae* brief, the NAHB takes issue with the Commission's methods of collecting its information, as well as its interpretation of the evidence received. On the underlying assumption that no participant in the market understands better than end users – its members – which products are truly substitutable and which are not, NAHB challenges the Commission on what it regards as the weighting of evidence in favour of domestic producers, which are the market participants farthest removed from the end user. In citing evidence provided by its members, NAHB argues that the Commission failed to take into account evidence that would undermine its conclusions. NAHB's position is that, "(w)hile the Panel is not called to reweigh evidence, the obvious gaps in

²³⁵ Final Staff Rep. at II-22 et seq., II-41-45.

²³⁶ *Id.* at II-28.

the Commission's discussion of the record bear directly on whether the Commission has supported its determination with substantial evidence."²³⁷

A. Substitution Elasticity

One approach to the assessment of substitutability is a calculation of elasticity which, in the words of Commission staff, "measures the responsiveness of the relative U.S. consumption levels of the subject imports and the domestic like products to changes in their relative prices. This reflects how easily purchasers switch from the U.S. product to the subject imports (or vice versa) when prices change."²³⁸ While estimating an elasticity range of 2.0 – 5.0 for most of the market, Staff added a caveat: "evidence suggests variations based on species being compared, the strength of regional and/or builder preferences" and product availability.²³⁹ "For applications in which purchasers have strong species preferences, substitutability is likely to be on the lower end of the range."²⁴⁰

The Canadian Parties argue that the Commission erred in adopting Staff's quantification of elasticity, which, they claim "had no basis in any facts or analysis...." They further claim that "(t)here is no record evidence to support the Commission's substitution elasticity – no citations to the record and no worksheets to back up the calculation."²⁴¹

The one pertinent document on the record, the Canadian Parties argue, was the commissioned study by Kirgiz and Uyar, which "reviewed independent, academic literature, including peer-reviewed articles," that suggested elasticity of a considerably lower order than that put forward by staff and by the Commission in its determination.

²³⁷ NAHB *Amicus Curiae* Brief at 14.

²³⁸ Final Staff Rep. at II-41.

²³⁹ *Id.* Petitioner noted that the range of 2.0 – 5.0 was identical to the range adopted in *Lumber IV*. Petitioner's Prehearing Brief at 28.

²⁴⁰ Final Staff Rep. at II-41.

²⁴¹ 57(1) Brief of Can. Parties at 125.

The Canadian Parties argue that the Commission's findings on substitution elasticity should be found to be "unsupported by substantial evidence on the record."²⁴²

The Commission asserts that it was not bound by the Staff's estimate and denies that it adopted it. The Agency states that it is required neither by statute nor by the CIT to use "such estimates, or any particular model, in its analysis" and instead "decided not to rely on staff's elasticity estimate or any elasticity estimate."²⁴³ According to the Commission, it "conducted an independent analysis" and "reviewed and cited to the detailed summary in the Staff Report of the relevant facts ..."²⁴⁴

Literature surveyed and summarized by staff shows a range of elasticity of substitution, in every instance indicating a value below 1.5 at the low end and, more importantly, in all instances but one, below 1.5 at the high end. The single study in which the high end of the range reached above that level was published in 1992 – the oldest by 12 years of all the studies reviewed, and 22 years old at the beginning of the POI. Another study using the same model (albeit modified in both instances) and published in 2006 concluded that a range of 0.153-0.622 was appropriate. Further, whereas the 1992 study referred to specific products – fir at the low end of the spectrum and pine at the high end – the later study referred to softwood lumber generally. Staff observed that the estimated elasticities of substitution presented in the articles differed depending on the time-frame considered, application of the product, and the level of aggregation, finding that elasticities of substitution are higher when considering longer time periods, products with similar application, and more disaggregated product samples.²⁴⁵

2. Opinion of the Panel

It is our view that, in determining that Canadian and domestic products are "at least moderately substitutable," the Commission demonstrated that it took into consideration

²⁴² *Id.* at 127.

²⁴³ 57(2) Brief of the Commission at 100.

²⁴⁴ *Id.* at 101.

²⁴⁵ Final Staff Report at II-42.

the evidence on the record that substitution is constrained by various forces at work in the market, such as limitations on overlap between species, which may be based on performance characteristics in different applications, different applications (e.g., house framing and decking and decking structures). The Commission also took into account other variables such as customer preference, complementarity in certain markets, and regionality.²⁴⁶

We see the phrase “at least moderately substitutable,” although susceptible to widely varying interpretations in any attempt to quantify its meaning, as an acknowledgment by the Commission that the products are not completely substitutable. This in turn implies an understanding that competition is attenuated. Numerous factors contribute to that attenuation by limiting the overlap between subject goods and like goods: for example, choices made for particular applications (including limitations on the use of appearance-grade products), species differentiation and preferences, proportions of certain species dedicated to particular applications (green vs. kiln-dried DF, pressure-treated SYP, etc.), and regional preferences.

On the basis of the evidence and argument presented, we consider the characterization “at least moderately substitutable” to be adequately supported by substantial evidence on the record and in accordance with law.

There remains the question of whether, and to what degree, the Commission ultimately factored this view of limited substitutability and the attendant attenuation of competition into its analysis of injury.

U.S. Court of International Trade jurisprudence indicates that the analysis of substitutability should include an element of proportionality:

(T)he degree of overlap of domestic and imported products will affect the Commission’s evaluation of impact in its material injury and threat of material injury determinations. As stated, “substitutability is one factor in the evaluation of volume and price.” Although not always the case, in some instances where two

²⁴⁶ Views of the Commission, Final at 43-47.

products are not directly comparable or interchangeable, there will likely be a weaker connection between the domestic and foreign products. ... This lack of interchangeability surfaces in the Commission's impact analysis with respect to volume and price effects. Therefore, evaluating substitutability as a condition of competition has a direct impact on the Commission's later considerations.²⁴⁷

In an analysis of injury, the impact of imports on the domestic market can be properly assessed only when the attenuation of competition related to limited substitutability is taken into account. In the present instance, the Commission failed to demonstrate how it took into account its conclusions on attenuated competition when performing its later analysis of the injury factors of volume, price, impact, and causation. In effect, it appears to have treated the products as fully fungible.

The Panel will first address the substitution elasticity question. The present Determination is lacking in any explanation of the Commission's basis for arriving at its conclusions on substitution elasticity, and also in establishing how and to what degree it applied its conclusions regarding this factor in its fuller analysis of substitutability. In the Staff Report, despite the use of the phrase, "(b)ased on available information," there is no indication of how Staff concluded that the range was "likely" 2.0 to 5.0.²⁴⁸ For its part, the Commission, indicating that it performed its own independent analysis, provides no information as to how it quantified elasticity as a part of that analysis. But at no point does it disavow Staff's proposed range, and in its Determination the Commission refers to "the methodologies and data used to estimate elasticities in this case,"²⁴⁹ apparently indicating that the use of substitution elasticity estimates remains in play. We believe the Canadian Parties are justified in understanding that the Commission had adopted the range of 2.0 to 5.0 for substitution elasticity.

Further, the Commission does not incorporate its findings on substitution elasticity into its discussions on volume, price effects, impact, or causation with respect to the subject

²⁴⁷ *COALITION for Fair Trade in Hardwood Plywood v U.S. Int'l Trade Comm'n*, 180 F. Supp. 3d 1137, 1147 (Ct. Int'l Trade 2016), quoted in 57(1) Brief of Can. Parties at 109-110.

²⁴⁸ Final Staff Rep. at II-41.

²⁴⁹ Views of the Commission, Final at 45, n.162.

imports. In our view the Commission does not support its conclusion on the range of substitution elasticity with substantial evidence on the record.

Second, whereas the Commission demonstrates an awareness of attenuation, as articulated in its conclusion that the products were “at least moderately substitutable” – not fully substitutable – it nevertheless failed to demonstrate how it quantified the various attenuating factors and applied that moderating influence to the analysis of injury.

In particular, its analysis of price effects required adjustment in accordance with the recognized limits on substitutability. Having provided an analysis leading to its conclusion on relative substitutability, the Commission makes no mention of limited substitutability as a mitigating factor in analyzing injury. It is the Panel’s view that, in not incorporating its conclusion that subject goods and like goods are “at least moderately substitutable” into its analysis of injury, the Commission failed to consider the relevant economic factors within the context of the business cycle and conditions of competition that are distinctive to the affected industry. The failure to do so renders the Commission’s determinations not supported by substantial evidence and in accordance with law.²⁵⁰

The Panel remands the matter to the Commission, and directs it to

1. reconsider its calculation of substitution elasticity, explaining how it reached its conclusion and demonstrating how that conclusion was

²⁵⁰ The Supreme Court has ruled that an agency needs to articulate a “rational connection between the facts found and the choice made.” *Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974). In the Panel’s view, in not using the finding of “at least moderate substitutability” in its analysis of the injury factors, the Commission has failed to make this connection. Its analysis does not adequately establish the context required for its injury analysis under 19 U.S.C. § 1677(7)(C)(iii)) to consider the relevant economic factors “within the context of the business cycle and conditions of competition that are distinctive to the affected industry,” and is therefore contrary to law.

applied in the Commission's analysis of volume, price effects, impact, and causation; and

2. demonstrate how, and to what extent, the limitations to substitutability implied in its conclusion that the goods were "at least moderately substitutable" factored into the Commission's analysis of volume, price effects, impact, and causation.

