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

IN THE MATTER OF:

CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA

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USA/CDA-02-1904-07

NON-PROPRIETARY VERSION

VIEWS OF THE U.S. INTERNATIONAL TRADE COMMISSION ON REMAND

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Non-Proprietary Version

VIEWS OF THE COMMISSION

By decision dated September 5, 2003, a United States-Canada Binational Panel remanded, in part, the Commission's determinations in Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928 (Final), USITC Pub. 3509 (May 2002). Upon consideration of the remand instructions and evidence in the record of these investigations, we determine that an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at less than fair value ("LTFV").[1]

I. Background

On May 16, 2002, the Commission determined that an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at LTFV.[2] Respondent parties subsequently challenged the Commission's final determinations before the United States-Canada Binational Panel, pursuant to Article 1904 of the North American Free Trade Agreement (NAFTA).[3] The

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[1]Commissioner Pearson did not participate in these investigations, either originally or upon remand.

[2]Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928 (Final), USITC Pub. 3509 (May 2002); 67 Fed. Reg. 36068-36077 (May 22, 2002).

[3]Eight parties to the original investigations filed complainants with the NAFTA Secretariat, including: Canadian Lumber Trade Alliance and constituent associations, Alberta Forest Products Association, British Columbia Lumber Trade Council, Free Trade Lumber Council, Ontario Forest Industries Association, Ontario Lumber Manufacturers Association, and Quebec Lumber Manufacturers Association (collectively "CLTA"); Government of Canada, Governments of the Provinces of Alberta, British Columbia, Manitoba, Ontario, and Saskatchewan, and Gouvernement du Quebec, and Governments of the Northwest Territories and

parties briefed and argued the case before the Panel, and on September 5, 2003, the Panel issued its decision.[4] The Panel affirmed in part and remanded in part the Commission's determinations. With respect to the remand, the Panel stated that:

> (1) The Commission's threat of material injury determination is hereby remanded and on remand the Commission should consider, in its analysis of whether there is a threat of material injury to the domestic softwood lumber industry, all of the information and data that it considered in its present material injury determination.
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> In the course of its analysis, the Commission is also directed to:
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> (a) Consider in its threat analysis the potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product.
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> (b) Undertake an analysis to distinguish between the contribution to threat of injury caused by the dumped and subsidized imports and the contribution to threat caused by the domestic industry itself.
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> (c) Undertake an analysis to determine whether third country imports "may have such a predominant effect in producing the harm as to . . . prevent the [subject] imports from being a material factor" of threat of injury.
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> (d) Undertake an analysis to distinguish between the contribution to threat of injury caused by the dumped and subsidized imports and the contribution to threat caused by engineered wood products.
>
> (e) Undertake an analysis of the fact that there are constraints on domestic

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the Yukon Territory (collectively " Govt. of Canada"); Governments of Provinces of New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador, and the Maritime Lumber Bureau of Canada (collectively "Maritime Complainants"); Abitibi-Consolidated Inc. ("Abitibi"); Doman Industries Ltd. and Enyeart Cedar Products, LLC ("Doman/Enyeart"); Ontario Forest Industries Association and the Ontario Lumber Manufacturers Association ("OFIA/OLMA"); Tembec Inc. ("Tembec"); and Weyerhaeuser Company ("Weyerhaeuser") (hereinafter collectively referred to as Complainants).

[4]Certain Softwood Lumber Products from Canada, USA-CDA-2002-1904-07 (September 5, 2003) ("Panel Decision").

production of softwood lumber in order to distinguish between the contribution to threat of injury caused by the dumped and subsidized imports and the contribution to threat of injury caused by the fact that there are insufficient timber supplies in the United States; and

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

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

(3) The Panel remands the Commission's decision to cross-cumulate in the context of a threat of material injury determination and instructs the Commission to reconsider its interpretation of the statute with respect to cross-cumulation in the context of a threat determination and, applying the fresh interpretation, reach an appropriate conclusion. In revisiting the questions of how to interpret and apply the statute, the Commission should consider the relevant arguments of the parties and should reach a reasoned conclusion.[5]

We have considered the record as a whole in light of the instructions in the Panel's opinion. Having considered the Panel's instructions and having examined the record consistently with those instructions, we again determine that an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at LTFV.[6] Because the Panel affirmed the

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[5]Panel Decision at 112-114.

[6]The administrative record contains substantial evidence to support our conclusions. We are mindful that the Panel will review our determination under the substantial evidence standard and that a basic tenet of that standard as set forth by the Supreme Court is that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Consolo v. Federal Maritime Commission, 383 U.S. 607, 620 (1966), quoted in Matsushita Elec. Indus. Co. v. United States,

Commission's domestic like product findings regarding western red cedar and eastern white pine, as well as its findings regarding Maritime Provinces, effects of subsidies or dumping, and consideration of the nature of the subsidy and its likely trade effects,[7] the Commission does not reconsider those issues and adopts its prior views on those issues in their entirety.[8] [9] We also incorporate in full our discussion of issues, including domestic industry and related parties, use of publicly available information, conditions of competition, and material injury analysis of volume, price effects and impact of subject imports, which were not subject to the appeal.[10] [11]

With respect to the domestic like product issues of square-end bed frame components and flangestock, the issue of cross-cumulation, and the threat of material injury analysis and determinations, we incorporate in full our prior findings, analysis and conclusions on the certain remanufactured products, conditions of competition, cross-cumulation, material injury analysis of

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750 F.2d 927, 933 (Fed. Cir. 1984); accord Committee for Fairly Traded Venezuelan Cement v. United States, Slip Op. 03-95 at 14 (CIT, July 28, 2003).

[7]Panel Decision at 114-115.

[8]See USITC Pub. 3509 at 3-13, 27-29, 30-31, and 39.

[9]Commissioner Lane has considered the record evidence in these investigations regarding domestic like product, Maritime Provinces, effects of subsidies or dumping, and consideration of the nature of the subsidy and its likely trade effects and adopts the Commission's prior views on these issues in their entirety.

[10]See USITC Pub. 3509 at 16-27, and 31-37.

[11]Commissioner Lane has considered the record evidence in these investigations regarding the discussion of issues, including domestic industry and related parties, use of publicly available information, conditions of competition, the material injury analysis of volume, price effects and impact of subject imports, which were not subject to the appeal in this matter, and adopts the Commission's prior views on these issues in their entirety.

volume, price effects and impact of subject imports, and threat of material injury by reason of subject imports,[12] [13] as supplemented and further explained below in response to the Panel's instructions.

In the ensuing pages of these Views of the Commission, we articulate reasoned and detailed explanations for issues material to our determinations so that our decisional path "may reasonably be discerned" by the Panel.[14]

II. Domestic Like Product Issues of Square-End Bed Frame Components and Flangestock

The Panel remanded in part the Commission's domestic like product finding for consideration "based on the existing record evidence" of "all six like product factors to determine whether square-end bed frame components and flangestock are part of a continuum of softwood lumber products defined as a single domestic like product."[15]

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[12]See USITC Pub. 3509 at 13-15, 21-27, 29-44.

[13]Commissioner Lane has considered the record evidence in these investigations regarding findings, analysis and conclusions in the original Views of the Commission on certain remanufactured products, conditions of competition, cross-cumulation, the material injury analysis of volume, price effects and impact of subject imports, and threat of material injury by reason of subject imports, and adopts the Commission's prior views on these issues in their entirety, as supplemented and further explained in this opinion.

[14]Statement of Administrative Action to the Uruguay Round Agreements Act of 1994, H.R. Rep. No. 103-316, Vol. 1 ("SAA") at 892 ("Existing law . . . requires that issues material to the agency's determination be discussed so that the "'path of the agency may reasonably be discerned'" by a reviewing court. See, e.g., Ceramica Regiomontana, S.A. v. United States, 810 F.2d 1137, 1139 (Fed. Cir. 1987)(quoting Bowman Transportation v. Arkansas-Best Freight Sys., 419 U.S. 281, 286 (1974)." See also Wheatland Tube Co. v. United States, 161 F.3d 1365, 1369-70 (Fed. Cir. 1998); Nippon Steel Corp. v. United States, 19 CIT 450, 469 (1995).

[15]Panel Decision at 20-25 and 113.

In its final determinations in these investigations, the Commission considered three domestic like product issues, specifically whether western red cedar ("WRC"), eastern white pine ("white pine"), or certain remanufactured products were separate domestic like products. The Commission found that there was a single domestic like product consisting of a continuum of softwood lumber products.[16]

The panel affirmed the Commission's finding that there are no clear dividing lines between the numerous species that comprise the continuum of softwood lumber products and its decision not to define either WRC or white pine as a separate domestic like product.[17] We hereby adopt and incorporate by reference the Commission's previous findings for purposes of these remand determinations. The panel remanded the Commission's finding that certain remanufactured products (more specifically square-end bed frame components and flangestock) are part of a continuum of softwood lumber products defined as a single domestic like product.

Square-end bed frame components are used, along with radius-end bed frame components,[18] in the manufacture of frames for mattress box springs.[19] Flangestock is an engineered, long-length specialty wood product made from softwood lumber, used by I-beam (or

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[16]Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928 (Final), USITC Pub. 3509 at 3-15 (May 2002).

[17]Panel Decision at 15-20.

[18]Radius-end bed frame components were specifically excluded from the scope of these investigations, along with certain box spring frame kits and assembled box spring frames. See, e.g., Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 15545, 15546 (Apr. 2, 2002) (Commerce's final countervailing duty determination).

[19]See, e.g., Abitibi's March 19, 2002, Prehearing Brief at 1.

I-joist)[20] manufacturers as a component of fabricated structural wood members, which are used primarily as floor joists.[21]

A. Background: The Interplay and Allocation of Statutory Responsibilities between Commerce and the Commission

Under the statutory scheme, Congress delegated to Commerce the responsibility to define the scope of imported goods subject to antidumping and countervailing duty investigations.[22] The scope of an investigation identifies the merchandise produced in the subject country that is subject to investigation.[23]

Whereas the Commission must accept Commerce's determination of the scope of the imported merchandise that is subject to investigation,[24] Congress delegated responsibility to the

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[20]I-joist beams were specifically excluded from the scope of these investigations. See, e.g., Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 15545, 15546 (Apr. 2, 2002).

[21]See, e.g., Tembec's Prehearing Brief at 35.

[22]See, e.g., 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1) (providing, inter alia, that the Commission must determine whether an industry in the United States is threatened with material injury "by reason of import, or sales (or the likelihood of sales) for importation, of the merchandise *with respect to which the administering authority has made an affirmative determination*" under 19 U.S.C. § 1671d(a) and 19 U.S.C. § 1673d(a), respectively) (emphasis added).

[23]See, e.g., 19 U.S.C. §§ 1671(a)(1), 1671d(a)(1), 1673(1), 1673d(a)(1), 1677(25).

[24]See, e.g., Hosiden Corp. v. Advanced Display Mfrs. of America, 85 F.3d 1561, 1568 (Fed. Cir. 1996); Mitsubishi Electric Corp. v. United States, 898 F.2d 1577, 1584 (Fed. Cir. 1990); Goss Graphics System, Inc. v. United States, 33 F. Supp.2d 1082, 1093 (CIT 1998), aff'd, 216 F.3d 1357 (Fed. Cir.), reh'g and reh'g en banc denied, (Fed. Cir. 2000); NEC Corp. v. United States, 36 F. Supp.2d 380, 383 (CIT 1998), aff'd, 151 F.3d 1361 (Fed. Cir. 1998), cert. denied, 525 U.S. 1139 (1999); Makita Corp. v. United States, 974 F. Supp. 770, 783 (CIT 1997); Algoma Steel Corp. v. United States, 688 F. Supp. 639, 644 (CIT 1988), aff'd, 865 F.2d 240,

Commission alone to determine what domestic product is like the imported articles Commerce has identified. The statute defines "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 … ."[25] The domestic like product then becomes the basis for the Commission's identification of and analysis of the relevant domestic industry,[26] and ultimately the Commission's determination whether that domestic industry is, for example, threatened with material injury by reason of subject imports.[27] Thus, Commerce's scope defines the bounds of subject merchandise for which the Commission must identify a domestic like product.

241-42 (Fed. Cir.), cert. denied, 492 U.S. 919 (1989).

[25]19 U.S.C. § 1677(10).

[26]19 U.S.C. § 1677(4)(A) (defining the relevant industry as the "producers as a whole of a domestic like product, or those producers whose collective output of the domestic like product constitutes a major proportion of the total domestic production of that product"); see also, e.g., Certain Polyester Staple Fiber from Korea and Taiwan, Inv. Nos. 731-TA-825 to 826 (Final), USITC Pub. 3300 (May 2000) (finding two domestic like products, low-melt and all other PSF, and defining two corresponding domestic industries); Certain Brake Drums and Rotors from China, Inv. No. 731-TA-744 (Final), USITC Pub. 3035 (Apr. 1997) (finding two domestic like products, aftermarket brake drums and aftermarket brake rotors, and defining two corresponding domestic industries).

[27]See, e.g., 19 U.S.C. § 1677(F)(i) ("In determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for importation) of the subject merchandise … ."); see also, e.g., Certain Polyester Staple Fiber from Korea and Taiwan, Inv. Nos. 731-TA-825 to 826 (Final), USITC Pub. 3300 (May 2000) (making separate injury determinations for the domestic industry producing low-melt fiber and for the domestic industry producing all other polyester staple fiber); Certain Brake Drums and Rotors from China, Inv. No. 731-TA-744 (Final), USITC Pub. 3035 (Apr. 1997) (finding that an industry in the United States is materially injured by reason of subject imports of brake rotors, but finding that an industry in the United States is not materially injured or threatened with material injury by reason of subject imports of brake drums from China).

B. Factual Background on the Variety of Softwood Lumber Products in the Scope of These Investigations and Produced in the United States

In its final determinations,[28] Commerce defined the scope to include a variety of softwood lumber products, including western red cedar and eastern white pine as well as pallet components and door and window frame parts. Its final determinations defined the imported merchandise within the scope of these investigations as follows –

> softwood lumber, flooring and siding (softwood lumber products). Softwood lumber products include all products classified under headings 4407.1000, 4409.1010, 4409.1090, and 4409.1020, respectively, of the Harmonized Tariff Schedule of the United States (HTSUS), and any softwood lumber, flooring and siding described below. These softwood lumber products include:
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> > (1) coniferous wood, sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding six millimeters;
> > (2) coniferous wood siding (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed;
> > (3) other coniferous wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces (other than wood mouldings and wood dowel rods) whether or not planed, sanded or finger-jointed; and
> > (4) coniferous wood flooring (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed.[29]

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[28]See, e.g., 67 Fed. Reg. 15545 (Apr. 2, 2002); 67 Fed. Reg. 15539 (Apr. 2, 2002).

[29]Commerce noted that although the HTSUS subheadings are provided for convenience and U.S. Customs purposes, the written description of the merchandise under investigation is

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dispositive. According to Commerce, the following products are excluded from the scope of these investigations (Group A):

(1) Trusses and truss kits, properly classified under HTSUS 4418.90;
(2) I-Joist beams;
(3) Assembled box spring frames;
(4) Pallets and pallet kits, properly classified under HTSUS 4415.20;
(5) Garage doors;
(6) Edge-glued wood, properly classified under HTSUS 4421.90.98.40;
(7) Properly classified complete door frames;
(8) Properly classified complete window frames; and
(9) Properly classified furniture.

Commerce also excluded from the scope of these investigations the following products, but only if they meet certain requirements (Group B):

(1) *Stringers* (pallet components used for runners): if they have at least two notches on the side, positioned at equal distance from the center, to properly accommodate forklift blades, properly classified under HTSUS 4421.90.98.40.
(2) *Box-spring frame kits*: if they contain the following wooden pieces – two side rails, two end (or top) rails and varying numbers of slats. The side rails and the end rails should be radius-cut at both ends. The kits should be individually packaged, they should contain the exact number of wooden components needed to make a particular box spring frame, with no further processing required. None of the components exceeds 1" in actual thickness or 83" in length.
(3) *Radius-cut box-spring-frame components*, not exceeding 1" in actual thickness or 83" in length, ready for assembly without further processing. The radius cuts must be present on both ends of the boards and must be substantial cuts so as to completely round one corner.
(4) *Fence pickets* requiring no further processing and properly classified under HTSUS 4421.90.70, 1" or less in actual thickness, up to 8" wide, 6' or less in length, and have finials or decorative cuttings that clearly identify them as fence pickets. In the case of dog-eared fence pickets, the corners of the boards should be cut off so as to remove pieces of wood in the shape of isosceles right angle triangles with sides measuring 3/4 inch or more.
(5) *U.S. origin lumber* shipped to Canada for minor processing and imported into the United States, is excluded from the scope of the investigations if the following conditions are met: (a) the processing occurring in Canada is limited to kiln-drying, planing to create smooth-to-size board, and sanding, and (b) if the importer establishes to Customs' satisfaction that the lumber is of U.S. origin.

Commerce determined that the scope of these investigations involved a single class or kind of

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(6) *Softwood lumber products contained in single family home packages or kits*, regardless of tariff classification, are excluded from the scope of the orders if the following criteria are met:
(A) The imported home package or kit constitutes a full package of the number of wooden pieces specified in the plan, design or blueprint necessary to produce a home of at least 700 square feet produced to a specified plan, design or blueprint;
(B) The package or kit must contain all necessary internal and external doors and windows, nails, screws, glue, subfloor, sheathing, beams, posts, connectors and if included in purchase contract decking, trim, drywall and roof shingles specified in the plan, design or blueprint;
(C) Prior to importation, the package or kit must be sold to a retailer of complete home packages or kits pursuant to a valid purchase contract referencing the particular home design plan or blueprint, and signed by a customer not affiliated with the importer;
(D) The whole package must be imported under a single consolidated entry when permitted by the U.S. Customs Service, whether or not on a single or multiple trucks, rail cars or other vehicles, which shall be on the same day except when the home is over 2,000 square feet;
(E) The following documentation must be included with the entry documents: (1) A copy of the appropriate home design, plan, or blueprint matching the entry; (2) A purchase contract from a retailer of home kits or packages signed by a customer not affiliated with the importer; (3) A listing of inventory of all parts of the package or kit being entered that conforms to the home design package being entered; (4) In the case of multiple shipments on the same contract, all items listed in E(3) which are included in the present shipment shall be identified as well.

Commerce specified that "[l]umber products that Customs may classify as stringers, radius cut box-spring-frame components, and fence pickets, not conforming to the above requirements, as well as truss components, pallet components, and door and window frame parts, are covered under the scope of this investigation and may be classified under HTSUS subheadings 4418.90.40.90, 4421.90.70.40 and 4421.90.98.40. On January 24, 2002, Customs informed the Department of certain changes in the 2002 HTSUS affecting these products. Specifically, subheading 4418.90.40.90 and 4421.90.98.40 were changed to 4418.90.45.90 and 4421.90.97.40, respectively." 67 Fed. Reg. at 15546 to 15547. In the published antidumping determination, Commerce did not list product exclusions and referred to the "Issues and Decision Memorandum" for a "complete description of the scope of this investigation, including an itemized list of all product exclusions." 67 Fed. Reg. at 15539.

subject merchandise.[30] There is no dispute that imports from Canada of square-end bed frame components and flangestock are within the scope of merchandise subject to investigation defined by Commerce, as are other remanufactured products,[31] other finger-jointed products,[32] and other

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[30]See, e.g., 67 Fed. Reg. 15546 to 15548; March 21, 2002 Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada (Inv. A-122-838) (hereinafter "Commerce's March 21, 2002, Issues and Decision Memorandum"). If Commerce finds that there is more than one class or kind of merchandise in the scope of an investigation, then it will calculate a separate antidumping or countervailing duty margin for each class or kind of merchandise. See, e.g., Certain Brake Drums and Brake Rotors from the People's Republic of China, 62 Fed. Reg. 9160 (Feb. 28, 1997) (finding two classes or kinds of merchandise, brake drums and brake rotors, and calculating separate dumping margins for each). The Commission's domestic like product findings, however, need not track Commerce's class or kind findings. See, e.g., Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1568-69 (Fed. Cir. 1996) (Commission may find a single like product corresponding to several different classes or kinds defined by Commerce); Torrington Co. v. United States, 747 F. Supp. 744, 748-53 (CIT 1990), aff'd, 938 F.2d 1278, 1280 (Fed. Cir. 1991) (affirming Commission determination of six like products in investigations where Commerce found five classes or kinds).

[31]Commerce excluded a specific list of remanufactured products from the scope of investigation, such as trusses and truss kits, I-joist beams, garage doors, properly classified complete door frames, properly classified complete window frames, and properly classified furniture, but it did not exclude all remanufactured products. For example, the scope includes items such as flooring and siding, angle-cut lumber for trusses and sheds, laminating blanks, and edge glue blanks. See, e.g., 67 Fed. Reg. at 15546; Commerce's March 21, 2002, Issues and Decision Memorandum (comment 57).

[32]For example, the scope also includes products such as coniferous wood, sawn or chipped lengthwise, sliced or peeled, whether or not planed, that is finger-jointed of a thickness exceeding six millimeters; coniferous wood siding (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, that is finger-jointed; other coniferous wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces (other than wood mouldings and wood dowel rods) whether or not planed, that is finger-jointed; and coniferous wood flooring (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its

products made to particular specifications or for particular end uses.[33]

Just as there are a wide variety of imported Canadian softwood lumber products in the scope of these investigations, there are a wide variety of softwood lumber products that are produced in the United States. For a number of items imported from Canada in the scope of these investigations, there is a corresponding item that is produced in the United States. In the absence of a "like" product produced domestically to a subject item imported from Canada, the statute directs the Commission to find the product produced domestically that is "most similar in characteristics and uses with" the imported article.[34] The record indicates that there are many

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edges or faces, whether or not planed, that is finger-jointed, unless a specific exclusion applies. See, e.g., 67 Fed. Reg. at 15545-46; see also, e.g., Commerce's March 21, 2002, Issues and Decision Memorandum (comment 57) (noting that finger-joint blocks produced from planer mill trim ends that are defect trimmed, sorted and graded and are 8" to 24" in length and used in the manufacture of finger-jointed studs and dimension lumber, are in the scope of these investigations and that finger-jointed stock machined to very tight tolerances and produced to customers' specifications as garage door core; finger-jointed recreational vehicle product; and finger-jointed stock used in the manufacture of walk-in refrigerators are not excluded from the scope of these investigations).

[33]For example, the scope includes certain stringers (pallet components used for runners); certain fence pickets; truss components; pallet components; door and window frame parts; stair part turning squares that are precision-end trimmed to designated sizes in lengths ranging from 31" to 42"; certain furniture parts at an early processing stage that have not yet assumed the unique characteristics of a component of a specific item of furniture; and angle-cut lumber for trusses and sheds; as well as used railroad ties that may be purchased for landscaping uses; timbers; boards; industrial grade lumber; treated lumber; and dimension lumber, including in lengths of less than three feet. See, e.g., 67 Fed. Reg. at 15545-46; Commerce's March 21, 2002, Issues and Decision Memorandum (comment 57).

[34]See 19 U.S.C. § 1677(10) (defining "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 … ."); see also, e.g., Certain Frozen Fish Fillets from Vietnam, Inv. No. 731-TA-1012 (Final), USITC Pub. 3617 (Aug. 2003) (frozen catfish fillets are the domestic product that is "most similar in characteristics and uses with the articles subject to investigation," frozen basa

types of remanufactured products,[35] engineered wood products made from softwood lumber,[36] finger-jointed products,[37] and other products made to particular specifications or for particular

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and tra fillets); Extruded Rubber Thread from Malaysia, Inv. No. 753-TA-34, USITC Pub. 3112 at 5 (June 1998) (where there was no commercial production of food-grade extruded rubber thread in the United States the Commission concluded it could not be considered a separate domestic like product; the Commission defined the domestic like product as all extruded rubber thread); Nepheline Syenite from Canada, Inv. No. 731-TA-525 (Final), USITC Pub. 2502 at 7 (Apr. 1992) (since nepheline syenite was not produced in the United States, the Commission defined the domestic like product to include two similar products, feldspar and aplite), aff'd, Feldspar Corp. v. United States, 825 F. Supp. 1095 (CIT 1993); Professional Electric Cutting and Sanding/Grinding Tools from Japan, Inv. No. 731-TA-571 (Prelim.), USITC Pub. 2536 at 17 (July 1992) ("The Commission has rejected 'the notion that a like product could be defined as a product not produced by a U.S. industry.'"); Certain Cold-Rolled Steel Products from Australia, India, Japan, Sweden, and Thailand, Inv. Nos. 731-TA-965, 971 to 972, 979 and 981 (Final), USITC Pub. 3536 at 10, n.30 (Sept. 2002) (finding that, for particular "niche" cold-rolled steel products in the scope of the investigation not produced domestically, the product most similar in characteristics and uses was the broad range of certain cold-rolled steel products).

[35]The record indicates, for example, that remanufactured products such as edge-glued lumber; finger-jointed lumber; flooring/stepping; furniture stock; gutter stock; ladder stock; landscape timbers; lath; mine timbers; pallet stock; paneling/ceiling; pattern stock; railway/car material; scaffold plank; and siding are produced in the United States. See, e.g., Tembec's March 19, 2002, Prehearing Brief at Tab 18 (including an excerpt from a Random Lengths publications identifying various softwood lumber products produced by various U.S. companies); Conf. Tr. at 142-43, 145 (noting the existence of U.S. remanufacturing operations); USITC Pub. 3509 at I-15 (five domestic producers indicated that they converted some of their softwood lumber into a more specialized or higher grade product through further remanufacturing).

[36]For example, the record indicates that glue lamb, I-beams, and finger-jointed lumber, including finger-jointed studs are produced in the United States. See, e.g., Hearing Tr. at 149-50 (Wood, Emmerson, Elliot); Tembec's March 19, 2002, Prehearing Brief at Tab 16 (including a page from a Random Lengths publication showing pricing for finger-jointed studs).

[37]See, e.g., Tembec's March 19, 2002, Prehearing Brief at Tab 18 (with excerpts from Random Lengths publications listing U.S. sawmills that produce finger-jointed products, including finger-jointed studs and siding, long dimension (22 feet and longer) products, or structural joists); NLBMDA/NAHB's April 27, 2001, Joint Postconference Brief at Exh. 33 (indicating production of finger-jointed products in Texas and Louisiana); Commerce's March 21, 2002, Issues and Decision Memorandum (indicating that certain types of finger-

end uses produced in the United States.[38] Canadian respondents Abitibi and Tembec argued that there is no, nominal, or only captive production in the United States of square-end bed frame components and flangestock.[39] Even if true, the Commission is then required to define the domestic like product as the domestically-produced product "most similar in characteristics and uses" with square-end bed frame components and flangestock.

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jointed carpentry construction flangestock products are made in the United States).

[38]For example, the record indicates that flooring/stepping products, furniture stock, ladder stock, and siding are all produced in the United States. See, e.g., Tembec's March 19, 2002, Prehearing Brief at Tab 18 (with excerpts from Random Lengths publications listing various U.S. sawmills and the various softwood lumber products they produce).

[39]For example, with respect to square-end bed frame components, in its December 11, 2001, comments (at 7, 8) on the draft final phase questionnaires, Abitibi stated that to its knowledge, "there are no major manufacturers in the United States" of square-end bed frame components. See also Abitibi's March 19, 2002 Prehearing Brief at 4, 5-6 (stating that to its knowledge, "there are no major manufacturers in the United States of these wood bed frame components."); NLBMDA/NAHB's March 19, 2002 Prehearing Brief at 26.

With respect to flangestock, other than its Canadian operations, Abitibi reported that it "knows of no U.S. or Canadian producer that produces non-engineered lumber in such lengths." See Abitibi's December 11, 2001, Comments in Draft Final-Phase Questionnaires at 4. Several months later, Tembec reported that the "only U.S. production of flangestock is consumed internally in the production of downstream products. There are no companies in the United States that produce flangestock for merchant sale" and "The only supply of flangestock to the U.S. merchant market comes from Canada." See Tembec's March 19, 2002 Prehearing Brief at 46; see also Tembec's April 2, 2002, Posthearing Brief at 11 ("All U.S.-made flangestock is produced by I-joist manufacturers, and consumed internally by them. There is no domestic merchant market for flangestock available to U.S. I-joist manufacturers, who depend heavily upon imported flangestock."); Tembec's April 29, 2002 Final Comments at 12 ("all U.S. production of this product is consumed captively by companies that do not have enough capacity to meet their own internal demand and must themselves import."), Tab 2 (indicating that certain companies in the United States produce their own flangestock for internal consumption in the production of I-joists); Hearing Tr. at 325-26 (Feldman).

C. Is the Continuum of Domestically Produced Softwood Lumber Products the Domestic Like Product, or Are There Clear Lines Dividing Any of These Products or Subsets of These Softwood Lumber Products?

Having ascertained that a wide variety of softwood lumber products are manufactured in the United States that are "like" or "most similar in characteristics and uses with" the Canadian-manufactured softwood lumber products that are in the scope of these investigations, we next examine whether the domestically produced softwood lumber products constitute a continuum or if there are clear lines dividing any of these products or subsets of these products. Such an approach is consistent with Congressional sentiment expressed in the legislative history,[40] and with Commission practice in other investigations.[41] This approach is also judicially sanctioned.[42]

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[40]See S. Rep. No. 96-249 at 90-91.

[41]See, e.g., Ball Bearings from China, Inv. No. 731-TA-989 (Final), USITC Pub. 3593 at 6-7 (Apr. 2003); Ferrovanadium from China and South Africa, Inv. Nos. 731-TA-986 to 987 (Final), USITC Pub. 3570 (Jan. 2003); Certain Structural Steel Beams from China, Germany, Luxembourg, Russia, South Africa, Spain, and Taiwan, Inv. Nos. 731-TA-935 to 936 and 938-42 (Final), USITC Pub. 3522 at 4-7 (June 2002); Certain Cold-Rolled Steel Products from Australia, India, Japan, Sweden, and Thailand, Inv. Nos. 731-TA-965, 971 to 972, 979 and 981 (Final), USITC Pub. 3536 at 6-11 (Sept. 2002); Stainless Steel Bar from France, Germany, Italy, Korea, and United Kingdom, Inv. Nos. 701-TA-413 (Final) and 731-TA-913 to 916 and 918 (Final), USITC Pub. 3488 at 4-8 (Feb. 2002); Certain Steel Wire Rod from Canada, Germany, Trinidad and Tobago, and Venezuela, Inv. Nos. 701-TA-368 to 371 (Final), USITC Pub. 3075 at 7-9 (Nov. 1997); Steel Concrete Reinforcing Bars from Turkey, Inv. No. 731-TA-745 (Final), USITC Pub. 3034 at 4-8 (Apr. 1997); Oil Country Tubular Goods from Argentina, Austria, Italy, Japan, Korea, Mexico, and Spain, Inv. Nos. 701-TA-363 and 364 and 731-TA-711 to 717 (Final), USITC Pub. 2911 at I-10 (Aug. 1995); Certain Seamless Carbon and Alloy Standard, Line, and Pressure Steel Pipe from Argentina, Brazil, Germany, and Italy, Inv. Nos. 701-TA-362 and 731-TA-707 to 710 (Final), USITC Pub. 2910 at I-7 to I-8 (July 1995); Professional Electric Cutting and Sanding/Grinding Tools from Japan, Inv. No. 731-TA-571 (Final), USITC Pub. 2658 at 8-10, 49-51 (July 1993); Polyethylene Terephthalate Film, Sheet and Strip from Japan and the Republic of Korea, Inv. Nos. 731-TA-458 to 459 (Final), USITC Pub. 2383 at 8-14 (May 1991); Certain Table Wine from France and Italy, Inv. Nos. 701-TA-210 to 211 (Prelim.) and 731-TA-167 to 168 (Prelim.), USITC Pub. 1502 at 4-6 (Mar. 1984); Certain Table Wine from the Federal

Square-end bed frame components and flangestock are "niche" products. Whether or not they are produced in the United States for the commercial market or in more than nominal (if any) quantities, we do not find that either square-end bed frame components or flangestock are a separate domestic like product, as explained below. We conclude that domestically produced softwood lumber products comprise a continuum that includes remanufactured products, engineered wood products produced from softwood lumber, finger-jointed products, and other products that are made to particular specifications or for specific end uses. We do not find any clear dividing line between any subsets of softwood lumber products, whether at a particular manufacturing stage, or for use for general construction purposes, as a remanufactured product, a finger-jointed product, or an engineered wood product made from softwood lumber, let alone any clear dividing line between square-end bed frame components or flangestock and other domestically produced softwood lumber products. Instead, taking into account the scope of imported subject merchandise from Canada defined by Commerce and based on our traditional six-factor test, we find a single domestic like product defined as a continuum of softwood lumber products.

Republic of Germany, France and Italy, Inv. Nos. 701-TA-258 to 260, 731-TA-283 to 285 (Prelim.), USITC Pub. 1771 at 5-7 (Oct. 1985).

[42]See, e.g., NEC Corp. v. United States, 36 F. Supp.2d 380, 383-90 (CIT 1998); Makita Corp. v. United States, 974 F. Supp. 770, 781-85 (CIT 1997); Aramide Maatschappij V.O.F. v. United States, 19 CIT 884, 885-91 (1995); Acciai Speciali Terni v. United States, 19 CIT 1051, 1063 (CIT 1995); Nippon Steel Corp. v. United States, 19 CIT 450, 454-59 (CIT 1995); Kern-Liebers USA, Inc. v. United States, 19 CIT 87, 91-92 (CIT 1995).

1. Square-End Bed Frame Components

Physical Characteristics and End Uses: Abitibi argues that square-end bed frame components are manufactured in short lengths and to specific, odd dimensions, including for use as end fillers, L-braces, center supports, center rails, filler blocks, and the like, depending on the size of the end-use product (twin, double, queen, or king-size frame).[43] Because the final mattress box-spring frame assembly process involves a lot of nailing and stapling, Abitibi asserts that bed frame components are manufactured from spruce pine fir lumber. Unlike other softwood lumber products that it contends are mainly used in longer lengths for home construction, Abitibi argues that bed frame components are smaller and used only in the manufacture of box springs.[44]

Whether or not square-end bed frame components are manufactured domestically, we agree with Abitibi that the domestic product that is "like" or "most similar in characteristics and uses" with square-end bed frame components is other softwood lumber.[45] Not all softwood

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[43]Sample measurements of specific types of square-end bed frame components are provided in Annex 1 to Abitibi's December 11, 2001, Comments on the Draft Final Phase Questionnaires. As this exhibit shows, the term "square-end bed frame components" used by Abitibi itself encompasses a variety of dimensions.

[44]See, e.g., Abitibi's December 11, 2001, Comments on Draft Final-Phase Questionnaires at 6-9, Annex 1; Abitibi's March 19, 2002, Prehearing Brief at 2-4; ISPA's Postconference Brief at 1-7; Conference Tr. at 123-24.