G. Whether the Commission's Volume Analysis Was Supported by Record Evidence and in Accordance with Law

1. Arguments of the Parties

Section 771(7)(c)(i) of the Tariff Act of 1930 provides that the "Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant."²⁵¹

The Court of International Trade has stated that, in determining the significance of subject import volume, the ITC must assess "the extent to which, if at all, subject imports 'captured' market share from the domestic industry over the POI" and that "it is sufficient that the Commission point to evidence showing that subject imports captured a substantial portion of market share from the domestic industry."²⁵²

The Commission's volume analysis, set out in section D of Part VI of its Final Determination, concluded that "the volume of subject imports and the increase in that volume are significant both in absolute terms and relative to consumption in the United

²⁵¹ 19 U.S.C. § 1677(7)(C)(i).

²⁵² *Nippon Steel v. United States*, 182 F. Supp. 2d 1330, 1335 (Ct. Int'l Trade 2001).

States.”²⁵³ In coming to this conclusion the Commission indicated that it considered the actual volume of subject imports (i.e. the volume in absolute terms) and the market share of subject imports (i.e. the volume relative to consumption) throughout the POI. The Commission also indicated that “The volume of subject imports rose at a faster rate than apparent U.S. consumption, and subject imports experienced significant gains in market share directly at the expense of the domestic industry.”²⁵⁴

The Canadian Parties, in their 57(1) Brief, assert that the Commission’s conclusion was not supported by substantial evidence.²⁵⁵ More specifically, the Canadian Parties allege that the Commission failed to consider four factors in its volume analysis:

1. the historical context and the business cycle;²⁵⁶
2. the Commission’s substitutability findings;²⁵⁷
3. the impact of third-party imports;²⁵⁸ and
4. regional U.S. demand and supply issues;²⁵⁹

In their 57(3) Brief, the Canadian Parties take issue with the Commission’s statement that there was “no evidentiary support” for their claim that new residential construction requires a greater proportion of Canadian lumber than domestic lumber.²⁶⁰

A. Historical Context and Business Cycle

The Canadian Parties submit that the Commission failed to consider whether import volumes were significant relative to historical volumes and the business cycle.²⁶¹

²⁵³ Final Det., *supra* note 151 at 33.

²⁵⁴ *Id.*

²⁵⁵ 57(1) Brief of Can. Parties at 131.

²⁵⁶ *Id.* at 132.

²⁵⁷ *Id.* at 136.

²⁵⁸ *Id.* at 139.

²⁵⁹ *Id.* at 140.

²⁶⁰ 57(3) Brief of Can. Parties, at 73.

²⁶¹ 57(1) Brief of Can. Parties, at 131.

While the law requires the Commission to “evaluate all relevant economic factors...within the context of the business cycle and conditions of competition that are distinctive to the affected industry,” the Panel notes that there is no statutory requirement to consider historical volumes *per se* in determining the significance of subject import volume. The Panel considers the concept of a historical “floor,” as advanced by the Canadian Parties, to be contrary to the statutory directive that, *inter alia*, the Commission consider the “volume of subject imports.” To accept the proposition that the significance of imports can only be determined relative to historical volumes would be contrary to the statutory requirement to not only consider the significance of any increase in volume but also to consider the significance of the volume in absolute terms.

We also agree that the Commission’s finding that there is no minimum rate of increase in subject import volume or a baseline percentage of market share for subject imports, above which volume will be considered “significant,” is in accordance with law.²⁶²

Accordingly, the Panel finds that the Commission’s consideration of volume, and the increase in volume of subject imports, in both absolute and relative terms, without regard to prior historical volume levels, was reasonable and in accordance with law.

B. Substitutability

The Canadian Parties submit that the Commission failed to consider substitutability in its volume analysis in light of its finding of “at least moderate substitutability.”²⁶³ Specifically, the Canadian Parties point to evidence that when new residential construction increases in the United States, demand for Canadian softwood lumber

²⁶² 57(2) Reply Brief of ITC at 117 (citing *Nippon Steel*, *supra* note 22 at n. 2.

²⁶³ 57(1) Brief of Can. Parties at 136.

species increases faster relative to the demand for US softwood lumber species.²⁶⁴ The Canadian Parties submit that this evidence contradicts the Commission's finding that "subject imports experienced significant gains directly at the expense of the domestic industry."²⁶⁵

The Commission in response states that the Canadian Parties' explanation for the increasing Canadian market share during the POI as being attributable to increasing new residential construction is inconsistent with the fact that subject imports increased faster than apparent U.S. consumption.²⁶⁶

In their 57(3) Brief, the Canadian Parties allege that the Commission, in defending its treatment of substitutability in its volume analysis, has misrepresented the record as lacking evidentiary support with respect to the connection between greater residential construction and a greater proportionate demand for Canadian softwood species as opposed to domestic softwood species.²⁶⁷ The Canadian Parties cite evidence on the record on this point from expert economists and a homebuilder. The Panel notes that this point was also raised in the *Amicus Curiae* Brief.²⁶⁸

Given the statement by the Commission that the Canadian Parties' submission "lacked evidentiary support,"²⁶⁹ the Canadian Parties take the position that the Commission failed to consider the evidence on the record "as evidenced by its disavowal of the existence of such evidence."²⁷⁰

²⁶⁴ *Id.* at 138.

²⁶⁵ Final Det., *supra* note 151 at 33.

²⁶⁶ 57(2) Reply Brief of ITC at 122-123.

²⁶⁷ 57(3) Brief of Can. Parties at 73-74.

²⁶⁸ NAHB *Amicus Curiae* Brief at 36-37 ("...significantly more lumber in new housing construction goes toward framing, an application where SPF dominates, thus pulling SPF into the market to fulfill additional need rather than displacing domestic production.")

²⁶⁹ 57(2) Reply Brief of ITC at 123.

²⁷⁰ 57(3) Brief of Can. Parties at 74-76.

2. Opinion of the Panel

While there is a presumption that the Commission has considered all the evidence on the record,²⁷¹ the Commission, by its own comments, has shown that not to be the case here. As stated by the U.S. CIT, Commission determinations are not supported by substantial evidence where the Commission “failed to take into account record evidence that fairly detracts from the weight of the evidence supporting its...determinations.”²⁷²

In Section VI (F) above, the Panel noted that the finding of at least moderate substitutability means that there is some degree of attenuated competition between subject imports and domestically produced softwood lumber.

The Panel finds that the Commission failed to include its finding of “at least moderate substitutability” in its volume analysis, thus rendering this analysis not based on substantial evidence. The Panel remands this determination to the Commission and directs the Commission to consider all record evidence to demonstrate how, and to what extent, the limitations to substitutability implied in its conclusion that the goods were “at least moderately substitutable” factored into its conclusion that subject imports experienced significant gains in market share directly at the expense of the domestic industry. The Panel directs the Commission to further reconsider its volume analysis as the Commission determines appropriate.

A. Third Party Imports

The Canadian Parties submit that the Commission and its staff relied on erroneous 2017 data with respect to third party imports which had been subsequently corrected by the U.S. Census Bureau, and that the Commission had further misinterpreted that

²⁷¹ *Siemens Energy, Inc. v. United States*, 992 F. Supp. 2d 1315,1324 (Ct. Int’l Trade 2014), *aff’d*, 806 F.3d 1367 (Fed. Cir. 2015).

²⁷² *Ad Hoc Shrimp Trade Action Comm. v. United States*, 791 F. Supp. 2d 1327, 1334 (Ct. Int’l Trade 2011).

incorrect data, which would have contradicted the Commission's conclusion that increases in subject imports were "directly at the expense of the domestic industry."²⁷³

The Commission notes in response that the corrected figures show a lower level of third-party import market share, which is consistent with the Commission's conclusion that third-party imports had a minimal presence during the POI.²⁷⁴

Considering the trend in the third-party import market share in the 2014-2016 period, the Commission notes that the quantity of non-subject imports remained essentially flat – fluctuating from 1 percent up to 2 percent market share while subject imports increased their market share by 3.4 percent.