[45]See Abitibi's March 19, 2003, Prehearing Brief at 5-6 (in which Abitibi concedes that the product most similar in characteristics and uses with bed frame components "as to which the Commission has gathered data would be softwood lumber other than western red cedar and white pine.") The Commission's determinations that western red cedar and eastern white pine are part of a continuum of softwood lumber products was affirmed by the Panel.

lumber products are used in home construction, and other softwood lumber products are also produced to specific dimensions or for specific end uses.[46] The term "softwood lumber" encompasses a variety of products, such as boards, planks, timbers, framing materials, flooring, and siding, produced from coniferous species of trees.[47] According to the extent or stage of manufacture, such lumber (a product derived from a log by lengthwise sawing which, in its original sawed condition, has at least two approximately parallel flat longitudinal-sawed surfaces, and which may be rough, dressed or worked) is classified by producers of most softwood lumber (both domestic and imported) into seven major categories –

> *Studs*: lumber used in framing building walls with little or no trimming before they are set in place;
>
> *Dimension*: lumber that is 2" to 5" thick, and 2" or more in width;
>
> *Stress grades*: lumber having assigned working stress and modulus of elasticity values in accordance with accepted basic principles of strength grading and meeting the provisions of the American Lumber Standards for Softwood Lumber;
>
> *Timbers*: lumber that is at least 5" in least dimension;
>
> *Boards*: lumber less than 2" in nominal thickness and 1 inch or more in width.
>
> *Selects*: high quality lumber graded for appearance.
>
> *Shop*: lumber that is graded for the number and sizes of cuttings that can be used for the manufacture of other products.[48]

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[46]For example, some are made for flooring or siding uses, and others are made for use in doors or windows.

[47]See, e.g., USITC Pub. 3509 at I-11.

[48]See, e.g., USITC Pub. 3509 at I-11 to I-12.

While it is true that in 2000, 83 percent of softwood lumber products were used in construction, some were used for other purposes, including remanufacturing.[49]

As the Commission found in previous investigations[50] and in the preliminary phase of these investigations,[51] there is no widespread agreement on an exact definition of remanufactured lumber, but it may require further re-sawing of lumber to specified sizes and edge profiles, joining two or more pieces of lumber by finger-jointing or glue-lamming, or further planing or sanding.[52] Remanufactured lumber is used for a variety of purposes, from construction to manufacturing furniture.[53] Remanufactured products are made from lower grade to higher grade lumber (e.g., utility grade to shop grade).[54] Some market participants consider square-end bed

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[49]See, e.g., USITC Pub. 3509 at Table I-1.

[50]See Softwood Lumber from Canada, Inv. No. 701-TA-312 (Final), USITC Pub. 2530 at 6 (July 1992).

[51]See Softwood Lumber from Canada, Inv. Nos. 701-TA-414, 731-TA-928 (Prelim.), USITC Pub. 3426 at 11 (May 2001).

[52]See, e.g., USITC Pub. 3509 at I-15. The Canadian Lumber Remanufacturers Alliance proposed defining remanufactured products as lumber that is manufactured beyond sanding, planing and finger-jointing, whether by drilling, notching, angle cutting, combing, resawing or otherwise in a way that adapts it to a particular use. It noted that remanufacturers subject lumber to various processes, including one or more of the following: a change in the thickness; a change in the width; a change in the length; a change in the profile; a change in the texture; a change in the grade; a change in the moisture content by drying; or joining together by finger-jointing or otherwise. See Conference Tr. at 141; CLRA's April 26, 2001, Postconference Brief at 2.

[53]See, e.g., USITC Pub. 3509 at I-15.

[54]See, e.g., USITC Pub. 3509 at I-15.

frame components to be a remanufactured product.[55]

Because remanufactured products are made to specific dimensions and/or for specific end uses and other softwood lumber products are also made to specific dimensions and/or for specific end uses, we do not find a clear line between square-end bed frame components and other remanufactured products or between remanufactured products and other softwood lumber products in terms of physical characteristics and uses.

Interchangeability: Abitibi argues that square-end bed frame components are made to specific dimensions for specific end uses and are thus not interchangeable with other softwood lumber.[56]

We do not find the fact that square-end bed frame components are made to specific dimensions for specific end uses to be a reason to draw a line between square-end bed frame components and other remanufactured products or other softwood lumber products. As we noted above, other remanufactured products and other softwood lumber products are made to specific dimensions and/or for specific end uses.[57] Once a log has been sawn to specific dimensions or put through one or more remanufacturing operations, the range of uses as to which the resulting

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[55]See, e.g., Conf. Tr. at 144 (in which representative from Canadian Lumber Remanufacturers Association characterized bed frame components, fencing panels, and unassembled crates as examples of remanufactured products).

[56]See, e.g., Abitibi's December 11, 2001, Comments on Draft Final-Phase Questionnaires at 7; Abitibi's March 19, 2002, Prehearing Brief at 5.

[57]And, for example, shipments of Eastern White Pine might also contain a variety of lengths and sizes, and Eastern White Pine is frequently sold in "non-standard" dimensions. See, e.g., Tembec's March 19, 2002, Prehearing Brief at Tab 13 at 2-3.

lumber is suited has been limited. Perfect interchangeability is not the standard for including products in the definition of the same domestic like product.[58] If it were, then we would have to find a separate domestic like product for each possible variation: boards made from WRC versus boards made from white pine; products made from "green" versus "dried" lumber; 2 x 4's versus 4 x 6's; 2 x 4's of one length versus 2 x 4's of a different length; unfinished furniture stock for chairs versus unfinished furniture stock for sofas or for tables; furniture versus ladder stock, etc.[59] Moreover, as even Abitibi concedes,[60] a reason why square-end (as opposed to radius-end) bed frame components were not excluded from the scope of these investigations by Commerce is because of concerns that square-end components have enough similarities with other softwood lumber products that they might be used to evade the orders.

Channels of Distribution: Abitibi argues that square-end bed frame components are sold directly or through distributors to bed frame manufacturers, and that square-end bed frame components are almost always sold together with radius-end components, but not packaged

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[58]See, e.g., Acciai Speciali Terni v. United States, 19 CIT 1051, 1063 (CIT 1995).

[59]See, e.g., Kern-Liebers USA, Inc. v. United States, 19 CIT 87, 91-92 (CIT 1995) (affirming the Commission's finding of a single domestic like product rather than a series of "niche" domestic like products. The court noted with agreement the Commission's reluctance to fragment its like product definitions in cases involving a continuum of domestic products where doing so "would result in a large number of separate, specialized steel like products characterized by distinct metallurgy, end uses, and customer perceptions, and would ignore the need to identify 'clear dividing lines' between potential separate like products.")

[60]See, e.g., Abitibi's March 19, 2002, Prehearing Brief at 6.

together for individual bed frames.[61]

The record in these investigations indicates that, in general, the more specialized the product, the fewer the levels in the distribution chain, but the more commodity-oriented products, such as SPF dimension lumber and boards, tend to have longer channels of distribution.[62] Softwood lumber products may be distributed, for example, directly to manufacturers, directly to retailers, through stocking wholesalers, through brokers or office wholesalers, to buying groups, or through wholly-owned distributors.[63] Because other softwood lumber products are also sold directly to manufacturers or through distributors, we do not find square-end bed frame components to be sold through any special channels of distribution.

Manufacturing facilities, production processes, and employees: Abitibi argues that square-end bed frame components are not produced in its "regular" saw mills, but in a remanufacturing mill. It argues that the remanufacturing mill takes standard green boards and further processes them through kiln drying, planing, shaping, and sizing to manufacture square-end bed frame components to specific, non-standard dimensions. It also contends that bed frame components are graded differently than standard lumber.[64]

There is some overlap between "remanufactured" products and other softwood lumber

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[61]Abitibi's December 11, 2001, Comments on Draft Final-Phase Questionnaires at 9-10; Abitibi's March 19, 2002, Prehearing Brief at 3, 5.

[62]See, e.g., USITC Pub. 3509 at I-21, Table I-2.

[63]See, e.g., USITC Pub. 3509 at I-21 to I-22, Table I-2.

[64]Abitibi's December 11, 2001, Comments on Draft Final-Phase Questionnaires at 7; Abitibi's March 19, 2002, Prehearing Brief at 3-4.

products in the manufacturing facilities, production processes, and employees at what Abitibi refers to as the "regular" sawmill. Although some softwood lumber products are produced in "regular" sawmills, others then undergo additional processing or "remanufacturing."[65]

We also do not find the fact that square-end bed frame components are specially graded distinguishes them from other softwood lumber products, such as Western Red Cedar or Eastern White Pine, for which there are also special grading procedures.[66]

Customer and producer perceptions: Abitibi argues that bed frame manufacturers purchase bed frame components that are pre-manufactured for their use to exacting specifications.[67] Square-end bed frame components, however, are not the only softwood lumber or remanufactured product made to specific customers' specifications. Other softwood lumber products intended for use in specific end-use applications, such as flangestock, ladder stock, flooring, siding, truss components, door and window frame parts, are also made to particularized specifications.

As further evidence of producer and customer perceptions, we note that petitioning

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[65]See, e.g., Tembec's March 19, 2002, Prehearing Brief at Tab 18 (listing various services provided by domestic producers, such as custom cutting, custom kiln drying, custom planing, precision trim, pressure treating, resawing/ripping, special patterns, end paining/waxing, paper/poly wrapping, and listing various remanufactured products they produce such as edge-glued lumber, finger-jointed lumber, flooring/stepping, furniture stock, gutter stock, ladder stock, landscape timbers, lath, mine timbers, pallet stock, paneling/ceiling, pattern stock, railway/car material, scaffold plank, and siding); USITC Pub. 3509 at I-13 to I-15, Figure I-1.

[66]See, e.g., Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928 (Final), USITC Pub. 3509 at 10, 13 (May 2002).

[67]Abitibi's December 11, 2001, Comments on Draft Final-Phase Questionnaires at 9; Abitibi's March 19, 2002, Prehearing Brief at 4-5.

domestic producers[68] and other market participants such as the National Lumber and Building Material Dealers Association and the National Association of Home Builders[69] (as well as other respondents such as the Canadian Lumber Trade Alliance and the Government of Canada)[70] advocated for or did not disagree with a finding of a single domestic like product in these investigations.

Price: Abitibi argues that it generally obtains significantly higher prices for square-end bed frame components than for standard dressed and dried boards of similar dimensions. It argues that bed frame components tend to be sold under long-term contracts at fixed prices, unlike other softwood lumber which is sold at frequently fluctuating prices.[71]

We do not find price to be a distinguishing factor among softwood lumber products. Although some remanufactured, finger-jointed products, or non-engineered wood softwood lumber products might command higher prices than non-remanufactured, non-finger-jointed or non-engineered wood softwood lumber products, differences in species and/or differences in the specifications of the product (whether pre-arranged or not for a particular end user) may also lead

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[68]See, e.g., Petition at I-13 to I-15; Petitioners' Postconference Brief at 5-7, Exhs. 6-7.

[69]See, e.g., Dealers/Builders' Postconference Brief at 5; Conference Tr. at 130-31. In addition, Fred Tebb & Sons, a domestic remanufacturer of high-grade hemlock, fir, and spruce, argued that the Commission properly found that remanufactured lumber was not a separate domestic like product in previous investigations and it should do so again here. See, e.g., FT&S Postconference Brief at 4.

[70]See, e.g., CLTA's Postconference Brief at 4 n.6; Conference Tr. at 91.

[71]Abitibi's December 11, 2001, Comments on Draft Final-Phase Questionnaires at 8; Abitibi's March 19, 2002, Prehearing Brief at 4.

to differences in prices.[72]

2. Flangestock

Physical Characteristics and End Uses: Respondents argue that flangestock is generally sold in 2 x 3 or occasionally 2 x 4 width dimensions, whereas other softwood lumber is cut to a wide range of thicknesses and widths. Respondents argue that unlike regular 2 x 3 and 2 x 4-width dimension lumber which is generally sold in lengths between 8 and 24 feet, flangestock is produced in lengths greater than sixteen feet and as much as 48 to 66 feet, with 48 and 52 foot lengths of flangestock being most common. They argue that flangestock is used exclusively in the manufacture of I-joists; their customers cut a groove along the length of two flangestock pieces and glue oriented-strand board (or a strip of plywood) at a perpendicular angle between them to fashion the I-joist. The I-joists, in turn, are used mainly in commercial construction as flooring and other supports, given their long lengths. They argue that flangestock is manufactured to be straighter, denser, stronger, and more stable than softwood lumber, and during manufacturing, natural defects like knots, cracks and curvature are removed from flangestock that are not removed from other softwood lumber. They argue that flangestock, with an average moisture content of 14 percent, is drier than dried softwood lumber, which has a moisture content of 19 percent.[73]

The record does indicate that I-beams or I-joists, for which flangestock is the primary

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[72]See, e.g., USITC Pub. at V-4 to V-13, Tables V-1 to V-5, and Figures V-3 to V-5.

[73]Abitibi's December 11, 2001 Comments on Draft Final-Phase Questionnaires at 4; Tembec's March 19, 2002, Prehearing Brief at 35-39; Tembec's April 2, 2002, Posthearing Brief at 9-10.

input, may have special characteristics, that for some purchasers may make I-beams more desirable than non-engineered wood softwood lumber products.[74] But, the fact that flangestock is produced to specific dimensions or to specific strengths for use in I-beam production does not differentiate it from other remanufactured products, other finger-jointed products, or even other softwood lumber products. As we noted above, the term "softwood lumber" encompasses a variety of products, such as boards, planks, timbers, framing materials, flooring, and siding, each of which may be produced to particular dimensions or size ranges. Finger-jointed studs (another engineered wood product made from softwood lumber) are produced to particular lengths, just as finger-jointed flangestock, square-end bed frame components, and stock for window and door frames are tailored to particular dimensions or for particular uses.

Flangestock is produced from softwood lumber, so it necessarily shares some physical characteristics with other products made from the same species. The fact that certain physical properties may be achieved through finger-jointing does not distinguish one finger-jointed product from another, or finger-jointed flangestock's strength from, for example, machine-stress-rated ("MSR") lumber. Nor is it the case that all softwood lumber products correspond to a single set of physical characteristics because different species and different manufacturing or remanufacturing operations (including finger-jointing, glue lamming, drilling, notching, etc.) can and do lead to varying subsets of physical traits such as color, dryness, strength, durability, and

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[74]For example, "some responses indicated that over time some substitute products, particularly EWPs and composite materials, have increased their presence in the market due to specific characteristics such as reduced floor squeaks or lower maintenance." USITC Pub. 3509 at II-4.

straightness.[75]

Interchangeability: Respondents argue that flangestock is used for no purpose other than as a component part of wood I-joists/I-beams, which are usually manufactured in 48 foot lengths. They argue that without flangestock, which is available in lengths up to 66 feet, making long, continuous I-beams would be impossible or would require labor-intensive assembly from shorter pieces of softwood lumber, at the expense of strength and stability. They note that builders of duplexes and row houses benefit immensely from flangestock because a single, long I-beam can be used along the length of the multiple-unit structure, resulting in a substantial cost savings over softwood lumber notwithstanding flangestock's higher price.[76]

For the reasons noted earlier, we do not find the fact that flangestock is made to particular dimensions or for a single end use to be determinative. As expected, the additional processing required for flangestock has a limiting effect on its interchangeability, but the same can be said for other finger-jointed softwood lumber products such as finger-jointed studs, MSR lumber, other remanufactured products such as square-end bed frame components, furniture stock, or

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[75]For example, eastern white pine products generally do not have knots, other softwood lumber products, such as western red cedar, eastern white pine, and bed-frame products also have low (or even lower) moisture content. Moreover, even ***. See, e.g., April 26, 2001, U.S. Red Cedar Manufacturers' Association's Postconference Brief at 5; Tembec's March 19, 2002, Prehearing Brief at 38, Tab 3 at 2, Tab 25; Tembec's April 2, 2002 Posthearing Brief at 5; NLBMDA/NAHB's Apr. 26, 2001, Joint Postconference Brief at Exh. 6; Weyerhaeuser's Apr. 26, 2001, Postconference Brief at Exh. 2; USITC Pub. 3509 at I-13 & n.40.

[76]Abitibi's December 11, 2001 Comments on Draft Final-Phase Questionnaires at 4; Tembec's March 19, 2002, Prehearing Brief at 39-40.

other engineered wood products produced with softwood lumber.[77]

Indeed, the record suggests that flangestock, which is now being combined with oriented-strand board to produce I-beams and I-joists, has to some extent displaced southern yellow pine and Douglas fir, which used to be combined with southern yellow pine plywood to make I-joists, or used alone as 2 x 12 or 2 x 10 wooden beams for those applications.[78]

Channels of Distribution: Respondents argue that flangestock is marketed, advertised, and sold as a distinct product solely to I-joist manufacturers whereas other softwood lumber

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[77]For example, the Canadian Lumber Remanufacturers Association testified at the staff conference that it considered I-joist flanges to be a remanufactured product. See Conf. Tr. at 143 (comparing remanufactured products and particularly finger-jointed lumber such as I-joist flanges with equivalent dimensioned lumber).

[78]A representative from Millman Lumber testified that "[f]or flooring systems where 2 x 10 and 2 x 12 lumber is required, we have traditionally sold predominantly southern pine to satisfy customer preference. Southern pine is stronger and has greater stress value, making it well suited for flooring. Eye-joists and engineered wood products are displacing SYP in this application because they are consistently easy to work with." Conf. Tr. at 117, 119. Likewise, a representative from Centex Homes testified that the company also uses engineered wood products, "and these products have made significant inroads into the market. Ten years ago in Texas, floors were typically built using 2 x 12 dimensioned lumber made from southern yellow pine. [I-joists] have replaced lumber extensively in this area." He also noted use of I-joists for floor support in the Carolinas and use of solid lumber, plated floor trusses and I-joists in the Upper Midwest and Great Lakes area. See Conf. Tr. at 126. The President of Barry Rutenberg Homes testified that "[m]ore and more in my home building business and that of other builders in Florida we're using engineered eye joists and other engineered wooden beams in place of the traditional 2 x 10s and 2 x12s." Conf. Tr. at 128; see also, e.g., USITC Pub. 3509 at II-4 n.13 (According to certain purchasers, "EWPs have a tendency to replace SYP, which like EWPs is primarily used in floor and roof construction."); Hearing Tr. at 211 (John Bavester of Wickes stated that smaller trees are used for the lumber inputs for EWPs, while EWPs tend to displace wider width 2 x 12 lumber); NLBMDA/NAHB April 26, 2001 Joint Postconference Brief at 16, 23, 24, Exh. 33; NLBMDA/NAHB March 19, 2002, Joint Prehearing Brief at 19-21, 26, 30, 33, 37; Hearing Tr. at 63, 142, 143, 186, 193, 195, 201, 206, 207, 211 (regarding use of MSR lumber and I-beams as well as 2 x 8, 2 x 10, and 2 x 12s of southern yellow pine and Douglas fir in joist applications).

products (such as dimensional lumber, studs, boards, etc.) are sold through distributors and retail stores to a wide variety of users.[79] As discussed above for square-end bed frame components, we do not find flangestock to be sold through any special channels of distribution because other softwood lumber products are also sold directly to manufacturers.[80] Moreover, just as some domestic producers are reported to captively consume flangestock in the production of I-beams or I-joists, others domestic producers captively consume other softwood lumber products when manufacturing other finger-jointed or remanufactured products.[81]

Manufacturing facilities, production processes, and employees: Respondents contend that flangestock is produced with mostly 2 x 3 rough green dimension softwood lumber, generally in short lengths, that is kiln-dried, stressed tested, then sorted by grade. The grade required by the customer's specification is cut to length and then run through a shaper table, which cuts grooved "profile" or fingers of $1^{1/8}$ inches in width. The ends are glued together and pressure joined, then cured before the product is surfaced, cut to length, visually graded and then stress tested. They contend that the finger-jointing facility and individual flangestock are tested on a regular basis and flangestock producers generally are required to include a copy of an independent party's "Quality Control Report" with each shipment, certifying compliance with

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[79]Abitibi's December 11, 2001 Comments on Draft Final-Phase Questionnaires at 5-6; Tembec's March 19, 2002, Prehearing Brief at 40-41; Tembec's April 2, 2002, Posthearing Brief at 10.

[80]See, e.g., USITC Pub. 3509 at I-21 to I-22, Table I-2.

[81]See, e.g., USITC Pub. 3509 at I-13 to I-15.

rigorous building codes and industry standards.[82]

Although there are some differences in manufacturing facilities, production processes, and employees for the production of flangestock, there is also some overlap with other softwood lumber products in the first mill where the dimension lumber is produced. And, it would appear that there is some overlap in the manufacturing facilities, production processes, and employees between flangestock and MSR lumber (to the extent that both are stress tested, for example), between flangestock and other remanufactured products (to the extent that they are produced in a remanufacturing mill), and between flangestock and other finger-jointed products (to the extent that all are specially cut into finger-jointed pieces and then joined).[83]

Customer and producer perceptions: Respondents argue that I-joist manufacturers that purchase flangestock expect it to meet their pre-specified requirements for length, stress ratings, and product quality and consistency for use in the manufacture of I-joists. They note that producers meet these customer-specific requirements by subjecting the product to a rigorous battery of tests during and after manufacturing, including by independent third parties. They

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[82]Abitibi's December 11, 2001 Comments on Draft Final-Phase Questionnaires at 3-4; Tembec's March 19, 2002 Prehearing Brief at 35-38, 44-45; Tembec's April 2, 2002, Posthearing Brief at 9-10.

[83]See, e.g., USITC Pub. 3509 at I-13 to I-15, Figure I-1; Tembec's March 19, 2002, Prehearing Brief at Tab 18 (listing various services provided by domestic producers, such as custom cutting, custom kiln drying, custom planing, precision trim, pressure treating, resawing/ripping, special patterns, end paining/waxing, paper/poly wrapping, and listing various remanufactured products they produce such as edge-glued lumber, finger-jointed lumber, flooring/stepping, furniture stock, gutter stock, ladder stock, landscape timbers, lath, mine timbers, pallet stock, paneling/ceiling, pattern stock, railway/car material, scaffold plank, and siding).

argue that other softwood lumber products are produced to industry, not customer-specific, standards and are made for a variety of uses. They argue that even though MSR lumber meets generalized specifications set forth in the industry-wide grading rules, MSR is not manufactured to a customer's specifications, but the inherent qualities of a particular log happens to meet the industry standard. In contrast, they argue, flangestock is manufactured so as to meet specific customer strength requirements.[84]

As respondents recognize, MSR lumber meets particularized specifications, as do other products, such as square-end bed frame components, for which the specifications also are known a priori. And, even Tembec has difficulty differentiating flangestock from other engineered wood products.[85]

As further evidence of producer and customer perceptions, we note that petitioning domestic producers[86] and other market participants such as the National Lumber and Building Material Dealers Association and the National Association of Home Builders[87] (as well as the

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[84]Abitibi's December 11, 2001 Comments on Draft Final-Phase Questionnaires at 5-6; Tembec's March 19, 2002 Prehearing Brief at 41-44.

[85]Tembec argues that flangestock is an engineered product and not like softwood lumber. See Tembec's April 2, 2002, Posthearing Brief at 10-11; Tembec's April 29, 2002, Final Comments at 10-11.

[86]See, e.g., Petition at I-13 to I-15; Petitioners' Postconference Brief at 5-7, Exhs. 6-7.

[87]See, e.g., Dealers/Builders' Postconference Brief at 5; Conference Tr. at 130-31. In addition, Fred Tebb & Sons, a domestic remanufacturer of high-grade hemlock, fir, and spruce, argued that the Commission properly found that remanufactured lumber was not a separate domestic like product in previous investigations and it should do so again here. See, e.g., FT&S Postconference Brief at 4.

Canadian Lumber Trade Alliance and the Government of Canada)[88] advocated for or did not disagree with a finding of a single domestic like product in these investigations.

Price: Respondents argue that flangestock is a high-value long-length specialty product, and they assert that 2 x 3s of softwood lumber sold for between $250 and $265 per thousand board feet during the period of investigation whereas flangestock sold for $400 to $410 per thousand board feet. They argue that the cost of flangestock to the I-beam manufacturer represents only a fraction of the sales price of the I-beam to the ultimate user.[89]

As we explained above for square-end bed frame components, we do not find price to be a distinguishing factor among softwood lumber products. Although some remanufactured, finger-jointed products, or non-engineered wood softwood lumber products might command higher prices than non-remanufactured, non-finger-jointed or non-engineered wood softwood lumber products, differences in species and/or differences in the specifications of the product (whether pre-arranged or not for a particular end user) may also lead to differences in prices.[90]

D. Analysis and Conclusion

For these reasons and consistent with our findings in the preliminary phase of this case as well as all previous investigations of softwood lumber,[91] we continue to find a single domestic

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[88]See, e.g., CLTA's Postconference Brief at 4 n.6; Conference Tr. at 91.

[89]Abitibi's December 11, 2001 Comments on Draft Final-Phase Questionnaires at 5; Tembec's March 19, 2002 Prehearing Brief at 45, 48.

[90]See, e.g., USITC Pub. at V-4 to V-13, Tables V-1 to V-5, and Figures V-3 to V-5.

[91]See, e.g., Softwood Lumber from Canada, Invs. Nos. 701-TA-414, 731-TA-928 (Prelim.), USITC Pub. 3426 at 10-12 (May 2001); Softwood Lumber from Canada, Inv. No. 701-

like product consisting of the continuum of the domestically-produced softwood lumber products, whether or not remanufactured or finger-jointed, whether or not from a particular species, and whether or not manufactured to particular specifications or for a particular end use. In accordance with the Congressional sentiment expressed in legislative history that –

> [t]he requirement that a product be "like" the imported article should not be interpreted in such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not "like" each other, nor should the definition of "like product" be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under investigation,[92]

we do not find a clear line dividing any subset of domestically produced softwood lumber products from other softwood lumber products.

III. Cross-Cumulation

The Panel remanded the Commission's decision to cross-cumulate for reconsideration of the Commission's interpretation of the statute in the context of its discretionary authority in a

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TA-312 (Final), USITC Pub. 2530 at 5-11 (July 1992) (The Commission found that there are no clear dividing lines along which it could distinguish remanufactured lumber or any subset thereof (including bed frame components) from all other softwood lumber within the scope of Commerce's investigation and noting that "[t]he definition of a multitude of like products in this investigation would fragment the Commission's analysis of the industry." The Commission, therefore, determined that the like product is all softwood lumber, including all remanufactured lumber products within the scope of Commerce's investigation (including bed frame components). This domestic like product determination was never challenged on appeal); Softwood Lumber from Canada, Inv. No. 701-TA-274 (Prelim.), USITC Pub. 1874 at 5-7 (July 1986); Softwood Lumber from Canada, Inv. No. 701-TA-197 (Prelim.), USITC Pub. 1320 (Nov. 1982) at 4-5.

[92]S. Rep. No. 96-249 at 90-91.

threat of material injury determination.[93] After reconsideration of the statute and the record evidence, we have determined to exercise our discretion to cross-cumulate subsidized and dumped imports of softwood lumber from Canada for our consideration of whether the volume and price effects of subject imports threatened the domestic industry with material injury.

The standard cumulation provision for purposes of determining if a threat of material injury exists is set forth in section 19 U.S.C. § 1677(7)(H). The Commission may to the extent practicable cumulatively assess the volume and price of subject imports from all countries as to which petitions were filed on the same day if such imports compete with each other and with domestic like products in the U.S. market.[94] In this respect the provision preserves the Commission's discretion to cumulate imports in analyzing the threat of material injury. However, the limitations concerning what imports are eligible for cumulation and the exceptions for cumulation are applicable to cumulation for threat as well as to cumulation for present material injury.[95] The Commission has generally considered four factors intended to provide a framework for determining whether the imports compete with each other and with the domestic like product.[96] Only a "reasonable overlap" of competition is required.[97] In addition to

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[93]Panel Decision at 32-41 and 113-114.

[94]19 U.S.C. § 1677(7)(H).

[95]To be eligible for cumulation for threat analysis, the petitions must be filed on the same day and the imports must meet the competition requirement. Cumulation for threat analysis is precluded in the four instances in which it is precluded for material injury analysis; none of these instances apply to these investigations.

[96]The four factors generally considered by the Commission in assessing whether imports compete with each other and with the domestic like product are: (1) the degree of fungibility

considering the four cumulation factors, the Commission in the context of a threat analysis also may consider the similarity of trends in subject imports from the countries under investigation.[98]

Thus, as an initial matter, we note that the antidumping and countervailing duty petitions were filed on the same day. In considering whether subject imports compete with each other and with the domestic product, we recognize that imports subject to investigation are from a single country with one principal difference between the scope of each of these investigations. The antidumping duty investigation involves softwood lumber imports from Canada, including imports from the Maritime Provinces, whereas the countervailing duty investigation involves

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between the subject imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions; (2) the presence of sales or offers to sell in the same geographical markets of subject imports from different countries and the domestic like product; (3) the existence of common or similar channels of distribution for subject imports from different countries and the domestic like product; and (4) whether the subject imports are simultaneously present in the market. See Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898, 902 (CIT 1988), aff'd, 859 F.2d 915 (Fed. Cir. 1988).

[97]See Goss Graphic System, 33 F. Supp.2d at 1087 (CIT 1998), aff'd, 216 F.3d 1357 (Fed. Cir. 2000); United States Steel Group v. United States, 873 F. Supp. 673, 685 (CIT 1994), aff'd, 96 F.3d 1352 (Fed. Cir. 1996); Mukand Ltd. v. United States, 937 F. Supp. 910, 916 (CIT 1996); Wieland Werke, AG v. United States, 718 F. Supp. 50, 52 (CIT 1989) ("Completely overlapping markets are not required.").

[98]See Torrington Co. v. United States, 790 F. Supp. 1161, 1172 (CIT 1992) (affirming Commission's determination not to cumulate for purposes of threat analysis when pricing and volume trends among subject countries were not uniform and import penetration was extremely low for most of the subject countries), aff'd 991 F.2d 809 (Fed. Cir. 1993); Metallverken Nederland B.V. v. United States , 728 F. Supp. 730, 741-42 (CIT 1989); Asociacion Colombiana de Exportadores de Flores v. United States, 704 F. Supp. 1068, 1072 (CIT 1988).

softwood lumber imports from Canada, excluding imports from the Maritime Provinces.[99] Thus, the imports subject to the countervailing duty investigation are the same imports as most of those subject to the antidumping duty investigation, with the small additional volume of imports from the Maritime Provinces included in the scope of the antidumping duty investigation.[100] During the period of investigation, the imports subject to both investigations accounted for 88.2 percent to 90 percent of the volume of imports subject to the antidumping duty investigation.[101]

Clearly, there is an overlap of competition for the imports that are subject to *both* the antidumping duty and countervailing duty investigations; they are exactly the same imports. Moreover, we find a reasonable overlap of competition between (1) *all* imports subject to the antidumping duty investigation, and (2) those subject to the countervailing duty investigation, since the vast majority are the same imports.[102] The trends in import volumes show increases

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[99]Compare 67 Fed. Reg. 15539 (April 2, 2002) with 67 Fed. Reg. 15545, 15547 (April 2, 2002) and 66 Fed. Reg. 40228 (Aug. 2, 2001) (amendment to notice of initiation). This exclusion in the countervailing duty determination does not apply to imports of softwood lumber products produced in the Maritime Provinces from Crown timber harvested in any other Province.

[100]In the original investigation, the Maritime Provinces acknowledged that "[s]oftwood lumber imports from the Maritime Provinces are small, both in absolute terms and relative to domestic consumption." Maritime Respondents' Posthearing Brief at 12.

[101]Calculated from USITC Pub. 3509 at Tables IV-2 and IV-3. Imports of softwood lumber subject to both investigations as a share of those subject to the antidumping duty investigation were: 88.8 percent in 1999; 88.2 percent in 2000; and 90.0 percent in 2001. Id.

[102]Furthermore, we note that the evidence indicates that imports subject to only the antidumping duty investigation are the same or similar species as imports subject to both investigations, have been imported into overlapping geographical markets, involve similar channels of distribution and are simultaneously present in the market. USITC Pub. 3509 at Tables IV-2 and IV-3. See, e.g., USITC Pub. 3509 at Appendix E-27 and E-28 ***.

from 1999 to 2001 whether imports are subject to the antidumping duty investigation or are subject to the countervailing duty investigation.[103] Accordingly, we find that the conditions for cumulating the subject imports have been satisfied.

Parties provided no evidence nor arguments in the original investigations that the conditions for cross-cumulating subject imports had not been satisfied. In fact, in the original investigations, no party raised the issue that the Commission had discretionary authority to determine whether to cross-cumulate in the context of its threat determination nor challenged Bingham & Taylor as inconsistent with the URAA. Instead, Canadian parties' only basis for not cross-cumulating was alleged requirements to conduct separate investigations in order to consider the effects of subsidies.[104] But, as we found in the original investigation, and as affirmed by the Panel, there is no requirement to determine that the threat of material injury was caused through the effects of subsidies or dumping.[105]

We discuss below how the rationale of Bingham & Taylor still applies in the context of a

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[103]Imports of softwood lumber subject to the antidumping duty investigation increased by 2.4 percent from 1999-2000 and by 0.4 percent from 2000-2001, for an increase of 2.8 percent from 1999-2001. USITC Pub. 3509 at Table IV-2. Imports of softwood lumber subject to both investigations decreased by 0.2 percent from 1999-2000 but increased by 4.5 percent from 2000-2001, for an increase of 4.3 percent from 1999-2001. Id. at Table IV-3. We recognize there is a slight variation between years but note that the trends show increases over the period of investigation.

[104]See, e.g., Govt. of Canada's Prehearing Brief at 4-5, 7, and 12-14; Govt. of Canada's Posthearing Brief at 1-7; CLTA's Prehearing Brief at 6; Maritime Respondents' Posthearing Brief at 13.

[105]The Panel affirmed the Commission's finding that U.S. law clearly indicated that the ITC's determination is to be made on the basis of the effects of dumped imports or subsidized imports and not the effects of subsidies. Panel Decision at 42-50 and 114.

threat analysis and why cross-cumulation is consistent with the URAA. We note however that since no party raised arguments in the original investigation regarding the consistency of Bingham & Taylor with the URAA, there are no "relevant arguments of the parties"on the record in the original investigation for the Commission to consider in reaching a reasoned conclusion.[106]

The Commission's reviewing courts, in addition to prior binational panels, have affirmed that Congress intended both subsidized and dumped imports from a single country to be cross-cumulated for purposes of the Commission's injury analyses.[107] [108] The Federal Circuit decision

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[106]The Panel's remand instructions appear to mix the arguments regarding cross-cumulation that were before the Commission in the original investigations and the arguments that were subsequently made, particularly regarding the URAA and threat, to the Panel, but are not part of the underlying record evidence on which the remand is to be based. Panel Decision at 40-41 and 113-114. While we have addressed these issues on remand, the Commission's reviewing courts have repeatedly recognized that, in general, a party waives its right to argue an issue if not raised in the original investigation at the administrative level because a "litigant may not raise an issue for the first time on appeal." See, e.g., Texas Crushed Stone Co. v. United States, 822 F. Supp. 773, 781 (CIT 1993), aff'd, 35 F.3d 1535 (Fed. Cir. 1994).