While both the Commission and the Canadian Parties now appear to agree that the U.S. Census Bureau subsequently corrected its 2017 data with respect to third party imports and that the Commission had not considered this corrected data initially, the Panel is satisfied with the Commission's explanation that the corrected data is actually more supportive of its conclusion.

Given the low level of third-party imports and given that the statutory requirement is to focus on the significance of the subject imports, the Panel finds that the Commission's treatment of third-party imports was supported by substantial evidence and in accordance with law.

B. Regional U.S. Demand and Supply

The Canadian Parties allege the existence of variations in regional conditions of competition in the form of different regional lumber end-use preferences and different supply conditions. In this context, the Canadian Parties state any analysis of the

²⁷³ 57(1) Brief of Can. Parties at 139-140.

²⁷⁴ 57(2) Reply Brief of ITC at 125.

significance of the volume or increase in volume must take into consideration both regional supply and demand trends.²⁷⁵

The Commission properly points out that neither the Commission nor any of the parties viewed this case as one requiring a “regional industry” analysis and that, accordingly, the Commission was justified in conducting a single analysis for the national industry.²⁷⁶

While the statute provides that, in appropriate circumstances, the Commission may divide the national market into two or more separate markets,²⁷⁷ none of the parties viewed the present case as involving regional industries.

Given these facts, the Panel finds that it was reasonable and in accordance with law for the Commission to proceed on the basis of a single national industry.

H. Whether the Commission’s Price Effects Analysis Was Supported by Record Evidence and in Accordance with Law

1. Background

Section 771(7)(C)(ii) of the Tariff Act of 1930 provides that, in evaluating the effect of subject imports on prices, “the Commission shall consider whether (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which would otherwise have occurred, to a significant degree.”²⁷⁸

²⁷⁵ 57(1) Brief of Can. Parties at 140.

²⁷⁶ 57(2) Reply Brief of ITC, at 125-126.

²⁷⁷ 19 U.S.C. § 1677(4)(C).

²⁷⁸ *Tariff Act of 1930* § 771(7)(C)(ii); 19 U.S.C. § 1677(7)(C)(ii).

The U.S. CIT has held that the Commission is required to “undertake two distinct analyses to examine (1) the significance of underselling and (2) the causal connection between subject imports and price depression and/or suppression.”²⁷⁹ Additionally, it is “contrary to the plain language of the statute” for the Commission to collapse these two statutorily-mandated discrete inquiries into one.²⁸⁰

The Panel makes the following findings with respect to the issues which have been raised.

2. The Commission’s Determination with Respect to Price Underselling

A. Arguments of the Parties

The Commission stated, as with prior softwood lumber investigations, that it was problematic to find useful direct price comparisons and, despite the best efforts of the Commission and those of the Parties to develop meaningful price comparison data, the Commission could not determine, “based on this record, whether there has been significant underselling by subject imports.”²⁸¹

Both the COALITION and the Canadian Parties acknowledged that the price comparison data collected in the final phase had “limited utility” because it was not tied to a particular geographic market.²⁸²

Nonetheless, the Canadian Parties have suggested that this data indicates that subject imports significantly oversold domestic product.²⁸³ The COALITION, on the other hand,

²⁷⁹ *Altx, Inc. v. United States*, 167 F. Supp. 2d 1353, 1365 (Ct. Int’l Trade 2001).

²⁸⁰ *Id.*

²⁸¹ Final Det., *supra* note 151 at 36.

²⁸² *Id.* at 51; *see also* 57(3) Reply Brief of Can. Parties at 81; and 57(2) Rebuttal Brief of COALITION at 58.

²⁸³ 57(1) Brief of Can. Parties at 165.

has attempted to use lost sales and lost revenue information to indicate that there was, in fact, significant underselling.²⁸⁴

B. Opinion of the Panel

The Panel finds it difficult to place any weight on the price comparison data given the acknowledgement of the parties that it had limited utility because it did not reflect actual market conditions. In the Panel's view, to rely on this data as suggested by the Canadian Parties would amount to an impermissible reweighing of the evidence.

The Panel notes that the Commission did not rely on the lost sales and lost revenue information advanced by the COALITION. As noted by the Canadian Parties, this information was not confirmed by the Commission and the case law indicates that such anecdotal evidence is not always highly probative.²⁸⁵ In the Panel's view, to rely on this information as suggested by the COALITION would amount to an impermissible reweighing of the evidence.

Accordingly, the Panel finds that the Commission's conclusion that it could not determine, "based on this record, whether there has been significant underselling by subject imports" was supported by substantial evidence and in accordance with law.

3. The Commission's Determination with Respect to Price Depression

The Commission did not find that subject imports depressed prices to a significant degree. The Commission in its Brief notes that, to the extent the Canadian Parties argue that the Commission erred in finding price depression, the Canadian Parties were in error given the Commission actually did not find price depression:

²⁸⁴ 57(2) Rebuttal Brief of COALITION at 63-69.

²⁸⁵ 57(3) Reply Brief of Can. Parties at 96.

To the contrary, although the Commission observed that prices for softwood lumber generally were lower in 2016 than in 2014, it did not find that subject imports depressed prices to a significant degree.²⁸⁶

The Panel also notes the following Commission finding:

Prices for the domestic like product fluctuated from year to year but rose overall between 4.7 percent to 24.1 percent from January 7, 2014, to June 6, 2017.²⁸⁷

It is not apparent to the Panel that the Canadian Parties were arguing that there had been a price depression finding. Further, the Panel notes that the COALITION did not suggest in its Brief that there had been price depression.

The Panel finds that the Commission's determination that there was no significant price depression was supported by substantial evidence and in accordance with law.

4. The Commission's Determination with Respect to Price Suppression

The Commission concluded that the subject imports "prevented price increases which otherwise would have occurred, to a significant degree."²⁸⁸ The Commission indicated that the domestic industry faced a cost-price squeeze and that domestic prices, as revealed through an analysis of the COGS to net sales ratio, "did not recover to 2014 levels due to increasing volumes of subject imports, which prevented sufficient price increases relative to cost increases over the full POI".²⁸⁹ In coming to this conclusion, the Commission indicated that purchasers had confirmed purchasing subject imports rather than domestic goods due to their lower prices.²⁹⁰

²⁸⁶ 57(2) Rebuttal Brief of ITC at 144, footnote 568.

²⁸⁷ Final Det., *supra* note 151 at 37, n. 199.

²⁸⁸ *Id.* at 39.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 36.

A. Volume

The Canadian Parties allege that the Commission's "flawed volume analysis" undercuts the Commission's finding of price suppression. The Canadian Parties further allege, citing the NAFTA Panel's decision in *Lumber IV*, that it was inappropriate for the Commission to use volumes to justify its price suppression finding.²⁹¹

The Commission cites CIT decisions which have upheld the Commission's use of volume as a factor in its price suppression analysis. In *Shandong*, the Commission's finding of significant price suppression based on a high COGS to net sales ratio and significant subject import volume was upheld. In *JMC Steel Group*, the Commission's finding of negative price suppression based upon the lack of correlation of subject import volume to the COGS to net sales ratio was upheld.²⁹²

The Commission states that *Lumber IV* is not precedential and points out that the issue in the present determination is whether there is current material injury, whereas in *Lumber IV* the issue was whether there was a threat of material injury. The Commission notes there are different statutory requirements for determining current material injury versus the threat of material injury.²⁹³

The Panel's findings with respect to the Commission's volume analysis are set out in Section V (G) above.

The Panel agrees that the *Lumber IV* decision is not precedential here for the reasons stated by the Commission, and finds, consistent with the cases dealing with current material injury, that the Commission's use of the volume of subject imports as a factor for consideration in its price suppression analysis is based on substantial evidence and in accordance with law.

²⁹¹ 57(1) Brief of Can. Parties at 144.

²⁹² 57(2) Rebuttal Brief of ITC at 132, n.516 (citing the above-noted cases).

²⁹³ *Id.* at 132-133.

B. Domestic Capacity

In arriving at its price suppression determination, the Commission found that subject imports at declining prices placed pressure on domestic like products from 2014-2015 and dismissed the Canadian Parties' view that there was a price correction as a result of a supply/demand imbalance.

The Commission found that "domestic capacity actually declined by 0.06 percent from 2014 to 2015 and U.S. production and shipments increased by only 0.01 percent and 1.1 percent, respectively."²⁹⁴ Based on this information, the Commission found that the record did not support the Canadian Parties' "market correction" theory that prices fell in 2015 due to an increase in domestic industry capacity.²⁹⁵

The Canadian Parties state that the Commission has misunderstood the evidence, which, they say, indicates that the capacity and production of U.S. producers increased from 2014 to 2015. In so stating, the Canadian Parties take issue with the Commission's interpretation of Table III-4 in the Commission's Staff Report.²⁹⁶

The Canadian Parties also note that there was additional evidence on the record from the domestic industry's questionnaires indicating there had been an increase in U.S. capacity in 2015 greater than the increase in consumption.²⁹⁷

The Commission in its Brief notes that its analysis was based on the data in Table III-4, which the Commission adjusted by excluding the capacity of related parties that had been excluded from the domestic industry.²⁹⁸

²⁹⁴ Final Det., *supra* note 151 at 38, n. 205.

²⁹⁵ 57(2) Rebuttal Brief of ITC at 138.

²⁹⁶ 57(1) Brief of Can. Parties at 146-147.

²⁹⁷ *Id.* at 147.

²⁹⁸ 57(2) Rebuttal Brief of ITC at 139.

The Canadian Parties, in their 57(3) Brief, advance the position that the capacity of the total domestic industry (without exclusions for related parties) is the relevant yardstick for comparison.²⁹⁹

As the Panel found in Section V (B) above, the exclusions from the domestic industry were reasonable and in accordance with law and, as such, find the Commission properly excluded those parties in its domestic capacity analysis.

In support of its argument that the Commission's finding with respect to domestic capacity was flawed, the Canadian Parties further submit in their 57(3) Brief that the most current FEA data was not used to accurately determine domestic capacity, rendering the Commission's determination unsupported by substantial evidence.³⁰⁰

The Commission has acknowledged that the Western Wood Products Association (the "WWPA") data used in its domestic industry capacity calculation was based on data from FEA.³⁰¹ While the Commission indicated it used "the most updated WWPA data,"³⁰² it is not apparent whether this WWPA data included any adjustments to FEA data which occurred after the WWPA had published the relevant Lumber Track issue. Based on comments from counsel for the Commission during the Panel hearing, it would appear that this was not the case.³⁰³ The Panel thus finds that the Commission failed to consider whether to take the more recent FEA data into account, thus rendering its finding on domestic capacity unsupported by substantial evidence.

The Panel remands this determination to the Commission and directs the Commission to consider whether to take the more recent FEA data into account in its domestic capacity analysis, explain its decision, and, if it decides to take the updated FEA data into account, reconsider its price effects analysis as it determines is appropriate.

²⁹⁹ 57(3) Reply Brief of Can. Parties at 39.

³⁰⁰ 57(3) Reply Brief of Can. Parties at 35-36.

³⁰¹ 57(2) Rebuttal Brief of ITC at 140.

³⁰² *Id.* at 139.

³⁰³ Transcript of Panel's May 7, 2019, Hearing at 204.

C. Period of Review

The Canadian Parties submit that the Commission's price effects analysis is based on an inappropriate focus on the first two years of the POI – 2014 and 2015 – and the decline in prices that occurred in that period, whereas the Canadian Parties submit the Commission ought to have considered the more current data (*i.e.*, 2015 and 2016) which demonstrated the absence of any negative price effects combined with the greatest increase in subject imports during the POI.³⁰⁴

The Commission submits that the Canadian Parties' position is factually wrong and that its price effects determination "relied upon a comparison of full year data throughout the entire period of investigation, not just data from 2014 and 2015, for price effects findings."³⁰⁵ The Commission points out that it expressly found that although prices increased in 2016, they did not return to levels similar to those at the beginning of the POI, despite the increasing U.S. consumption from 2015 to 2016.³⁰⁶

The Canadian Parties also submit that the Commission ought to have only considered the price trends following the expiration of the 2006 SLA at the end of 2015 and note that even the COALITION "agreed during the investigation that the post-SLA period was the most relevant to examine."³⁰⁷

As stated in Section V (E) above, the Panel has found that the terms of the 2006 SLA did not preclude the Commission's consideration of the SLA period.

The Commission's mandate is to consider price effects throughout the POI and it is within the Commission's discretion to analyze the price effects in that period as it

³⁰⁴ 57(1) Brief of Can. Parties at 145.

³⁰⁵ 57(2) Rebuttal Brief of ITC at 133.

³⁰⁶ *Id.* at 134.

³⁰⁷ 57(1) Brief of Can. Parties at 151.

considers appropriate.³⁰⁸ The Panel notes that the weighing of the evidence in this period is a matter within the Commission's jurisdiction.

The Panel finds that the Commission based its price suppression analysis on a consideration of the entire POI and, in doing so, acted on the basis of substantial evidence and in accordance with law.

The Panel is aware that the various remands ordered may result in the Commission's deciding to reconsider the time period to be focused upon in its price suppression analysis.

D. Different Softwood Species

In arriving at its price suppression determination, the Commission stated that "the prices of different species *closely track* each other and seem to have an effect on others' prices, particularly those that are used in the same or similar applications."³⁰⁹

The Canadian Parties submit that the Commission's analysis is "literally wrong," as the record evidence indicates that there are "departures between prices for species produced in the United States and prices for species produced in Canada."³¹⁰ The Canadian Parties further submit that the Commission's price trend finding between species "actually contradicted its own findings," citing various articles "filled with references to price variations *between species*."³¹¹

The Canadian Parties submit that, while demand for softwood lumber species may cause similar changes in price, "differences in physical characteristics and customer

³⁰⁸ *Nucor Corp. v. United States*, 414 F.3d 1331, 1336 (Fed. Cir. 2005).

³⁰⁹ Final Det., *supra* note 151 at 37 (*emphasis supplied*).

³¹⁰ 57(1) Brief of Can. Parties at 149.

³¹¹ *Id.* at 149.

and regional preferences between species also cause prices for different species to deviate.”³¹²

In supporting its finding that prices of different species “closely track” each other, the Commission states that industry sources confirm that price movements of one species “affect” prices of other species³¹³ and, in this regard, cites the April 2015 article in *Madison Lumber Reporter* referenced in the Final Determination, indicating that Western SPF prices have dropped 22.8 percent, compared to a 16.5 percent drop in Eastern SPF, and a 4.2 percent drop in SYP. The article then concludes that “*such a great difference in price movement* of one compared to the other two is definitely worth watching.”³¹⁴

As further support of the “closely track” finding, the Commission in its Brief states that “pricing data from *Random Lengths* demonstrated that prices for SYP, Douglas Fir, and Hem Fir “*generally tracked* each other throughout the period of investigation.”³¹⁵

The Panel finds that the plain meaning of the words “affect,” “such a great difference in price movement,” and “generally track,” which are based on the evidence cited, do not support the Commission’s finding that the prices of different species “closely track” each other. The Panel finds that the Commission has misunderstood or misstated the record evidence, thus rendering the Commission’s this finding not supported by substantial evidence.

The Panel remands this determination to the Commission and directs the Commission to reconsider its conclusion that the prices of different species closely track each other to take into consideration that price movements of one species “affect” prices of other species, the existence of a “great difference in price movement” of one species

³¹² 57(1) Brief of Can. Parties at 150.

³¹³ 57(2) Rebuttal Brief of ITC at 141 (*emphasis supplied*).

³¹⁴ Final Det., *supra* note 151 at 37, n. 201; 57(2) Rebuttal Brief of ITC at 141-142 (*emphasis supplied*).

³¹⁵ 57(2) Rebuttal Brief of ITC at 142 (*emphasis supplied*).

compared to another, and that prices for different species “generally track” each other, as well as any other record evidence, and to determine what effect such reconsideration has on its price suppression analysis.

E. Evidence of “Overselling”

The Canadian Parties submit that the price comparison data collected in the final phase of the investigation supports a conclusion that there was a predominance of overselling of subject imports, which, in turn, does not support a finding of price suppression.³¹⁶

The Commission takes the position that the Canadian Parties are conflating the separate price effects analysis required and the different data used to consider underselling (price comparison data) with that used to consider price suppression (COGS data in combination with demand and price trends).³¹⁷

The Commission further takes issue with the Canadian Parties’ use of this price comparison data, given that all parties had agreed that it had limited utility.³¹⁸

As stated above, the Panel finds it difficult to place any weight on the price comparison data and finds that it was reasonable for the Commission not to use this data in conducting its price suppression analysis.

Given this finding, it is unnecessary for the Panel to consider whether price comparison data can be used in conducting a price suppression analysis.

³¹⁶ 57(1) Brief of Can. Parties at 167.

³¹⁷ 57(2) Rebuttal Brief of ITC at 135.

³¹⁸ *Id.* at 136.