[107]The Commission also has decided in prior cases to cross-cumulate subsidized and dumped imports from the same country. See, e.g., Certain Steel Wire Rod from Canada, Germany, Trinidad & Tobago, and Venezuela, Inv. Nos. 701-TA-368-371 (Final), USITC Pub. 3075 at 21-22 (Nov. 1997); Stainless Steel Wire Rod from Germany, Italy, Japan, Korea, Spain, Sweden and Taiwan, Inv. Nos. 701-TA-373 (Final) and 731-TA-769-75 (Final), USITC Pub. 3126 at 12 n.64 (Sept. 1998); Magnesium from Canada, Inv. Nos. 701-TA-309 and 731-TA-528 (Final), USITC Pub. 2550 (Aug. 1992).

[108]New Steel Rails from Canada, USA-89-1904-09 and 10, at 24-25 (Aug. 13, 1990) (Concurring with the findings in Bingham & Taylor, this Panel stated:

> . . . as the statute does not expressly prohibit cross-cumulation of imports from a single country, it would be improper for this Panel to engraft such a prohibition where Congress did not. . . .
>
> In the countervailing duty determination, the "hammering effect" of simultaneous dumped and subsidized imports from a single country is directly implicated because the domestic industry is being affected by both the dumped and subsidized imports. Indeed,

in Bingham & Taylor v. United States, which is the seminal case on this issue, held that cross-cumulation of dumped and subsidized imports in a present material injury context is mandatory whenever the statutory cumulation factors are otherwise satisfied.[109] The Federal Circuit relied on: 1) the legislative history indicating that Congress wanted to establish a uniform practice of cumulation covering the broad category of "simultaneous unfair imports from different countries;" and 2) the fact that the statutory standards for both cumulation and material injury are exactly the same in dumping and subsidy cases,[110] indicating the complementary role of the

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> but for the fortuity that the dumped imports came from the same country, it would have been error if the Commission majority had failed to consider whether to cumulate those imports in the countervailing duty investigation. . . .
>
> We conclude that the Commission may cross-cumulate imports from a single country for purposes of determining whether an industry in the United States is threatened with material injury.")

[109]815 F.2d 1482 (Fed. Cir. 1987), aff'g 627 F. Supp. 793, 798 (CIT 1986). The Federal Circuit affirmed the Court of International Trade's decision remanding the Commission's determination in order for it to cumulate subject imports of dumped light and heavy construction castings imported from India, Canada, the People's Republic of China and Brazil with subject imports of subsidized iron construction castings from Brazil.

[110]19 U.S.C. §§ 1677(7)(G)(i) and 1677(7)(H).

determinations in the statutory scheme.[111] [112]

The basis relied on by the Federal Circuit in Bingham & Taylor to support cross-cumulation, *i.e.*, simultaneous unfair imports and the parallel statutory construction, also applies in the context of a threat analysis where the Commission has discretionary authority, as discussed above, to determine whether to cumulate subject imports. Thus, the rationale for cross-cumulation provided by the Federal Circuit in Bingham & Taylor applies in the context of a threat analysis with the exception that it is discretionary rather than mandated if appropriate

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[111]The Federal Circuit in Bingham & Taylor stated:

> The sum of it is that (a) Congress used statutory words which, in and of themselves, fully authorize cross-cumulation (at the very least); (b) the legislative history shows, further, that Congress wanted both to establish a general, uniform rule to end the Commission's prior variations and also to cover the broad category of "simultaneous unfair imports from different countries," a phrase plainly blanketing both types of unfair trade practices; and (c) the statute as a whole fits well with cross-cumulation.

815 F.2d at 1487 (Fed. Cir.1987).

[112] In rejecting an argument that the distinctive provisions for antidumping and countervailing duty investigations implied there should be separate investigations, the Federal Circuit stated:

> First, when Congress added the cumulation provision in 1984 it did not include that matter in the specific sections applicable to subsidy and dumping investigations but instead placed it in the general part of the statute that applies to both types of unfair trade proceedings. 19 U.S.C. § 1677 ("Definitions; special rules"). Second, the material injury provisions applicable to the two types of proceedings are substantially the same, thus showing the complementary nature of both determinations. Third, in the same statute that added cumulation Congress also provided a method for facilitating the holding of simultaneous antidumping and subsidy investigations and proceedings with respect to the same merchandise. . . . This obviously makes cross-cumulation much easier.

815 F.2d at 1486 (Fed. Cir. 1987).

factors are satisfied.

We have considered and determined that changes made to the cumulation provisions in enacting the URAA do not preclude cross-cumulation. In enacting the URAA, Congress clearly indicated its intent to preserve prior practice regarding cumulation.[113] Congress has directed the Commission to cumulate in present material injury investigations if certain conditions are satisfied and encouraged the Commission to the extent practicable to cumulate in threat analyses. Moreover, Congress has provided no language in the statute or legislative history that prohibits cross-cumulation of dumped and subsidized imports from a single country. In fact, certain changes in the URAA would seem to make it more amenable to cross-cumulate imports from a single country.

First, the current version of the U.S. statute, 19 U.S.C. §§ 1677(7)(G)(i), 1677(7)(H), clearly permits the Commission to cumulate imports from *all countries* with respect to which petitions are filed (or investigations self-initiated) under *sections 1671a(b) or 1673a(b) on the same day*. Thus, by specifying that cumulation involves petitions filed on the "same day," the statute more clearly denotes that imports must be "subject to investigation," as recognized in Bingham & Taylor.[114] Moreover the current provision includes the term "*all countries*" which

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[113]SAA at 847-850 and 944.

[114]One condition to cumulating in the former provision was that imports be "subject to investigation." The Commission's reviewing court found that the statutory term "subject to investigation" contained in the former section 1677(7)(C)(iv) did not expressly require cross-cumulation, but was broad enough to encompass both dumped and subsidized imports.

replaced "*two or more countries*" in the former provision.[115] Thus, despite the language in the former provision of "*two or more countries*," the Commission's reviewing court affirmed cumulation of subsidized and dumped imports from a single country. The "*all countries*" language in the current provision more explicitly encompasses imports from either a single or multiple countries.

Congress retained the cumulation provision for determining threat of material injury in the common definitions for antidumping and countervailing duty cases in enacting the URAA.[116] The Federal Circuit in Bingham & Taylor recognized that placement of the cumulation provision in "the general part of the statute that applies to both types of unfair trade proceedings. 19 U.S.C. § 1677 ("Definitions; special rules")" fit well with cross-cumulation.[117]

The fact that Congress provided explicit direction to the Commission regarding the same day filing and competition requirements in the URAA does not support limiting the

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[115]The prior cumulation provision stated in relevant part: "the Commission shall cumulatively assess the volume and effect of imports from *two or more countries* of like products subject to investigation. . . ." 19 U.S.C. § 1677(7)(C)(iv) (1994) (emphasis added). (The prior cumulation provision for determining threat of material injury stated in relevant part: "the Commission may cumulatively assess the volume and price effects of imports from *two or more countries* if such imports. . . ." 19 U.S.C. § 1677(7)(F)(iv) (1994) (emphasis added)). The current provision relating to cumulation for determining threat of material injury states in relevant part: "the Commission may cumulatively assess the volume and price effects of imports of subject merchandise from *all countries* with respect to which . . . ." 19 U.S.C. § 1677(7)(H)(emphasis added).

[116]The "or" between "section 1671 or 1673" in the threat cumulation provision was in the pre-URAA version and retained by Congress in enacting the URAA. Compare 19 U.S.C. § 1677(7)(F)(iv) (1994) with 19 U.S.C. § 1677(7)(H).

[117]815 F.2d at 1486 (Fed. Cir. 1987).

Commission's authority to the explicit language of the statute which does not expressly mention cross-cumulation.

First, Congress has delegated to the Commission the authority to make decisions regarding cumulation. For instance, the same day filing requirement is straightforward, but the Commission has discretion even in a present material injury analysis in determining whether the competition requirement is satisfied. Second, in providing more guidance regarding the cumulation provisions, Congress did not prohibit the Commission from cross-cumulating subsidized and dumped imports from a single country, even though Congress was aware of both the Federal Circuit's Bingham & Taylor decision and the Commission's subsequent practice.[118] Moreover, as the Federal Circuit stated in Bingham & Taylor, "for the courts to engraft onto the statute a prohibition against cross-cumulation, where Congress itself has not done so would be improper."[119]

The new statutory language, like the language addressed by the Bingham & Taylor court, fits well with cross-cumulation. Both the legislative history relied upon by the court in Bingham & Taylor (in particular, Congress's concern that the Commission address on a cumulated basis all unfairly traded imports that might be having a "hammering effect" on the domestic industry)

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[118]See Bingham & Taylor, 815 F.2d at 1486 (Fed. Cir. 1987)("Nor can it be argued that Congress was unaware of the potential for cross-cumulation when it drafted the 1984 Act. . . .The matter was thus squarely presented to Congress."); H.R. Rep. No. 99-581, Part I at 88-89 (1984) ("Since passage of that [1984 Trade] Act, questions have arisen during the course of Commission investigations as to whether cumulation of dumped and subsidized imports which compete with one another is required. The Committee believes that cumulation of all unfairly traded imports which are competing at the same time in the U.S. market is appropriate.").

[119]815 F.2d at 1487 (Fed. Cir. 1987).

and the parallel statutory scheme relied on by that court were not changed by the URAA.

The conditions for cross-cumulating subject imports have been satisfied. Congress has encouraged the Commission to cumulate to the extent practicable in the context of its threat analysis. No evidence nor arguments have been presented that provide a basis for us not to exercise our discretion and determine to cross-cumulate subsidized and dumped imports of softwood lumber from Canada.

IV. Threat of Material Injury By Reason of Subject Imports

The Panel remanded the Commission's threat of material injury determinations for consideration, in its analysis of whether there is a threat of material injury to the domestic softwood lumber industry, all information and data considered in its present material injury determinations, including consideration of potential negative effects on the domestic industry's existing development and production efforts.[120] In addition, pursuant to the Panel's instructions, we have examined alleged other factors, including domestic supply, non-subject imports, engineered wood products, insufficient timber supplies in the United States, and the cyclical nature of the softwood lumber industry, to ensure that we have not attributed injury from other sources to the threat of injury caused by dumped and subsidized imports.[121]

We have considered the record as whole in light of the instructions in the Panel's opinion. After reconsideration of all of the record evidence in these investigations, we again determine that the domestic softwood lumber industry is threatened with material injury by reason of

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[120]Panel Decision at 112.

[121]Panel Decision at 112-113.

subject imports of softwood lumber from Canada that are subsidized and sold at less than fair value.

The statute, 19 U.S.C. § 1677(7)(F), directs the Commission to determine whether the U.S. industry is threatened with material injury by reason of the subject imports by analyzing whether "further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted."[122] The Commission may not make such a determination "on the basis of mere conjecture or supposition," and considers the threat factors "as a whole" in making its determination whether dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued.[123] In making our determination, we considered all statutory factors that are relevant to these investigations.[124] [125]

The statute requires the Commission to consider but does not require that it make a finding regarding any of the statutory threat factors, as the Panel affirmed regarding the subsidy

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[122]19 U.S.C. § 1677(7)(F)(ii).

[123]19 U.S.C. § 1677(7)(F)(ii).

[124]19 U.S.C. § 1677(7)(F)(i). The Commission's consideration of factor I regarding the nature of the subsidies was affirmed by the Panel. Thus, we do not reconsider this factor on remand and incorporate our prior views on this issue in its entirety. The Commission's treatment of factors VI and VII were not appealed and thus our prior views also are adopted here.

[125]Commissioner Lane has considered the record evidence in these investigations regarding factors I, VI, and VII and adopts the Commission's prior views on these issues in their entirety. In addition, Commissioner Lane notes that the evidence shows that no dumping findings or antidumping remedies in markets of foreign countries against the same class of merchandise have been alleged or reported. 19 U.S.C. § 1677(7)(F)(iii)(I).

factor.[126] [127] Congress directed the Commission to consider specific factors, and provided the Commission discretion to determine the weight to be accorded each factor set forth in the statute for its consideration.[128] Moreover, Congress endorsed the existing practice that "issues material to the agency's determination be discussed so that the 'path of the agency may reasonably be discerned' by a reviewing court" but has not required the Commission to discuss each argument or fact.[129]

Congress has explicitly stated that: "A threat of material injury determination is subject

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[126]Panel Decision at 64.

[127]See Negev Phosphates, Ltd. v. U.S. Dep't of Commerce, 699 F. Supp. 938, 947 (CIT 1988) ("The Commission, however, is not required to make explicit findings with respect to all the factors that it considers.")

[128]S. Rep. No. 96-249, at 87-88 (1979) ("[n]either the presence nor the absence of any [particular] factor listed . . . 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."); U.S. Steel Group v. United States, 96 F.3d 1352, 1362 (Fed. Cir. 1996). The Commission's reviewing courts have repeatedly affirmed that "[t]he Commission has the discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis." Asociacion de Productores de Salmon y Trucha de Chile AG v. United States, 180 F. Supp. 2d 1360, 1370 (CIT 2002), quoting Goss Graphics System, 33 F. Supp. 2d at 1100 (CIT 1998), aff'd, 216 F.3d 1357 (Fed. Cir. 2000).

[129]SAA at 892. Specifically, the SAA states in relevant part:

> Likewise, Commerce and the Commission need not issue explicit findings of fact or conclusions of law. Such findings and conclusions, while appropriate for adjudicatory proceedings, are not appropriate for antidumping or countervailing duty proceedings, which are investigatory in nature and which do not allow an extensive period of time in which to write determinations. Instead, the agencies must specifically reference in their determinations factors and arguments that are material and relevant, or must provide a discussion or explanation in the determination that renders evident the agency's treatment of a factor or argument.

to the same evidentiary requirements and judicial standard of review as a *present* material injury determination."[130] The Commission's reviewing courts have rejected arguments proposing that separate rules or standards must be devised for threat determinations,[131] and reaffirmed that "[i]n reaching a threat determination, the Commission is afforded discretion in interpreting the data, and the court does not weigh the evidence."[132] In fact, the court has recognized that "[t]his is particularly appropriate when threat, which Congress has seen fit to require the ITC to consider, is the issue."[133]

Congress, as well as the reviewing courts, have recognized that "[b]ecause of the predictive nature of a threat determination, and to avoid speculation and conjecture, the Commission will continue using special care in making such [threat] determinations."[134] Far

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[130]SAA at 855. The statute states that "[t]he statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression of the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d); accord Eveready Battery Company v. United States, and USITC, 77 F. Supp. 2d. 1327, 1330, n.4 (CIT 1999). See also Chevron U.S.A. v. Natural Resource Defense Counsel, 467 U.S. 837, 843, n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

[131]Dastech Int'l, Inc. v. USITC, 963 F. Supp. 1220, 1227 (CIT 1997).

[132]U.S. Steel Group, 873 F. Supp. at 703 (CIT 1994), aff'd, 96 F.3d 1352 (Fed. Cir. 1996).

[133]Bando Chemical Industries, Ltd. and Bando American Inc. v. United States, 17 CIT 798, 802 (1993), aff'd, 26 F.3d 139 (Fed. Cir. 1994).

[134]SAA at 855. See also Suramerica de Aleaciones Laminadas, C.A. v. United States, 818 F. Supp. 348, 353 (CIT 1993) ("This Court must be especially vigilant of the *threat* of material injury determination mechanism because the Commission's inquiry by its very nature endeavors to predict events that have not yet occurred.").

from establishing a special review standard, this statement simply recognizes that the Commission cannot base its threat findings on mere conjecture and speculation.[135] Nevertheless, the reviewing courts also have acknowledged that "[a]s it deals with the projection of future events . . . [the Commission's threat] analysis is inherently less amenable to quantification . . . ."[136] Projections involve extrapolations from existing data. Special care is the recognition that these are projections about future events, and such projections must be based on past and present facts.

Threat of material injury is material injury that has not yet occurred, but remains a future event whose actual materialization cannot, in fact, be assured with absolute certainty, although the determination must be based on evidence that is real and not mere conjecture or supposition.[137] The inclusion of the threat provision in the statute is a recognition that injury to a domestic industry may not yet have occurred, or not yet be "material," but rather there can be a progression or accretion of adverse effects by reason of subject imports that in the imminent future would ascend from a threat of material injury to actual present material injury if an order is

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[135]BIC Corp. v. United States, 964 F. Supp. 391, 405 (CIT 1997) ("Conjecture and speculation are not enough; there must be 'positive evidence tending to show an intention to increase levels of importation.'"), quoting Metallverken Nederland B.V. v. United States, 744 F. Supp. 281, 287 (CIT 1990).

[136]NEC Corp., 36 F. Supp.2d at 391(CIT 1998); see also Hannibal Indus., Inc. v. United States, 710 F. Supp. 332, 338 (CIT 1989); Rhone Poulenc. S.A. v. United States, 592 F. Supp. 1318, 1329 (CIT 1984). The Federal Circuit has held that predictive determinations by the Commission are by nature not "verifiable," but rather are "based on currently available evidence and on logical assumptions and extrapolations flowing from that evidence." Matsushita, 750 F.2d at 933 (Fed. Cir. 1984).