F. Cost of Goods Sold and Pricing Trends

The use of unit COGS information and the COGS to net sales ratio are an accepted basis for considering whether or not there has been price suppression.³¹⁹ As the CIT has noted, price suppression analysis focuses on COGS data in combination with demand and price trends³²⁰ and this is the approach taken by the Commission. As stated in its Brief:

In arriving at this (price suppression) conclusion, the Commission not only considered corroborating purchasers' narrative responses, but importantly also relied on COGS data in combination with demand and price trends.³²¹

In arriving at its price suppression determination, the Commission notes that the domestic industry's COGS to net sales ratio increased from [[]] in 2014 to [[]] in 2015 and then declined to [[]] in 2016³²² and states that "(w)hile the domestic industry's ratio of COGS to net sales improved in 2016, it did not recover to 2014 levels due to increasing volumes of subject imports, which prevented sufficient price increases relative to cost increases over the full POI."³²³

The Canadian Parties take issue with the Commission's COGS analysis and its conclusion that subject imports prevented sufficient price increases on several grounds.

First, the Canadian Parties state:

The fact that the ratio of COGS to net sales *declined continuously* from a peak in 2015 to the lowest rate of the POI in interim 2017, [[]], all while subject imports were higher than their 2015 levels, demonstrates that when there were

³¹⁹ 57(2) Rebuttal Brief of ITC at 132.

³²⁰ *LG Elecs.*, *supra* note 180 at 1350.

³²¹ 57(2) Reply Brief of ITC at 151.

³²² Final Det., Softwood Lumber Products from Canada, *see supra* note 151 at 38.

³²³ *Id.* at 39.

no trade restrictions, the domestic industry improved its return on COGS and therefore did not experience price suppression.³²⁴

...lumber prices and industry performance improved from 2015 to 2016 while unit costs declined and subject imports increased the most. This is literally *the opposite* of price suppression.³²⁵

The Commission takes the position that the Canadian Parties are attempting to reweigh the evidence and state that the Commission reasonably found that the most pertinent period for assessing injury was 2014 to 2016 where there was a rising COGS to net sales ratio.”³²⁶

As indicated in the “Period of Review” subsection above, the Panel has found that the Commission considered the entire POI and, in doing so, acted on the basis of substantial evidence and in accordance with law.

As noted in that subsection, the Panel is also aware that the various remands ordered may result in the Commission’s deciding in its discretion to reconsider the time period to be focused upon in its price suppression analysis.

Second, the Canadian Parties submit that the price trends over the POI were not attributable to subject imports but were determined by market fundamentals as evidenced by the similar price movement of other construction materials.³²⁷

In terms of the other construction materials, the Commission acknowledges that “there may be multiple factors that contribute to movements in price,” but the fact that there

³²⁴ 57(1) Brief of Can. Parties at 159.

³²⁵ *Id.* at 185.

³²⁶ Reply Brief of ITC at 145.

³²⁷ 57(1) Brief of Can. Parties at 161.

are similar market forces does not undermine the Commission's price suppression finding.³²⁸

The Panel agrees that the fact that other construction materials experienced similar movements in prices does not, in and of itself, mean that subject imports did not suppress domestic prices. The Panel further notes that the Canadian Parties do not suggest that the Commission failed to take this information into account.

Third, the Canadian Parties state that the COGS to net sales ratio information contradicts the Commission's conclusion that there was a cost-price squeeze. In this regard, the Canadian Parties cite the *Glycine from Japan and Korea* decision and a number of other Commission decisions which, they say, constitute an agency practice that there is no cost-price squeeze where unit COGS fluctuate and the ratio of COGS to net sales declines during the POI.³²⁹

The Commission takes issue with the Canadian Parties' reference to the *Glycine from Japan and Korea* decision as support for the position that the fact that unit COGS declined from 2014 to 2016 demonstrates the absence, not the presence, of a cost-price squeeze. In this regard, the Commission in its Brief takes the position there is no agency "practice" and cites the *Crystalline Silicon Photovoltaic* decision as indicating that the Commission has found significant price suppression under circumstances in which unit COGS declined over the POI.³³⁰

The Panel takes no position as to whether there is an agency practice as argued by the Canadian Parties. The Panel further notes that, even if this were the case, a Commission determination involves a consideration of the specific facts and circumstances under investigation.

³²⁸ 57(2) Reply Brief of ITC at 143.

³²⁹ 57(1) Brief of Can. Parties at 185, n. 632; and 57(3) Reply Brief of Can. Parties at 89-91, nn. 294-302.

³³⁰ 57(2) Reply Brief of ITC at 147.

Fourth, the Canadian Parties submit that, because the finding of “at least moderately substitutable” was not taken into account, the Commission’s price suppression analysis is unsupported by substantial evidence and not in accordance with law.³³¹

As has been elaborated in Section V (F), the Panel has noted that the finding of “at least moderate substitutability” means that there is some degree of attenuated competition between subject imports and domestically produced softwood lumber. As noted in that Section, the U.S. CIT has indicated that substitutability can have a direct impact on the evaluation of price effects.³³²

A review of the COGS and price trends analysis does not indicate that the Commission took into account that, because of its substitutability finding, there was some degree of attenuation of competition between subject imports and domestic products, or whether this attenuated competition prevented price increases for domestic products which otherwise would have occurred.

The Panel finds that because the impact of attenuated competition between subject imports and domestic products was not taken into account, the Commission’s finding that subject imports prevented price increase which otherwise would have occurred to a significant degree is not supported by substantial evidence.

The Panel remands this determination to the Commission and directs the Commission to reconsider its COGS and price trends analysis to take into account the Commission’s finding that subject imports and domestic products are at least moderately substitutable, and determine what effect such reconsideration has on its finding that subject imports prevented price increases which otherwise would have occurred to a significant degree.

³³¹ 57(1) Brief of Can. Parties at 130.

³³² *Coal. for Fair Trade of Hardwood Plywood v. U.S. Int’l Trade Comm’n*, Slip Op. 16-147 244 (Ct. Int’l Trade 2016 at 36-37).

G. Questionnaire Responses

The Canadian Parties take issue with the Commission's determination that purchasers confirmed purchasing subject imports rather than domestic products "*due to* their lower prices" and that these purchasers (the 12 identified by the Commission) "reported purchasing a total of 5.6 billion board feet of subject imports *due to* lower prices."³³³

The Canadian Parties submit that these findings are not supported by the evidence on the record.

Of the 40 usable questionnaire responses, 30 purchasers reported that they bought subject imports instead of U.S.-produced products. Of those 30 purchasers, 12 responded that price was a primary reason for purchasing decisions.³³⁴

The Canadian Parties in their 57(3) Brief point out that the question posed to purchasers was whether price was "a primary reason for purchasing imports from Canada rather than domestic product" and that it did not ask whether "the primary reason" for such a purchase was price.³³⁵

As the Canadian Parties also point out, there could be other primary reasons for a purchase decision and that a review of the 12 questionnaire responses shows that other factors were reported [[

]] as important in those purchase decisions.³³⁶

³³³ 57(1) Brief of Can. Parties at 168 (*italics added*).

³³⁴ Final Det., *supra* note 151 at 37.

³³⁵ 57(3) Reply Brief of Can. Parties at 92.

³³⁶ 57(1) Brief of Can. Parties at 169-170; 57(3) Reply Brief of Can. Parties at 95.

Both the Commission and the COALITION acknowledge that factors other than price may have been considered in purchasing subject imports.³³⁷

When examining the 12 purchasers that imported the 5.6 billion board feet of subject imports referenced by the Commission, the Canadian Parties note that the questionnaire responses indicate that [[]] of those imports were not made due to lower prices alone.³³⁸

The Canadian Parties also take issue with the reliance of the Commission on 4 of the 40 questionnaire responses that reported U.S. producers had reduced prices in order to compete with subject imports. The Canadian Parties take the position that this 10 percent response rate representing only a small portion of the total purchases [[]] is not a representative sample meeting the substantial evidence requirement and further point out that all four purchasers had noted factors other than price.³³⁹ The Canadian Parties also note that two of those purchasers accounting for [[]] of the total purchases indicated they bought [[]] their lumber from Canada based on other factors such as [[]] and not on price alone.³⁴⁰

The Canadian Parties submit that the Commission improperly relied on “a misleading interpretation of a small minority of purchasers’ questionnaire responses,”³⁴¹ and submit that the Panel would not be reweighing the evidence if it were to remand the final determination, because the questionnaire responses relied on “taken as a whole, literally support the opposite of the Commission’s conclusion.”³⁴²

³³⁷ 57(2) Rebuttal Brief of ITC at 110; 57(2) Rebuttal Brief of COALITION at 65.

³³⁸ 57(3) Reply Brief of Can. Parties at 93.

³³⁹ 57(1) Brief of Can. Parties at 169.

³⁴⁰ *Id.* at 169-170.

³⁴¹ *Id.* at 171.

³⁴² 57(3) Reply Brief of Can. Parties at 95.