[137]SAA at 854.

not issued. Thus, the threat of material injury and present material injury analyses necessarily are intertwined rather than entirely separate, and many of the same factors weigh into our analysis for both. We repeat, in this analysis of threat on remand, relevant elements from sections other than threat from our prior views for the Panel's benefit. However, we note that consideration and explanation of a factor in any one section of the Views of the Commission does not limit its application to that section. Instead, the Commission's Views must be viewed as a whole, and analysis conducted in any particular section can, and often does, have a bearing on analysis in other sections.[138]

For example, in our present material injury analysis, there are a number of subsidiary facts that support affirmative findings on aspects of that analysis. These facts foreshadow future material injury and therefore show the existence of threat of material injury. In brief, we found that the volume of subject imports was significant[139] and would support a finding that the domestic industry was presently materially injured by reason of the subject imports if combined with significant price effects and adverse impact. In fact, we found that the volume of subject imports was significant and increasing in spite of the restraining effect of the SLA or the

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[138]Accord Angus Chemical Co. v. United States, 140 F.3d 1478, 1486 (Fed. Cir. 1998) (Court held that "sufficient analysis and findings with regard to the three factors to satisfy the statute" were in portions of opinion joined by two Commissioners even though they had not joined portions of opinion that explicitly discussed those three factors.). See also Ceramica Regiomontana, 810 F.2d at 1339 ("The lack of an explicit statement in the agency's published notices to the effect that the ITA, therefore, utilized "the best information available" has prevented neither the trial court nor this court from discerning the path of the agency in its decision-making process. A court may "uphold [an agency's] decision of less than ideal clarity if the agency's path may reasonably be discerned . . . .").

[139]USITC Pub. 3509 at 32.

pendency of the investigations.[140] Moreover, there were substantial declines in prices in 2000 and again at the end of the period of investigation in the third and fourth quarters of 2001.[141] We found that subject imports had already caused some adverse price effects.[142] The evidence showed a deterioration in the condition of the domestic industry, and in particular its financial performance, over the period of investigation, which was largely a result of substantial declines in price.[143] We recognized, however, that the evidence indicated that both Canadian producers and U.S. producers had contributed to the excess supply that had resulted in substantial price declines, particularly in 2000.[144] Thus, largely because both subject imports and domestic supply had contributed to the significant price effects during the period of investigation, we concluded that subject imports did not yet have a significant adverse impact on the domestic industry.[145] On the other hand, the declines in the industry's performance, particularly financial performance, made it vulnerable to future injury.[146]

Therefore, the Commission made several findings in its present injury analysis that

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[140]USITC Pub. 3509 at 22 and 41.

[141]USITC Pub. 3509 at 32-35.

[142]USITC Pub. 3509 at 34-35.

[143]USITC Pub. 3509 at 36-39.

[144]USITC Pub. 3509 at 34-35.

[145]USITC Pub. 3509 at 36.

[146]USITC Pub. 3509 at 37-39. As discussed below, we incorporate our assessment of the condition of the domestic industry, including our finding that it is vulnerable to injury, from the original Views of the Commission.

foreshadow injury and clearly support the existence of a threat of material injury; these include the findings that the volume of subject imports already was significant; subject imports had increased during the period of investigation even with the restraining effect of the Softwood Lumber Agreement (SLA); imports had some adverse price effects on domestic prices; and the condition of the domestic industry had deteriorated, primarily as a result of substantial declines in prices, and thus was in a vulnerable state. The threat analysis must be read in the context of these findings.

A. Analysis of Threat Factors

1. Likelihood of Substantially Increased Imports

Two of the statutory factors considered in a threat of material injury analysis focus on the likelihood of substantially increased subject imports. These factors are as follows:

> (II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,[147]
>
> (III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports.[148]

The statute directs the Commission to consider, in addition to the relevant statutory

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[147]We note that the statute uses the disjunctive "or" rather than the conjunctive "and" referring in relevant part to "any existing unused production capacity **or** imminent, substantial increase in production capacity. . . ." In contrast, the Panel's remand decision seems to require a showing of both when the text clearly permits only one.

[148]19 U.S.C. § 1677(7)(F)(i)(II) and (III).

factors, other economic factors the Commission deems relevant.[149] We find that there is an interrelationship between six factors subsidiary to these two statutory factors (i.e., likely import volume and production capacity factors) that warrants considering them together rather than in a piece-meal approach.[150] All of the factors considered, whether listed in the statute or not, the record evidence, and, most importantly, the likely effects being assessed are interrelated and should not be considered and analyzed as isolated fragments.

We find that there is a likelihood of substantial increases in subject imports based on evidence regarding, *inter alia*, Canadian producers' excess production capacity and projected increases in capacity, capacity utilization and production, the export orientation of Canadian producers to the U.S. market, the increase in subject imports over the period of investigation, the effects of expiration of the SLA, subject import trends during periods when there were no import restraints, such as the SLA, and forecasts for strong but relatively stable demand in the U.S. market. Each of the six subsidiary factors considered relate directly to whether there is a significant rate of increase in imports and to whether there is existing unused production capacity.

We find that the imports of softwood lumber were significant, and increasing during the period of investigation, and are likely to increase further in the future. The Panel's focus on the "relatively stable" characterization of import volume overlooks our finding that the actual

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[149] 19 U.S.C. § 1677(7)(F)(i).

[150] Accord NEC Corp., 83 F. Supp.2d at 1346 (CIT 1999) ("here, for example, that unused capacity and volume increases 'indicat[e] the likelihood of substantially increased imports.'").

volume of imports from Canada, which was about 34 percent of apparent consumption, was already significant. In addition, the volume of imports increased by 2.8 percent during the period of investigation even with the restraining effect of the SLA in effect during that time. That increase, coupled with excess Canadian capacity and projected capacity increases, leads to the conclusion that there is a likelihood of substantially increased imports to the United States above the already significant level, given the fact that Canadian producers rely on sales in the U.S. market for about two-thirds of their sales. These findings are discussed in detail below. However, we note at the outset that the Panel's use of the negligibility provision of the statute to suggest that a 2.8 percent increase in imports is not significant is clearly misplaced. That provision refers to subject imports as a share of total imports (of which Canadian imports constitute over 90 percent), not imports as a percentage of domestic consumption (of which Canadian imports constitute over a third). Moreover, Congress has acknowledged that for a given industry, an apparently small volume of imports may have a significant impact on the market, whereas for others the same volume might not be significant.[151]

Our analysis of likely substantial increases in subject imports first takes into account the fact that subject import volumes, both in absolute terms and relative to consumption, were already, as we previously found, at significant levels, i.e., accounting for about 34 percent of the U.S. market. The volume of subject imports from Canada increased by 2.8 percent from 1999 to

[151]H.R. Rep. No. 96-317, at 46 (1979); S. Rep. 96-249, at 88 (1979).

2001.[152] As a share of apparent domestic consumption, subject imports from Canada increased from 33.2 percent in 1999 to 34.3 percent in 2001.[153] The evidence shows volume increases even with the restraining effect of the SLA in place, and substantial increases during periods when such imports were not subject to import restraints. Moreover, Canadian producers had increasing excess capacity during the period of investigation.

A threat analysis looks at whether these imports, which in this case already were at significant levels and would be indicative of material injury when combined with significant price effects and adverse impact, are likely to be injurious in the imminent future. The evidence demonstrates that subject imports will not only continue to enter the U.S. market at this already significant level, but are projected to increase.

a. *Canadian Producers' Excess Capacity and Projected Increases in Capacity, Capacity Utilization, and Production*

The Canadian producers had excess capacity. Canadian producers' capacity utilization had peaked in 1999 at 90 percent, and then declined to 84 percent in 2001.[154] This

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[152]The volume of imports of softwood lumber from Canada increased from 17,983 mmbf in 1999 to 18,483 mmbf in 2001. USITC Pub. 3509 at Tables IV-1, IV-2, and C-1.

[153]USITC Pub. 3509 at Table IV-2 and C-1. Conversely, subject imports by value declined by 16 percent. The value of subject imports decreased from $7.1 billion in 1999 to $6.0 billion in 2001. Id. at Tables IV-1, IV-2, and C-1.

[154]USITC Pub. 3509 at Tables VII-1 (publicly available data series) and VII-2 (questionnaire response data series). Data from Canadian producers' questionnaire responses and from publicly available sources were very similar. Questionnaire responses reported capacity utilization as 90.3 percent in 1999, 88.8 percent in 2000, and 84.4 percent in 2001. Id. at Table VII-2. Data from publicly available sources reported capacity utilization as 90.5 percent in 1999, 88.9 percent in 2000, and 83.7 percent in 2001. Id. at Table VII-1.

contrasted with the relatively stable level for Canadian capacity utilization in the three years prior to the period of investigation, while operating under the SLA.[155] Thus, in 2001, excess Canadian capacity had increased to 5,343 mmbf, which was equivalent to 10 percent of U.S. apparent consumption.[156] Moreover, the evidence showed that this increase in excess capacity could not be attributed to declines in home market shipments from 1999 to 2001, since increases in exports to the U.S. market for that period were nearly equal to the declines in home market shipments.[157]

The Canadian producers projected increases in capacity and production in 2002 and 2003. The evidence showed that there had been a steady increase in Canadian producers' capacity from 1995 to 1999, with a more gradual increase from 1999 to 2001.[158] Thus, Canadian production capacity in 2001 was 10.4 percent higher than in 1995.[159] Canadian production increased by 11.3 percent from 1995 to 1999, and then declined from 1999 to 2001.

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[155]In the three years prior to the period of investigation, also while under the SLA, Canadian capacity utilization had been at a relatively stable level ranging from 87.3 percent to 87.7 percent. USITC Pub. 3509 at Table VII-1.

[156]USITC Pub. 3509 at Tables VII-1 and C-1.

[157]USITC Pub. 3509 at Table VII-2. Based on questionnaire responses, home market shipments declined by 663 mmbf from 1999 to 2001 while shipments to the U.S. market increased by 525 mmbf from 1999 to 2001. Id.

[158]USITC Pub. 3509 at Tables VII-1 and VII-2. Data from publicly available sources showed Canadian producers' capacity increase from 29,700 mmbf in 1995 to 32,100 mmbf in 1999, and increase again to 32,800 mmbf in 2001. USITC Pub. 3509 at Table VII-1. Canadian producers' questionnaire responses (covering nearly 80 percent of production in Canada) followed similar trends with reported production capacity in Canada increasing from 24,871 mmbf in 1999 to 25,804 mmbf in 2001. USITC Pub. 3509 at Table VII-2.

[159]USITC Pub. 3509 at Table VII-1.

Nevertheless, Canadian production in 2001 was 5.2 percent higher than it had been in 1995.[160]

Despite the excess capacity already available in 2001, as capacity utilization declined to 84 percent from 90 percent in 1999, Canadian producers projected additional capacity increases, improvements in capacity utilization, and additional production in 2002 and 2003.[161] Canadian producers projected increases in production of 5.4 percent from 2001 and 2002, and a 3 percent increase from 2002 to 2003.[162] Capacity utilization was projected to increase to 90 percent in

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[160]Data from publicly available sources showed Canadian production increase from 26,093 mmbf in 1995 to 29,041 mmbf in 1999, and then decline to 27,457 mmbf in 2001. USITC Pub. 3509 at Table VII-1. Canadian producers' questionnaire responses (covering nearly 80 percent of production in Canada) covered only the 1999-2001 period with production declining from 22,452 in 1999 to 21,770 mmbf in 2001, or by 3 percent. Id. at Table VII-2.

[161]USITC Pub. 3509 at Tables VII-1 and VII-2. Canadian producers projected capacity increases from 25,804 mmbf in 2001 to 26,206 mmbf in 2003, production increases from 21,770 mmbf in 2001 to 23,698 mmbf in 2003, and capacity utilization increases from 84.4 percent in 2001 to 90.4 percent in 2003. Id. at Table VII-2. While Canadian producers' questionnaire responses (covering nearly 80 percent of production in Canada) projected increases in production capacity from 2001 to 2003, we recognize that RISI forecasts predicted slight declines from 2001 to 2003, with further increases in 2004, 2005, and 2006. CLTA's Posthearing Brief, Vol. 2, Tab C, Attachment 4 at 2 (RISI North American Lumber Forecast, January 2002 at 61-62); see also Panel Decision at 67. This evidence does not undermine the evidence that Canadian producers already had substantially increased capacity, had substantial excess production capacity, and planned to substantially increase production and improve capacity utilization from 2001 to 2003. Thus, Canadian producers expected to further increase their ability to supply the U.S. market. (We also note that these RISI forecasts are based on substantial declines in both U.S. and Canadian demand from 2001 to 2002, which is contrary to other evidence, including other RISI forecasts, that U.S. demand is predicted to remain unchanged or increase slightly from 2001 to 2002 and is contrary to arguments about substantial growth in demand and resultant effects by Canadian parties.).

[162]USITC Pub. 3509 at Table VII-2.

2003, as capacity also was projected to increase.[163] The projected increase in production was significant enough to result in substantial projected improvements in capacity utilization, resulting in additional lumber available for export to the U.S. market. These increases were projected even while the evidence demonstrated that demand in the U.S. market was forecast to remain relatively unchanged or increase only slightly.

In sum, Canadian producers had excess capacity, and increases in capacity and production were projected for 2002 and 2003. Given the fact that Canadian producers export about two-thirds of their lumber to the U.S. market, we find that the excess capacity, and projected increases in capacity and production, would likely result in substantial increases of subject imports.

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[163]We note that in the remand decision, the Panel inverted the capacity utilization data to consider it as "unused Canadian production capacity" data. In so doing, the Panel appears to confuse whether a decline supports the ITC or, as the Panel mistakenly holds, it does not. The evidence showed that capacity utilization was projected to increase from the 83.7 percent to 90 percent. The Panel takes the 83.7 percent capacity utilization number and inverts it to 16.3 percent unused Canadian production capacity. Panel Decision at 65-66. Thus, the Panel finds that unused production capacity was forecasted to fall from 16.3 percent in 2001 to 9.6 percent in 2003. The Panel fails to recognize that a decline in "unused capacity" is the same as an increase in "capacity utilization." That is, a decline in "unused capacity" comes as a result of increased use of production facilities which would mean more supply that could be shipped to the U.S. market, which supports the ITC's finding. The Panel, however, erroneously holds that "[b]ecause existing Canadian unused production capacity was predicted to decline, and Canadian exports to the United States were predicted to fall (with exports to other export markets predicted to increase) we find that there is no support on the record to show that 'existing unused production capacity' in Canada indicated 'the likelihood of substantially increased imports. . . .'" Panel Decision at 66. The Panel also has relied incorrectly on data regarding Canadian exports as a share of Canadian shipments to indicate that exports would fall, when the evidence demonstrated that absolute level of Canadian exports was projected to increase. USITC Pub. 3509 at Table VII-2

b. *Export-Orientation and Export Projections of Canadian Producers to the U.S. Market*

The Canadian producers rely on sales in the U.S. market for about two-thirds of their production. Canadian producers are predominantly export-oriented toward the U.S. market, with exports to the United States accounting for 68 percent of their production in 2001.[164] Canadian exports to the United States as a share of Canadian production were about 63 percent in 1999 and 2000, but also had ranged from 64.9 to 67.4 percent for the four years preceding the period of investigation.[165]

The significance of Canada's export-orientation is very clear. When a single export market accounts for two-thirds of a country's production, the exporting industry's success, and probably survival, is tied to its performance in that exporting market. The statute contemplates that the Commission will consider the importance of the export industry's markets in determining threat of material injury.[166] In this case, the evidence demonstrates that the U.S. market had been the most important for Canadian producers and was expected to continue to be. On the other hand, other export markets account for only 8 to 9 percent of Canadian shipments and the home market accounts for about 24 percent for the 1999-2001 period.[167] Therefore, there is limited availability of markets (whether other export or home) other than the U.S. market to

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[164]USITC Pub. 3509 at Table VII-7.

[165]USITC Pub. 3509 at Table VII-7.

[166]19 U.S.C. § 1677(7)(F)(i)(II).

[167]USITC Pub. 3509 at Table VII-2.

absorb additional Canadian production of softwood lumber. Canadian softwood lumber production is projected to increase, and the U.S. market would be the most likely target of those additional goods. The U.S. export-orientation of the Canadian producers therefore supports our finding of a likely substantial increase in subject imports in the imminent future.

There was evidence of incentives to produce more softwood lumber and export it to the U.S. market. We recognize that many Canadian provinces subject tenure holders (lumber producers) to requirements to harvest at or near their annual allowable cut ("AAC") or be subject to penalties/reductions in future AACs.[168] These mandatory cut requirements stimulate increased production even when domestic demand is low and thus increase the incentive to export more softwood lumber to the U.S. market. Subject imports were at significant levels during the period of investigation with the AAC requirements in place.[169] Finally, while only certain provinces have AAC requirements, we note that one that does is British Columbia, which accounts for almost 50 percent of Canada softwood lumber production and 50 percent of Canadian exports to

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[168]See, e.g., Canadian Forest Act §§ 64 and 66-67 (British Columbia) (tenure holders are required to harvest within 10 percent of their AAC over five years and within 50 percent in any year, or face penalties for undercutting including loss of tenure in later years). Petition at Exh. IV B-3. The evidence also demonstrated that certain provincial governments also may require major forest tenure holders to operate specific timber processing facilities and prohibit or restrict closures and reductions in capacity. Petitioners' Prehearing Brief at 89-92; Petitioners' Posthearing Brief at Appendix B-23. We, however, acknowledge that there is evidence that Quebec, Alberta, New Brunswick, and Nova Scotia do not have minimum cut requirements, and that U.S. timber harvest contracts often require full payment regardless of the amount of timber actually harvested. CLTA's Posthearing Brief at 12.