The *Amicus Curiae* Brief discusses Table II-8 from the Commission's Staff Report and states that it demonstrates that purchasers deemed species "very important" more frequently than price when purchasing softwood lumber.³⁴³

It is clear to the Panel that the Commission relied on the above noted questionnaire responses for its conclusion that purchasers confirmed purchasing subject imports "due to price."

The Commission in its Brief affirms its determination that purchasers confirmed purchasing subject imports "due to lower prices," acknowledges that it "did not find or purport to find that 'a majority of purchasers' had done so" and takes the position that the Canadian Parties are attempting to reweigh the evidence.³⁴⁴

In dealing with the five of the 12 purchasers who indicated they considered other factors when purchasing subject imports, the Commission states in its Brief that this did not detract from its decision that these purchasers "*expressly stated that price was the main reason* for making those purchases."³⁴⁵

A plain language reading of the Commission's determination is that the Commission found that that 5.6 billion board feet of subject imports were purchased due to lower prices and not due to any other factor. However, the plain meaning of the wording used in the questionnaire, *i.e.*, whether price was "a primary reason" and the specific questionnaire responses indicating that there were also other primary reasons for purchases of subject imports, does not support a conclusion that these purchases were due solely to price considerations. The Panel finds that the Commission has misstated or misunderstood the questionnaire responses, thus rendering its finding not supported by substantial evidence.

³⁴³ NAHB *Amicus Curiae* Brief at 37-39.

³⁴⁴ 57(2) Rebuttal Brief of ITC at 150.

³⁴⁵ *Id.* at 150-151 (*emphasis supplied*).

The Panel remands this determination to the Commission and directs the Commission to reconsider the record evidence, its conclusion that purchasers confirmed purchasing subject imports rather than domestic product solely due to their lower prices, and to determine what effect such reconsideration has on its price suppression analysis.

I. Whether the Commission's Impact Analysis Was Supported by Record Evidence and in Accordance With Law

1. Background

The Canadian Parties advance several arguments that the Commission's impact analysis was unlawful and unsupported by substantial evidence. Some of these arguments turn on issues that the Panel discusses elsewhere. The Canadian Parties first assert that the ITC's impact analysis was flawed because it was conducted "within a fundamentally flawed, unlawful framework."³⁴⁶ This "framework," according to the Canadian Parties, consisted of (i) the Commission's alleged failure to account for the U.S. softwood lumber industry's performance in the context of the business cycle and conditions of competition;³⁴⁷ (ii) the Commission's use of 2014, or the first year of the POI, as a benchmark year for its injury analysis, without properly considering the industry's performance in a broader "historical context;"³⁴⁸ (iii) the Commission's decision to discount interim 2017 data because of post-petition effects;³⁴⁹ (iv) the Commission's treatment of the SLA as a condition of competition;³⁵⁰ and (v) the Commission's alleged failure to account for its substitutability findings in its injury analysis.³⁵¹ The Canadian Parties argue further that the Commission's impact analysis

³⁴⁶ 57(1) Brief of Can. Parties at 52, 171.

³⁴⁷ *Id.* at 54-64.

³⁴⁸ *Id.* at 64-84.

³⁴⁹ *Id.* at 84-93.

³⁵⁰ *Id.* at 93-109.

³⁵¹ *Id.* at 109-130.

was flawed in light of its allegedly “unsupported and erroneous conclusions regarding volume and price effects.”³⁵²

Because we have addressed each of these issues elsewhere, the Panel need not discuss them again here. With respect to the use of 2014, or the first year of the POI, as a benchmark year for its injury analysis and the Commission’s treatment of the SLA as a condition of competition, the Panel has sustained the Commission’s determination.³⁵³ Any argument that the Commission’s impact analysis was tainted by its treatment of these issues is therefore academic. With respect to the Commission’s Business Cycle determination, its decision to discount Post-petition data, and its failure to account for its Substitutability findings in its injury analysis, the Panel has remanded the Commission’s determinations regarding these issues for reconsideration. If, after reconsideration, the Commission changes its determination with respect to these issues, it should reconsider its impact analysis in light of its new findings. Where appropriate, we discuss below the specific aspects of the Commission’s impact analysis that may require additional explanation if it reaches a different conclusion on certain issues on remand.

2. Statutory Indicia of Industry Performance

A. Arguments of the Parties

The Canadian Parties challenge the Commission’s impact analysis based on their characterization of the domestic industry’s “unprecedented success during the POI.”³⁵⁴ With respect to trade indicators, they point to the Commission’s observation that “virtually all trade indicators for the domestic industry increased as apparent U.S. consumption rose,” and in particular the Commission’s recognition of increases in the domestic industry’s production, capacity utilization, U.S. shipments, and ratio of U.S.

³⁵² *Id.* at 171.

³⁵³ See *supra* at Sections V (A).

³⁵⁴ 57(1) Brief of Can. Parties at 173.

shipments to inventories.³⁵⁵ They also question the evidentiary basis for (i) the Commission's characterization of the domestic industry's production capacity from 2014-2016 as "relatively flat," and (ii) the Commission's finding that the domestic industry's U.S. shipments failed to keep pace with growth in apparent domestic consumption.³⁵⁶

With respect to the Commission's analysis of the domestic industry's financial indicia, the Canadian Parties emphasize their related argument that the Commission erred in discounting 2017 data because of post-petition effects. They assert that the Commission "concocted declines in financial performance" by "discounting the relevance of interim 2017."³⁵⁷ They nevertheless highlight "improvements from 2015 to 2016," including the fact that, from 2015-2016, the domestic industry's gross profit increased by [[]], operating income [[]], and net income [[]].³⁵⁸ Finally, they fault the Commission for "seiz(ing) on declining capital expenditures to support its adverse impact findings."³⁵⁹

In light of these indicators, the Canadian Parties describe the industry's performance during the POI here as superior to its performance during the periods underlying the Commission's analyses in *Lumber III* and *Lumber IV*. With respect to *Lumber III*, they call to the Panel's attention that the reviewing NAFTA panel "never blessed the Commission's current injury determination."³⁶⁰ With respect to *Lumber IV*, they assert that the reviewing NAFTA panel "demanded the Commission issue a negative determination."³⁶¹

³⁵⁵ *Id.* at 174-175.

³⁵⁶ *Id.* at 176.

³⁵⁷ *Id.* at 177. As discussed above, the Panel has remanded the Commission's decision to discount post-petition data, see Section V (D).

³⁵⁸ *Id.* at 178-179.

³⁵⁹ *Id.* at 180-181.

³⁶⁰ *Id.* at 174.

³⁶¹ *Id.*

In response, the Commission argues first that the Panel should not consider this case with reference to *Lumber III* and *Lumber IV* because each determination by the Commission is *sui generis* and because subsequent amendments to U.S. law have changed the statutory requirements applicable to the Commission's determinations. The Commission emphasizes that, in 2015, the statute was amended to state explicitly that the Commission "may not determine that there is no material injury or threat of material injury to an industry in the United States merely because that industry is profitable or because the performance of that industry has recently improved."³⁶² According to the Commission, the Canadian Parties "cherry-pick certain data" and ask the Panel to reweigh the evidence in their favor, ignoring the "statutory caveat that 'the presence or absence of any factor which the Commission is required to evaluate . . . shall not necessarily give decisive guidance with respect to' the Commission's injury determination."³⁶³ Finally, the Commission asserts that its findings regarding the domestic industry's "relatively flat" production capacity and the inability of the domestic industry's U.S. shipments to keep pace with demand were both based on accurate data.³⁶⁴

B. Opinion of the Panel

Notwithstanding any reconsideration of the Commission's determinations on related issues on remand, the Panel finds insufficient basis to remand the Commission's determination regarding the evidence of adverse impact on the domestic industry. As discussed above, the standard of review applied by reviewing courts in the United States requires us to sustain the Commission's determination unless it is unsupported by substantial evidence or otherwise not in accordance with law.³⁶⁵ Under this standard, the Commission is presumed to have considered the entire record, and a reviewing court will sustain a determination of less than ideal clarity, as long as the path of the

³⁶² *Id.* at 177. As discussed above, the Panel has remanded the Commission's decision to discount post-petition data, see Section V (D).

³⁶³ *Id.* at 158.

³⁶⁴ *Id.* at 161-62.

³⁶⁵ 19 U.S.C. § 1516a(b)(1)(B)(i).

agency's decision is reasonably discernible.³⁶⁶ We must also sustain the Commission's determination even if the record may have supported a different outcome, or if the Panel may have reached a different conclusion if it were to review the record *de novo*.³⁶⁷

We begin with the Canadian Parties' arguments regarding the alleged flaws in the data underlying certain of the Commission's findings. As noted above, they point to two such flaws: (i) the Commission's alleged miscalculation of the domestic industry's capacity data and the subsequent finding that capacity was "relatively flat" throughout the POI, and (ii) the apparent consumption and U.S. shipment data underlying the Commission's finding that U.S. demand increased at a greater rate than the domestic industry's U.S. shipments. The Panel has addressed the first alleged flaw elsewhere and has determined that additional explanation regarding the Commission's capacity calculation is warranted.³⁶⁸ If, upon reconsideration, the Commission discovers flaws in its calculations or the underlying data,³⁶⁹ it should also provide additional explanation regarding whether and to what extent its impact analysis relied on the domestic industry's "relatively flat" production capacity during the POI.³⁷⁰ The second alleged

³⁶⁶ See, e.g., *Siemens Energy, Inc. v. United States*, 992 F.Supp.2d 1315, 1324 (Ct. Int'l Trade 2014); *Timken U.S. Corp v. United States*, 421 F.3d 1350, 1354-55 (Fed. Cir. 2005).

³⁶⁷ See *Siemens Energy, Inc. v. United States*, 806 F.3d 1367, 1374 (Fed. Cir. 2015).

³⁶⁸ See *supra* at Section V (H)(3)(c).

³⁶⁹ Before the Panel, the Commission has argued that its calculations were accurate. Transcript of Panel Hearing May 7, 2019, at 204-205 (Ms. Dempsey).

³⁷⁰ While the Canadian Parties argue extensively about the allegedly inaccurate domestic industry capacity figure that the Commission used, this figure does not appear to have played an important role in the Commission's determination. To the contrary, the Commission noted the domestic industry's "relatively flat" production capacity in discussing a series of data points that tend to detract from its affirmative determination. The Commission's affirmative determination instead emphasizes overall declines in the domestic industry's market share, financial performance, and U.S. shipments, which the Commission found did not keep pace with or otherwise reflect the growth in U.S. demand over the relevant period. See Conf. Views at 59-60. Even if the Commission's capacity number were incorrect, it is thus unclear to the Panel that this would be material error. The Commission, however, neither explained its determination in this regard nor presented any such legal argument to the Panel on review, other than maintaining that the capacity calculation at issue was correct.

flaw, as the Commission points out, appears to be a mistake on the part of the Canadian Parties, who do not contest the Commission's response in their reply brief.³⁷¹ The Panel therefore finds no fault with the Commission's finding that the domestic industry's U.S. shipments failed to keep pace with demand growth.

We turn now to the Canadian Parties' argument that the domestic softwood lumber industry was doing too well to support a material injury determination.³⁷² As we have discussed elsewhere, the Panel has determined that the Commission's decision to confine its analysis to the POI, using 2014 as the starting point, was supported by substantial evidence and otherwise lawful.³⁷³ One of the Canadian Parties' primary challenges to the Commission's impact findings is thus academic, and the Panel is left to consider whether the Commission's determination was supported by substantial evidence with respect to the analysis that the Commission actually conducted, and not the one that the Canadian Parties believe that it should have conducted. We find that it was.

Of particular importance to the Panel's decision in this regard is the 2015 amendment to the U.S. statute, which now prohibits the Commission from reaching a negative determination "merely because that industry is profitable or because the performance of that industry has recently improved."³⁷⁴ The Canadian Parties initially do not discuss the implications of this provision for their arguments regarding the "flourishing" domestic industry, and in reply to the Commission, they urge an interpretation of the statute that is unsupported by its plain language. Specifically, they argue that the "the domestic industry was not 'merely' profitable or 'merely' exhibiting recently improved performance."³⁷⁵ But the word "merely" in the statute does not modify "profitable" or "improved." In the Panel's view, the plain meaning of this provision is that the

³⁷¹ 57(2) Rebuttal Brief of ITC at 162.

³⁷² 57(1) Brief of Can. Parties at 173 ("Not only was the domestic softwood lumber industry not suffering material injury, it was flourishing.")

³⁷³ See *supra* at Section V (C).

³⁷⁴ 19 U.S.C. § 1677(7)(J).

³⁷⁵ 57(3) Reply Brief of Can. Parties at 105.

Commission may not, *i.e.*, does not have the discretion to, reach a negative determination based solely on a showing that the domestic industry is profitable or improving. Moreover, a direct corollary of the plain language of this statutory provision is that the Commission may find a negative impact from investigated imports when a domestic industry is profitable and experienced recent improvement.

The Panel recognizes that the domestic industry may have been doing relatively well in a strong market. But the Canadian Parties point us to no authority that has interpreted the statutory provision otherwise than we do here. Nor do they point us to any authority that has drawn a line that may or may not have been crossed, in this particular investigation, between “profitable” and “improving” and, for example, some level of “historically high profitability,” or “extraordinary improvements,”³⁷⁶ which may or may not be sufficient for the Commission to deviate from this statutory directive. We decline to draw this line here. Under U.S. law, authority is given to the Commission in the first instance to interpret ambiguous provisions in the statute that it is tasked with implementing.³⁷⁷ Unless that interpretation is contrary to the express intent of Congress or otherwise impermissible, reviewing courts will defer to the Commission’s interpretation.³⁷⁸

Although the Canadian Parties are correct that the Commission did not explicitly “purport to interpret or apply the amendment in its Final Determination,”³⁷⁹ it is reasonably discernible from the Commission’s determination that it was aware of the amendment and that it conducted its analysis in accordance with its requirements.³⁸⁰

³⁷⁶ *Id.*

³⁷⁷ *Chevron*, *supra* note 32, 844-45 (1984).

³⁷⁸ *Id.* See also *Pesquera Mares Australes v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001) (interpreting statutory interpretations in Agency determinations under *Chevron* framework).

³⁷⁹ 57(3) Reply Brief of Can. Parties at 105.

³⁸⁰ The Panel also notes that accepting the Canadian Parties’ argument that the Commission’s cite to 19 U.S.C. § 1677(7)(J) in its brief as a *post hoc* rationalization would lead to the absurd result of the Commission not being able to point the Panel to a statutory provision directly on point to the issue at hand unless and until there is a remand.

Citing to 19 U.S.C. § 1677(7)(C)(iii), the Commission noted that “(t)his provision was amended by the Trade Preferences Extension Act of 2015,” the amendment at issue here.³⁸¹ That the domestic industry was “profitable,” and that many indicators “improved” from 2015 to 2016 is apparent on the face of the Commission’s analysis.³⁸² The Commission in fact highlighted several of these improving indicators at the outset of its analysis.³⁸³ It went on, however, to find that these improvements were outweighed by the domestic industry’s lost market share and its declining financial performance despite growing demand and improving trade indicators.³⁸⁴

Clearly aware of the statutory requirement imposed by the Trade Preferences Extension Act of 2015, in other words, the Commission considered whether the domestic industry nevertheless manifested indicia of adverse impact during the POI, discounting interim 2017 because of post-petition effects.³⁸⁵ Without finding that the Commission erred in using 2014 as a starting point for its analysis, we see insufficient basis to fault the Commission’s point-A-to-point-B comparison of the domestic industry’s financial indicators in 2014 and 2016, or with the Commission’s conclusion that certain improvements in the industry were not commensurate with growth in U.S. demand. The Commission provided a reasoned explanation for its finding of negative impact on the domestic industry. The Canadian Parties would have the Panel both ignore the deference granted to the Commission under *Chevron* in interpreting the impact analysis provision of the statute and improperly reweigh the evidence on the record.

This result includes the Commission’s consideration of the domestic industry’s capital expenditures. As with other financial indicators, the Commission considered the domestic industry’s capital expenditures in 2016 in comparison to its expenditures in 2014 and found that they declined [[]].³⁸⁶ Beyond the assertion that

³⁸¹ Conf. Views at 57 n. 208.

³⁸² See, e.g., *id.* at 58-59.

³⁸³ *Id.* at 58.

³⁸⁴ *Id.* at 60-61.

³⁸⁵ *Id.* at 59-61.

³⁸⁶ *Id.* at 60.

considering total capital expenditures over the entire POI may have supported a different outcome, the Canadian Parties give us no compelling reason that the Commission was required to conduct its analysis in that manner.³⁸⁷ The Canadian Parties also ignore that the Commission's consideration of the domestic industry's capital expenditures did not rely solely on the amounts of the domestic industry's investments, but also on reports by U.S. producers of many incidents of negative effects on investment.³⁸⁸ The Panel may not reweigh the evidence or remand the Commission's determination simply because the record may support two different outcomes.³⁸⁹ In such situations, the standard of review demands that we defer to the agency.³⁹⁰

The Panel further finds that the Canadian Parties are also inconsistent in advocating what time periods should be examined. For example, the Canadian Parties rely on the 2014 to interim 2017 period for the COGS-to-net sales ratio trend, but the 2014 to 2016 period for the unit COGS trend.³⁹¹ All that the Canadian Parties have demonstrated is that it is possible to generate almost any trend in data given the ability to pick and choose the start and end points. This obviously cannot be the methodology for the Commission's analysis and, correspondingly, the basis for reviewing the Commission's determination. Moreover, the Canadian parties' frequent focus on trends for 2015-2016 to detract from the Commission's analysis of the 2014-2016 POI reflects an unsupported standard that trends which vary over the POI cannot be valid. The Commission, moreover, "has broad discretion with respect to the period of investigation that it selects for purposes" of its inquiry, as well as with respect to its "focus on (the statutory factors) during particular periods of the investigation period."³⁹² That the

³⁸⁷ 57(1) Brief of Can. Parties at 180-183.