[169]Moreover, for most of the period of investigation imports were subject to the SLA or preliminary measures. With the SLA in effect, fees of $50 or $100 per mbf were imposed after specified import levels were reached, which would certainly result in different import levels than if there had been no such restraint in place.

the U.S. market.[170]

Canadian producers' export projections. We have considered Canadian producers' export projections, but find them inconsistent with other record evidence.[171] Thus, we find that more weight should be given to actual data showing excess Canadian capacity, declines in home market shipments, and declines in exports to other markets, as well as projected increases in production, than to these export projections, which are inconsistent with the other data.

While Canadian producers projected that exports to the U.S. market would increase only slightly in 2002 and 2003, these projected increases in exports to the United States accounted for only about one-fifth of the planned increases in production. In contrast, the U.S. market has generally accounted for about 65 percent of Canadian softwood lumber production, and for 68 percent in 2001. Canadian producers projected their production would increase from 2001 to 2003 by 8.9 percent.[172] Canadian producers also projected that export shipments to the U.S. market would increase, but only by 3 percent, while exports to non-U.S. markets were projected

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[170]USITC Pub. 3509 at Tables VII-5 and VII-7.

[171]USITC Pub. 3509 at Tables VII-2 and VII-7. Canadian exports to the United States as a share of Canadian production were about 63 percent in 1999 and 2000, but also had ranged from 64.9 to 67.4 percent for the four years preceding the period of investigation. Id. According to Canadian producers' questionnaire responses (covering nearly 80 percent of production in Canada), exports to the United States increased from 13,021 mmbf in 1999 to 13,041 mmbf in 2000, and to 13,546 mmbf in 2001, and are projected to increase to 13,660 mmbf in 2002 and 13,954 mmbf in 2003. As a share of total Canadian shipments, reported Canadian exports to the United States were 57.4 percent, 57.4 percent, and 60.9 percent in 1999, 2000, and 2001, respectively, with projections for 2002 and 2003 of 58.8 percent and 58.5 percent, respectively. Id. at Table VII-2.

[172]USITC Pub. 3509 at Table VII-2.

to increase by 21 percent, and shipments to the home market were projected to increase by 13 percent from 2001 to 2003.[173] Thus, they allocated only about 20 percent of the projected increases in production to exports to the United States and not the 65 percent of production historically directed to the U.S. market. On the other hand, the home market, which accounted for about 24 percent of production, and non-U.S. export markets, which accounted for about 8-9 percent of Canadian production, were supposed to receive substantially higher shares of projected production increases, shares wholly inconsistent with historic trends.[174] This aspect of producers' projections reasonably caused the Commission to question their validity. Moreover, even though Canadian demand, which had declined by almost 20 percent from 2000 to 2001, was not forecast to return to 2000 levels, somehow home market shipments were projected to increase beyond 2000 levels.[175] This cast producers' projections in further doubt. Their projections posited that the U.S. market would suddenly not continue to account for at least 65 percent of additional Canadian production, consistent with historical levels, but rather only the 20 percent in the Canadian producers' export projections.

It is reasonable, given the evidence as a whole, for the Commission to discount the Canadian producers' unsupported expectations regarding export projections and conclude that projected increases in production would likely be distributed among the U.S. market, Canadian home market, and non-U.S. export markets in shares similar to those prevailing during the prior

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[173]USITC Pub. 3509 at Table VII-2.

[174]USITC Pub. 3509 at Table VII-2.

[175]USITC Pub. 3509 at Tables VII-2 and VII-7.

five years. Parties offered no positive evidence to refute our reasonable conclusion, discounting export projections, that production increases would be distributed according to historic proportions; that is, no positive evidence, such as a new supplier contract, which would show a large share of the increased production was to shift to markets other than the U.S. market.

In this case, the evidence demonstrates that the U.S. market had been the most important market to Canadian producers and there was no evidence that it would not continue to be. There were limited alternative markets (whether other export or home) other than the U.S. market to absorb additional Canadian production of softwood lumber. We reasonably considered the U.S. export-orientation of the Canadian producers and discounted the export projection data (which contradicted other substantial record evidence) in finding likely substantial increases in subject imports in the imminent future.

c. *Increases in Subject Imports During the Period of Investigation*

The volume of subject imports was already significant and had increased even with the restraining effect of the SLA in place. The volume of subject imports from Canada increased by 2.8 percent from 1999 to 2001.[176] The increases in subject imports occurred despite the $50-100 fees on imports over specified levels. Imports of softwood lumber from Canada held a substantial share of the domestic market. As a share of apparent domestic consumption, subject

[176]The volume of imports of softwood lumber from Canada increased from 17,983 mmbf in 1999 to 18,483 mmbf in 2001. USITC Pub. 3509 at Tables IV-1 and C-1. The value of subject imports decreased from $7.1 billion in 1999 to $6.0 billion in 2001, a decline of 16 percent. Id.

imports from Canada increased from 33.2 percent in 1999 to 34.3 percent in 2001.[177] While the market share was relatively stable at this significant level during the period of investigation, we recognize that subject imports' 2001 market share (34.3 percent) was lower than that in 1995 prior to the SLA (35.7 percent). Moreover, we find that the evidence demonstrates that subject imports will continue to enter the U.S. market at least at this significant level and are projected to increase. We further note that we would have found this significant level of imports to be injurious in our present material injury analysis if it had been combined with significant price effects and an adverse impact.[178]

We have placed these investigations in the appropriate context when analyzing the facts and relevant factors. In contrast to a typical original antidumping or countervailing duty investigation, these investigations involved consideration of evidence regarding imports during a period of investigation when such imports were subject to a trade restraining agreement. Moreover, immediately upon expiration of the SLA, petitions were filed and these investigations were pending. Thus, as discussed below, we have also considered the restraining effects of the SLA[179] on imports and trends in subject imports during periods when such imports were not

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[177]USITC Pub. 3509 at Table IV-2 and C-1.

[178]Mitsubishi Materials Corp. v. United States, 820 F. Supp. 608, 627 (CIT 1993) ("Plaintiffs were also unable to discredit Commissioner Rohr's findings that imports increased from 1986 until Commerce's suspension of liquidation in 1990, as did import penetration. Plaintiffs did not undermine Commissioner Rohr's conclusion that **even in the absence of any further increases, present levels were likely to be injurious in the future**." (emphasis added)).

[179]The SLA set a limit for imports on a fee-free basis and two levels of quotas for imports above the fee-free level.

subject to some type of restraint, in making our findings.

Finally, the Panel's use of the statutory negligibility provision[180] as a surrogate test for considering what constitutes a significant rate of increase in volume of imports does not comport with Congressional intent and judicial precedent. The Panel refers to no legal basis and even acknowledges that there is "no judicial precedent" for its analysis.[181]

The Panel should be aware that the Commission's reviewing courts have repeatedly recognized that Congress intended that the Commission "be given broad discretion to analyze import volume in the context of the industry concerned."[182] Congress acknowledged that:

> For one industry, an apparently small volume of imports may have a significant impact on the market; for another, the same volume might not be significant.[183]

Congress has indicated that the Commission has "the authority to weigh each factor in light of

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[180]In spite of the Panel's use, the negligibility measurement is not comparable to measuring increases in the volume of imports. The negligibility provision involves a static measure of subject imports as a share of total imports. In this case, subject imports account for 93 percent of all imports of softwood lumber into the U.S. market, well above the three percent negligibility level which is applied to present injury analysis and the three percent potential negligibility level considered in a threat analysis. The volume of imports threat factor, on the other hand, involves a measure of the change, in this case an increase or likely increase, in subject import volumes relative to prior subject import volumes. Moreover, if the volume of subject imports already is substantial, even large additional increases in volume will not necessarily result in large rates of increase because the base volume already is significant.

[181]Panel Decision at 69-70. We note that neither the statute nor legislative history indicate that a finding of negligibility is the same as a finding of no material injury, as the Panel seems to imply, but rather that after a finding of negligibility "the investigation shall be terminated." See 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1), or 1677(24); SAA at 855-857.

[182]USX Corp. v. United States, 698 F. Supp. 234, 238 (CIT 1988), quoting, Copperweld Corp. v. United States, 682 F. Supp. 552, 570 (CIT 1988).

[183]H.R. Rep. No. 96-317, at 46 (1979); S. Rep. No. 96-249, at 88 (1979).

the circumstances: *The significance of the various factors affecting an industry will depend upon the facts of each particular case. . . .and the significance to be assigned to a particular factor is for the ITC to decide."*[184]

There is nothing in the statute, case law or administrative practice to indicate Congressional intent to bind the Commission to a precise numerical percentage for factors involving the injury analysis, as the Panel has done.[185] [186] These determinations are to be made

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[184]Iwatsu Elec. v. United States, 758 F. Supp. 1506, 1510-1511 (CIT 1991) (emphasis in original), quoting, S. Rep. No. 96-249, at 88 (1979); see also Ranchers-Cattlemen Action Legal Foundation, et al. v. United States, 74 F. Supp.2d 1353, 1375-76 (CIT 1999), citing, S. Rep. No. 96-249, at 86 (1979) ("Congress has vested the ITC with considerable discretion as to the weight it will assign a given factor in making its injury determination" and "discretion in interpreting the data. . . ."); U.S. Steel Group, 873 F. Supp. at 703 (CIT 1994), aff'd, 96 F.3d 1352 (Fed. Cir. 1996). Moreover, the Commission's reviewing court has recognized that affording discretion in interpreting the data to the Commission "is particularly appropriate when threat, which Congress has seen fit to require the ITC to consider, is the issue." Bando, 17 CIT at 802 (1993), aff'd, 26 F.3d 139 (Fed. Cir. 1994). See also Dastech Int'l, 963 F. Supp. at 1227 (CIT 1997).

[185]Cemex, S.A. v. United States, 790 F. Supp. 290, 294 (CIT 1992), aff'd, 989 F.2d 1202 (Fed. Cir. 1993); see also Mitsubishi Materials, 820 F. Supp. at 616 and 617 (CIT 1993). The Cemex court specifically held that it was not appropriate to apply the regional market isolation criteria to the "all or almost all" criterion for injury analysis ("a numerical analysis would not be appropriate under the regional injury provision . . . [because] numerous factors must be considered and a quantitative analysis is inappropriate.").

[186]Pursuant to Article 1904 of the North American Free Trade Agreement, the Panel applies the "general legal principles that a court of the importing Party [the United States] otherwise would apply" in reviewing whether the Commission's determination is "in accordance with the antidumping and countervailing duty law of the importing Party [the United States]." NAFTA Articles 1904.2 and 1904.3. Thus, for the purpose of this review, U.S. law consists of:

> the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the . . . [United States] would rely on such materials in reviewing a final determination of the . . . [Commission].

NAFTA Article 1904.2.

on a case by case basis.[187] Moreover, in the context of a threat analysis, the Commission's reviewing court has affirmed a finding that present levels were likely to be injurious in the future even in the absence of any further increases.[188] The reviewing courts also have acknowledged that "[a]s it deals with the projection of future events . . . [the Commission's threat] analysis is inherently less amenable to quantification . . . ."[189]

d. *Restraining Effects of the SLA*

While the market share of subject imports was relatively stable at the significant 34 percent level during the period of investigation, we recognize that it had been higher prior to the imposition of the restraining effect of the Softwood Lumber Agreement (SLA). Thus, we find that the SLA, which expired, had constrained market share at a relatively stable level. Subject imports held a U.S. market share of 35.7 percent in 1995, the year prior to the SLA, and 35.9 percent in 1996, the year the SLA was imposed (on May 29, 1996). During the first full year

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[187]The Commission's reviewing courts have repeatedly stated:

> The court has long recognized that "each injury investigation is *sui generis*, involving a unique combination and interaction of many economic variables; and consequently, a particular circumstance in a prior investigation cannot be regarded by the Commission as dispositive of the determination in a later investigation."

USEC Inc. v. United States, 132 F. Supp.2d 1, 14 (CIT 2001), quoting, U.S. Steel Group, 873 F. Supp. at 695 (CIT 1994).

[188]Mitsubishi Materials Corp., 820 F. Supp. at 627 (CIT 1993).

[189]NEC Corp., 36 F. Supp.2d at 391(CIT 1998); see also Hannibal Indus., 710 F. Supp. at 338 (CIT 1989); Rhone Poulenc, 592 F. Supp. at 1329 (CIT 1984). The Federal Circuit has held that predictive determinations by the Commission are by nature not "verifiable," but rather are "based on currently available evidence and on logical assumptions and extrapolations flowing from that evidence." Matsushita, 750 F.2d at 933 (Fed. Cir. 1984).

under the SLA (1997), subject imports declined to a U.S. market share of 34.3 percent, the same market share held in 2001, with a range from 33.2 percent to 34.6 percent during the SLA period.[190] We find that the relatively stable market share during the SLA period does not negate the finding that the market share was significant. Rather it is an indicator of the SLA's restraining effect and supports a finding of likely substantial increases in subject imports.

Moreover, the increases in imports under the SLA occurred in spite of some of these imports being subject to $50 and $100 fees. Each year during the pendency of the SLA, Canadian producers used their fee-free quota, substantially all of their $50 fee quota in every year except 2000-2001,[191] and in each year, including 2000-2001, exported significant quantities of softwood lumber with $100 fees.[192] Canadian producers also shipped significant quantities of bonus exports each year.[193] For example, in 2000-2001, while $50 fee imports were 207.3 million board feet and $100 fee imports were 68.3 million board feet, bonus exports were 297.5

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[190] USITC Pub. 3509 at Table IV-2.

[191]The SLA was structured to disperse the volume of subject imports over the course of each year and by Province.

[192]See, e.g., USITC Pub. 3509 at Table IV-3 and Petitioners' Prehearing Brief at Exh. 62. Canadian producers imported with $50 fees: 578.2 million board feet, or 89 percent of their $50 fee quota, in 1996-1997; 541.1 million board feet, or 83 percent, in 1997-1998; and during the period of investigation 617.3 million board feet, or 95 percent, in 1998-1999; 598.1 million board feet, or 92 percent, in 1999-2000; and 207.3 million board feet, or 31.4 percent, in 2000-2001. Calculated from Petitioners' Prehearing Brief at Exh. 62. Canadian imports with $100 fees were: 476.9 million board feet in 1996-1997, 137.6 million board feet in 1997-1998, and during the period of investigation, 186.1 million board feet in 1998-1999, 329.5 million board feet in 1999-2000, and 68.3 million board feet in 2000-2001. Id.

[193]Bonus exports are Canadian exports of softwood lumber that enter the U.S. market without fees and are not subject to the quota limitations pursuant to Article III of the SLA.

million board feet.[194] The significant quantity of imports subject to $100 fees indicates that, in the absence of the SLA, Canadian producers would have shipped more, given the near prohibitive level of the $100 fee.[195] In fact, even as demand leveled off during the period of investigation and prices declined substantially, subject imports continued to enter the U.S. market in quantities above the fee-free quota, incurring additional fees of $50 to $100 per mbf.

We consider additional evidence that the SLA had restrained the volume of subject imports from Canada. First, increases in subject imports had not kept pace with increases in demand. Subject imports increased by 8.8 percent while apparent U.S. consumption increased by 13.1 percent from 1995 to 2001. Second, the anecdotal information reported to the Commission by importers of subject merchandise and Canadian producers regarding the effects of the SLA also supported a conclusion that it had some restraining effect on the volume of subject imports and their effect on prices in the U.S. market.[196] We considered the responses by 75 U.S. producers of softwood lumber, 8 U.S. importers (5 of which were also Canadian producers) and 29 Canadian producers of softwood lumber to a question in the Commission questionnaires

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[194]Petitioners' Prehearing Brief at Exh. 62.

[195]The average unit value for subject imports ranged between $323.57 per mbf and $404.80 per mbf over the life of the SLA. (between 1996 to 2001). USITC Pub. 3509 at Table IV-2.

[196]See also CLTA's Posthearing Brief, Vol. 1 at 14, n.10 ("The circumstances facing the Canadian industry during and after the SLA were very different: the SLA established a stable, predictable regime for a fixed 5-year period; but after it expired, uncertainty and change have reigned, with changing bonding requirements and expectations about how the case would proceed and end. Given how different the SLA world was from the post-SLA world, it would be a remarkable coincidence if the SLA had the same net effect on the volume and price of Canadian imports as the hodgepodge of post-SLA factors.").

regarding the effects of the expiration of the SLA.[197] The majority of U.S. producers indicated that the SLA had a restraining effect on the volume of imports, and that expiration of the SLA had affected their operations and domestic prices.[198] The Panel referred to four partial responses from Canadian producers for the proposition that the SLA led "to a redistribution of imports among Canadian provinces and that its expiration was returning provincial trade patterns to their pre-SLA state, while having no effect on overall import volumes from Canada."[199] As discussed below, the facts do not support the anecdotal self-serving statements made by these Canadian producers regarding the redistribution after the SLA. Moreover, the full statements of each of these Canadian producers, as set forth in Appendix E of INV-Z-049, demonstrate that the SLA constrained Canadian exports.[200]

Finally, during the pendency of the SLA, Canadian shipments from non-covered provinces to the United States more than doubled.[201] Canadian exporters' contentions in the

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[197]USITC Pub. 3509 at Appendix E.

[198]USITC Pub. 3509 at Appendix E. See, e.g., the following representative statements by U.S. producers: ***.

[199]Panel Decision at 89-91.

[200]Compare Panel Decision at 89-90 with INV-Z-049 at Appendix E. For example, the Panel provided a partial quote from *** Id. at Appendix E-31. Likewise, a partial quote was provided for *** Id. at Appendix E-26. Moreover, later in the quotes provided by the Panel for ***, these Canadian producers acknowledged that the SLA constrained the volume of their exports to the U.S. market. Panel Decision at 90.