³⁸⁸ *Conf. Views* at 60 n. 223 (citing CR Table D-3 at D-13 to D-18).

³⁸⁹ See *Siemens Energy, Inc. v. United States*, 806 F.3d 1367, 1374 (Fed. Cir. 2015).

³⁹⁰ *Id.* We are, nevertheless, not convinced that the Commission "seized upon declining capital expenditures to support" its injury determination, as the Canadian Parties submit. 57(1) Brief of Can. Parties at 180-181. This was one of many factors that the Agency considered.

³⁹¹ 57(1) Brief of Can. Parties at 185-186.

³⁹² *Nucor Corp. v. United States*, 414 F.3d 1331, 1337 (Fed. Cir. 2005).

Commission was not persuaded to analyze data for specific portions of the POI in a manner that the Canadian Parties believe would have been more appropriate is therefore insufficient grounds for remand.

We also find the Canadian Parties' citation to the *Lumber III* and *Lumber IV* Commission determinations and remand orders unpersuasive. Not only was the statute amended as discussed above, "(i)t is a well-established proposition that the ITC's material injury determinations are *sui generis*; that is, the agency's findings and determinations are necessarily confined to a specific period of investigation with its attendant, peculiar set of circumstances."³⁹³ This is because "(t)he Commission must consider the many economic variables unique to each (determination) and there is limited precedential value to previous (determinations)"³⁹⁴ As the U.S. CIT observed, "rarely would circumstances and their multi-faceted interactions defining a period of material injury investigation exhibit sufficient similarity to another period."³⁹⁵ Indeed, in *Celanese Chemicals Ltd. v. United States*, the U.S. CIT held that the Commission's impact analysis in a previous investigation of the same product was not relevant even where the POIs for the earlier investigation and the investigation under review overlapped for two years.³⁹⁶ In addition, the *Lumber III* and *Lumber IV* records are not before us here.³⁹⁷

Even if we could treat them as persuasive authorities as a legal matter, it is unclear to the Panel how, as a factual matter, Commission determinations covering periods from 1988 to 1991 and 1998 to 2001, respectively, should elucidate our review of a determination covering the period from 2014 to 2017. The Canadian Parties have not explained whether or to what extent the U.S. industry was at a similar point in the

³⁹³ *Nucor Corp. v. United States*, 318 F. Supp. 2d 1207, 1246-47 (Ct. Int'l Trade 2004).

³⁹⁴ *Usinor v. United States*, 342 F. Supp. 2d 1267, 1291 (Ct. Int'l Trade 2004).

³⁹⁵ *Committee for Fair Beam Imports v. United States*, 27 C.I.T. 932, 944 (2003).

³⁹⁶ *Celanese Chemicals Ltd. v. United States*, Slip Op. 07-16 at 44-48 (2007).

³⁹⁷ The Panel has no visibility at all into the confidential portions of those records.

business cycle or how the conditions of competition were otherwise comparable during the previous investigations as compared to the investigation now under review. To the contrary, they emphasize what they describe as certain historically aberrational characteristics of the 2014-2017 period, which seems inconsistent with arguing that the Panel should look to previous periods for guidance.

For these reasons, we find that the Commission's determination of adverse impact is lawful and supported by substantial evidence. This finding, however, is limited to the Commission's analysis in light of its determinations regarding post-petition data, substitutability, volume, price effects, and the business cycle, which have been remanded elsewhere in this decision. If, in any of these remands, the Commission reaches a different finding or conclusion on the particular issue, then the Panel directs the Commission to determine and explain what effect such reconsideration has on its impact analysis.

J. Whether the Commission Identified a Causal Relationship Between Subject Imports and the Performance of the U.S. Industry

The Canadian Parties' submissions on causation focused primarily on their arguments that the Commission's analysis and determinations with respect to volume of subject imports, price effects, and their impact are unsupported by substantial evidence and contrary to law.³⁹⁸

With respect to the causation analysis in the Commission's decision, the Canadian Parties do not point to errors for remand, except with respect to the Commission's finding on timber supply constraints discussed below. In the Panel's view, the Commission identified a reasonable basis for finding that the domestic industry was materially injured by reason of subject imports. Based on its factual findings with respect

³⁹⁸ 57(1) Brief of Can. Parties at 183-186; 57(3) Reply Brief of Can. Parties at 108-110.

to significant volume of imports, price suppression, and injury, the Commission found that subject imports have had a significant impact on the domestic industry.³⁹⁹

We find that the Commission's finding of causation is lawful and supported by substantial evidence in light of its determinations regarding volume, price effects, and impact. If, after reconsideration, the Commission reaches a different finding or conclusion on any of these issues, then the Panel directs the Commission to determine and explain what effect such reconsideration has on its causation analysis.

1. Arguments of the Parties

The Canadian Parties argue that the Commission did not properly consider timber supply constraints in the Western region of the United States as the cause of the relatively poor performance of certain Western lumber producers and, as a result, misattributed injury to Canadian imports.⁴⁰⁰ The Canadian Parties point to statements by Western producers that link decreased production to log shortages and evidence that deficient supply was the primary cause for a quarter of mill curtailments in the West.⁴⁰¹ According to the Canadian Parties, the Commission relied on anecdotal evidence regarding a limited number of companies to justify its findings. The companies that fared the worst were located in the Western United States where only a small portion of the subject imports were shipped and where other factors explained the industry's predicament.⁴⁰²

The Commission argues that its determination that suppressed lumber prices directly impact the ability of softwood lumber producers to acquire timber supply is based on

³⁹⁹ Conf. Views at 55 at 63.

⁴⁰⁰ 57(1) Brief of Can. Parties at 186-189; and 57(3) Reply Brief of Can. Parties at 110-118.

⁴⁰¹ 57(1) Brief of Can. Parties at 186-188; and 57(3) Reply Brief of Can. Parties at 110-118.

⁴⁰² 57(3) Reply Brief of Can. Parties at 118.

substantial evidence. The Commission relied on the statements of two witnesses at the hearing that linked suppressed prices of softwood lumber prices to the timber supply. The fact that the Canadian Parties can point to other evidence does not preclude the Commission's conclusion from being supported by substantial evidence.⁴⁰³ Further, the Commission must determine whether the industry as a whole is experiencing material injury. The Canadian Parties arguments are limited to producers in the West.⁴⁰⁴

2. Opinion of the Panel

The Panel agrees with the Commission that the Canadian Parties' submission amounts to an attempt to reweigh the evidence. As noted by the Commission, it is unsurprising that there is some evidence to support the argument that factors other than subject imports may also affect log availability. However, the Commission accepted witness testimony that suppressed lumber prices directly impacted the ability of softwood lumber producers to acquire timber supply. This Panel will not reweigh the evidence to come to a different determination. As we find that this determination is based on substantial evidence and in accordance with law, the Canadian Parties' further arguments that the Commission should have considered regional disparities because weaker performance in the West was not caused by subject imports are academic.

⁴⁰³ 57(2) Rebuttal Brief of ITC at 171-174 (citing *Siemens Energy, Inc. v. United States*, 992 F. Supp. 2d 1315, 1324 (Ct. Int'l Trade 2014)).

⁴⁰⁴ *Id.* at 173-174.

VI. Order of the Panel

THEREFORE, on the basis of the evidence in the record, the applicable law, the written submissions of the Parties, and oral argument at the Panel's hearing, the Panel remands the findings of the Commission as described in Section V above, and summarized in Section I above, with instructions as contained in this Interim Decision of the Panel.

The Commission shall have 90 days from the date of this Interim Decision to submit its Redetermination on Remand.

AND FURTHER, the Commission's holdings with respect to the other issues addressed herein are, HEREBY,

AFFIRMED.

SO ORDERED,

Issue Date: September 4, 2019

Signed in the original by:

/s/ Stephen Joseph Powell
Stephen Joseph Powell, Panel Chair

/s/ Stephen J. Claeys
Stephen J. Claeys, Panelist

/s/ W. Jack Millar
W. Jack Millar, Panelist

/s/ Andrew Newcombe
Andrew Newcombe, Panelist

/s/ James Ogilvy
James Ogilvy, Panelist