[201]See, e.g., USITC Pub. 3509 at Table IV-3. For example, imports from the Maritime Provinces increased from 931 mmbf in 1996 to 2,130 mmbf in 2000, before declining to 1,841 mmbf in 2001. Thus, the subject imports from the Maritime Provinces increased by 129 percent from 1996 to 2000, and by 98 percent from 1996 to 2001. Id. See also USITC Pub. 3509 at

investigations that such import volumes would be "redistributed" to previously SLA-covered provinces with the expiration of the SLA is speculative and fails to take into account that now there is no restraint on imports from any of the provinces.[202] In fact, the record shows that, with the expiration of the SLA, imports continued from non-covered provinces and thus were not "redistributed" to the formerly covered provinces.[203] For example, while imports from the Maritime Provinces declined by 289 mmbf from 2000 to 2001, other Canadian imports increased by 720 mmbf for the same period.[204] Moreover, imports from the Maritime Provinces, even with the decline in 2001, were almost three times the amount imported prior to the SLA in 1995.[205] Canadian exporters' theory about redistribution also failed to take into account the vast difference in volume of production and consequent exports to the U.S. market from former SLA-covered provinces and non-covered provinces; for example, the Maritime Provinces accounted for only between 7.1 and 8.5 percent of Canadian softwood lumber production for the 1999-2001 period.[206]

e. *Substantial Increases in Subject Imports During Periods With No Import Restraints*

Table VII-5 and Petition at Exh. I-B-62 (regarding production increases in Manitoba and Saskatchewan).

[202]CLTA's Prehearing Brief, Vol. 1 at 36-37.

[203]USITC Pub. 3509 at Table IV-3.

[204]USITC Pub. 3509 at Table IV-3.

[205]USITC Pub. 3509 at Table IV-3.

[206]USITC Pub. 3509 at Tables VII-5 and VII-7.

The evidence demonstrates that imports of softwood lumber from Canada increased during periods in which there were no restraints on their entry into the U.S. market, i.e., prior to the adoption of the SLA between 1994 and 1996,[207] and the period immediately after the SLA expired but before suspension of liquidation in these investigations.

First, we consider import trends during the period prior to the adoption of the SLA, between 1994 and 1996. The evidence demonstrates that subject imports from Canada held a 27.5 percent share of the U.S. softwood lumber market in 1991 when the Memorandum of Understanding (MOU) regarding softwood lumber from Canada that had been in effect since December 30, 1986 expired.[208] During the ensuing CVD investigation before the Commission, and the appeals of the affirmative determination before the U.S.-Canada Free Trade Agreement ("CFTA") panels, the subject import market share continued to increase.[209] In August 1994, the appeals were terminated and imports of softwood lumber from Canada were not subject to any trade restraining measure until the SLA took effect in April 1996.[210] During this period the evidence showed that subject import market share increased from 27.5 percent in 1991 to 35.9 percent in 1996.[211] With the SLA in effect, the market share for softwood lumber from Canada

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[207]See, e.g., Petitioners' Prehearing Brief at Exh. 65 and Petition at Exh. I-B-18.

[208]USITC Pub. 3509 at I-8; and Softwood Lumber III, USITC Pub. 2530 at Table 2.

[209]USITC Pub. 3509 at I-7 - I-8; and Petition at Exh. I-B-18.

[210]USITC Pub. 3509 at I-7 - I-8.

[211]USITC Pub. 3509 at Table IV-2 and Softwood Lumber III, USITC Pub. 2530 at Table 2.

declined to 34.3 percent in 1997.

Claims that the increase in Canadian market share over the 1994-1996 period was a continuation of a trend observed over 1991-1994, as referred to by the Panel,[212] ignore evidence regarding the decline in subject imports to 34.3 percent with the SLA in effect from 35.9 percent prior to its imposition. Moreover, such reasoning also ignores evidence that the most substantial increases in subject imports occurred when no restraints were in place. In particular, the evidence shows that during the seven quarters between August 1994 and April 1996, with no restraints in effect, subject imports market share increased from 32.6 percent in third quarter 1994 to 37.4 percent in first quarter 1996.[213]

In contrast to a typical original antidumping or countervailing duty investigation, these investigations involved consideration of evidence regarding imports during a period of investigation when such imports were subject to a trade restraining agreement. Thus, the examination of import data confined to a typical three year period of investigation would not necessarily provide a complete and accurate basis for projections of what the future events likely would be without any trade restraints.[214] Therefore, in addition to considering import data for a

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[212]Panel Decision at 95-96. We note that the claims relied on by the Panel regarding continuation of trends and import data back to 1985 were not raised before the Commission by Canadian parties in the original investigation in spite of the inclusion of this data in the Petition and Petitioners' Prehearing Brief.

[213]Petitioners' Prehearing Brief at Exh. 65.

[214]In this way, there are similarities in the analysis with that required in a five-year review where an order is in effect and the investigating authority considers the future effects if the order is removed.

typical period of investigation, we also took into account in our analysis other evidence including trends in subject imports during periods when they were not subject to any trade restraints. We note that in five-year review investigations which also involve considering data for periods of time with a trade restraining measure in place (i.e., an order or suspension agreement), the statute directs the ITC to consider evidence regarding the period prior to imposition of the duties or agreement. The rationale is that this period provides information and guidance regarding trade when restraints were not in place.

In the original investigation, Canadian parties not only did not challenge, on the basis that market conditions were not taken into account, the Commission's consideration of data outside the period of investigation (1999-2001) but themselves proffered data outside the period of investigation without any analysis of market conditions.[215] We considered throughout our analysis evidence for the four years prior to the period of investigation, i.e., 1995-2001, with no challenges by any party to the proceedings.[216]

Thus, we find it appropriate to consider import trends during the restraint-free 1994-1996 period. We note that this is only one of many factors we consider, and that we have not relied solely on this evidence to support our findings. In particular, the evidence for this earlier period is consistent with the evidence for the more recent restraint-free period (April-August 2001) which showed that imports substantially increased without restraints.

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[215]See, e.g., CLTA's Posthearing Brief, Vol. 1, at Exh. 3, and Vol. 2, Tab A at 19, and Tab C at 8 and Attachment 3.

[216]See USITC Pub. 3509 at 20 and Appendix D; CLTA's Posthearing Brief, Vol. 2, at Tab C.

The evidence demonstrates that subject imports increased during the period immediately after the SLA expired (April 2001) and before suspension of liquidation (August 2001). Subject imports of softwood lumber by volume for the period of April to August 2001 were higher than the comparable April-August period in each of the preceding three years (1998-2000) by a range of 9.2 percent to 12.3 percent.[217] We find that this evidence provides a clear indicator of how subject imports have entered, and would enter, the U.S. market in the imminent future if not subject to trade restraints and supports our finding of likely substantial increases in subject imports.

Claims that the substantial increase in imports during the April-August 2001 period only reflects "a shift in the timing of imports,"[218] fail to respond to the simple fact that imports increased. The facts also dispel such claims. The SLA expired on March 31, 2001; thus, the SLA was in effect for 1999, 2000, and only the first quarter of 2001. Subject imports increased by 2.4 percent from 2000 to 2001, and by only 0.4 percent from 1999 to 2000.[219] During the April-August 2001 period, which was subject to the pending investigation but free of trade

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[217]Official monthly import statistics. Total subject imports of softwood lumber by volume for the period of April to August 2001 were 11.3 percent higher than the comparable April-August period in 2000, 9.2 percent higher than April-August 1999, and 12.3 percent higher than April-August 1998. The evidence also shows that the subject imports by volume for the period between April and August 2001 was higher in each month than the comparable month in 2000, with the exception of June, by a range of 7.5 percent to 25.6 percent. Id.

[218]Panel's Decision at 96-98.

[219]USITC Pub. 3509 at Table C-1.

restraints, subject imports increased by 11.3 percent compared with the same period in 2000.[220] Moreover, for the April-December 2001 period, during part of which imports were subject to the August CVD preliminary finding, subject imports still increased, although at a lower rate of 4.9 percent, compared with the same period in 2000.[221] The fact that imports increased after expiration of the SLA and have continued to increase, even after bonding requirements associated with the preliminary CVD findings were imposed, does not support a theory that a shift in timing accounted for the higher level of imports after the SLA expired.

The simple fact is that without restraints imports have increased: increases stopped when the SLA was imposed; substantial increases in imports occurred when the SLA expired; and increases in imports stopped when preliminary duties were imposed. This evidence clearly shows that there is a distinction in the level of imports depending on whether restraints are in place and that the import volumes are substantially higher during periods when they are not subject to restraining measures. This evidence supports our finding that subject imports are likely to increase in the imminent future, exacerbating already significant subject import volumes.

f. *Demand*

Consumption of softwood lumber in the United States during the period of investigation was higher than it was during the preceding years, but remained relatively flat at that strong

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[220]Official import statistics.

[221]Official import statistics.

level.[222] We provide a detailed discussion of demand in the U.S. market, including demand forecasts, in the Conditions of Competition section of our original Views of the Commission, which we incorporate by reference here.[223] In summary, demand for softwood lumber is forecast to remain relatively unchanged or increase slightly in 2002, and then begin to increase in 2003 as the U.S. economy rebounds from recession.[224] Industry forecasts suggest slight growth in U.S. housing starts in 2002 and further increases in 2003.[225]

Thus, the record indicates level but strong demand in the United States over the period of investigation, and forecasts are for continued strong (but relatively flat) demand. We find that this strong demand will continue to make the U.S. market a very attractive and necessary one for imports from Canada (as the U.S. market accounts for about 65 percent of Canadian production). Thus, subject imports will continue to play an important role in the U.S. market, and conditions in the market indicate that there would likely continue to be increases in such imports.

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[222]USITC Pub. 3509 at Table IV-2.

[223]USITC Pub. 3509 at 22-24.

[224]USITC Pub. 3509 at II-3 - II-4; CLTA's Posthearing Brief, Vol. 2, Tab R at 1 and 3; Petitioners' Posthearing Brief, Vol. II, Appendix H, Exhibit 28 at 5 (Table 3).

[225]CLTA's Posthearing Brief, Vol. 2, Tab R at 1 and 2; Petitioners' Posthearing Brief, Vol. II, Appendix H, Exhibit 28 at 3 (Table 2). We also note that while U.S. housing starts increased in January and February of 2002 to the highest levels for single-family starts in over 20 years, they then fell by 7.8 percent in March 2002 to the lowest level in two years. USITC Pub. 3509 at II-3-4, n.10. This evidence of a decline in housing starts seems to be a signal that the market was relinquishing some of the strong gains made during the mild winter of 2001-2002. Thus, we conclude that the mixed evidence does not support a finding that there would be substantial growth in the primary end-use, housing starts, and hence substantial growth in already strong demand for softwood lumber.

CLTA argued that a purported significant increase in U.S. demand for softwood lumber was imminent and that this anticipated spike in demand would restore the U.S. industry's financial health and insulate it from any further adverse effects from additional subject imports from Canada.[226] But this simplistic theory about the effects that growth in demand would have on U.S. industry performance, imports, and prices, and the optimistic characterizations of the forecasts for future demand, are not supported by the facts. We find, having reviewed the evidence, that demand was not likely to increase in the manner CLTA suggests, as discussed above, or to have the effects that it posits.

The evidence showed that while demand remained relatively stable in 2000 and 2001 at the record levels it reached in 1999, substantial declines in price occurred,[227] particularly in 2000, which resulted in a deterioration in the condition of the domestic industry.[228] Thus, contrary to the Canadian exporters' theory, strong demand did not translate into price improvements. Moreover, it did not prevent substantial declines in prices for softwood lumber. In fact, the evidence demonstrated that it had been excess supply rather than demand trends that had played a pivotal role in the price declines of softwood lumber in the U.S. market, as the excess supply had

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[226]CLTA's Prehearing Brief at 46-47.

[227]For example, the price of SYP fell 32.9 percent, from a peak of $434/mbf in the third quarter 1999 to a low of $291/mbf in the fourth quarter 2000. The price of WSPF (a product mostly imported from Canada) fell 39.3 percent, from a peak of $336/mbf in the second quarter 1999 to $204/mbf in the fourth quarter 2000. USITC Pub. 3509 at Tables V-1 and V-2.

[228]The evidence demonstrates that many industry performance indicators declined significantly from 1999 to 2000, and declined slightly or stabilized from 2000 to 2001. USITC Pub. 3509 at Tables IV-1, VI-1, and C-1.

resulted in price declines through 2000. This evidence supports our finding, as discussed below, that substantial increases in subject imports likely will have adverse price effects. Thus, the facts show that, even with strong demand during the period of investigation, prices declined and the condition of the domestic industry deteriorated, effects opposite to those CLTA speculates should occur in the future.

g. *Conclusion*

Thus, we find a likelihood of substantially increased imports based on consideration of several factors, including: Canadian producers' excess capacity and projected increases in capacity, capacity utilization, and production; the export orientation of Canadian producers to the U.S. market; the increase in subject imports over the period of investigation; the effects of expiration of the SLA; subject import trends during periods when there were no import restraints; and forecasts of strong but relatively stable demand in the U.S. market.

2. Likely Adverse Price Effects

In making a determination regarding the existence of a threat of material injury, "the Commission shall consider, among other relevant economic factors –

> (IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices and are likely to increase demand for further imports.[229]

In evaluating the evidence in these investigations, we consider present and likely price effects by evaluating price trends for softwood lumber during the period of investigation. The evidence shows that during the period of investigation, prices for softwood lumber declined

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[229] 19 U.S.C. § 1677(7)(F)(i)(IV).

substantially, particularly in 2000, due to excess supply[230] in the price sensitive U.S. market, despite high, but relatively stable, demand.[231] In particular, we note that Random Lengths data indicated that prices of both the domestically-produced and imported Canadian softwood lumber products increased through the second or third quarters of 1999, before falling substantially through the third and fourth quarters of 2000 to their lowest point for the 1999-2001 period.[232]

The evidence also shows that prices at the end of the period of investigation were again at levels as low as they were in 2000. Prices for softwood lumber increased in mid-2001, at a time of considerable uncertainty in the market due to the expiration of the SLA and the commencement of these investigations.[233] Prices began to decline in the third quarter of 2001

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[230]The evidence indicates that both subject imports and domestic producers contributed to the excess supply, and thus the declining prices, in 2000. See USITC Pub. 3509 at 34-35, nn. 212, 214 and 217.

[231]USITC Pub. 3509 at Tables IV-2, V-1, and V-2, and Figures V-3 - V-5.

[232]For example, the price of SYP fell 32.9 percent, from a peak of $434/mbf in the third quarter 1999 to a low of $291/mbf in the fourth quarter 2000. The price of WSPF (a product mostly imported from Canada) fell 39.3 percent, from a peak of $336/mbf in the second quarter 1999 to $204/mbf in the fourth quarter 2000. USITC Pub. 3509 at Tables V-1 and V-2.

[233]There is considerable evidence regarding the effects this uncertainty was having on prices for softwood lumber. For example, Random Lengths reported that "Uncertainty surrounding Monday's likely announcement that the U.S. will conduct [antidumping and countervailing] duty investigations prompted Canadian mills to limit offerings and price aggressively as a way of protecting themselves against potential duties. This funneled more business to U.S. producers, who could price their wood and quote without having to worry about duties." Random Lengths at 4, Apr. 20, 2001; see also Random Lengths at 4, June 1, 2001 ("Canadian mills reiterated that they would continue to restrict shipments due to the anti-dumping case and the potential for retroactive duties. However, in this week's nervous climate, this stance backfired as many buyers figured that restricted shipments translated into growing inventories at Canadian mills.") in Petitioners' Posthearing Brief at Appendix B-18 - B-19, and Appendix H, Exh. 7.

and fell substantially in the fourth quarter of 2001 to levels as low as those in 2000.[234] These price declines occurred while demand, considered on a seasonal basis, remained relatively stable at very high levels. Thus, the price trend evidence shows that U.S. prices for softwood lumber were at their lowest levels at the end of the period of investigation.

Other evidence such as average unit values for imports and domestic shipments confirms these declining trends. For example, the average unit value of imports of softwood lumber from Canada, based on official Commerce statistics, decreased from $395.72 in 1999 to $347.89 in 2000 and $323.57 in 2001.[235]

Thus, the evidence demonstrates that prices declined substantially again at the end of the period of investigation, to levels as low as 2000, supporting a conclusion that subject imports are entering at "current prices" that are likely to have a significant depressing or suppressing effect on domestic prices.[236]

In the present injury analysis in the original Views of the Commission, incorporated by reference here, the Commission observed, and public sources generally confirmed,[237] that the

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[234]USITC Pub. 3509 at V-11, Tables V-1 and V-2, and Figures V-3 - V-5. These trends are consistent with information reported in other public sources and questionnaire responses. The product-specific pricing data collected through questionnaires indicated similar trends for both domestic products and subject imports.

[235]USITC Pub. 3509 at Table C-1. Similarly, the average unit value of U.S. shipments of softwood lumber decreased from $416.13 in 1999 to $361.07 in 2000, and $347.86 in 2001 according to questionnaire responses. Id.

[236]See Panel Decision at 70-73.

[237]See, e.g., Random Lengths, at 2 (Mar. 31, 2000) ("The lumber bulls see the decline {in the Random Lengths Framing Lumber Composite Price to $375} as a buying opportunity. But

price declines in 2000 were the result of too much supply in a market with high, but relatively stable, demand.[238] [239] Thus, despite near record consumption of softwood lumber,[240] prices generally fell through 2000. The Commission acknowledged that there was evidence indicating that both subject imports and the domestic producers contributed to the excess supply,[241] and thus

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the bears, while acknowledging that demand remains high, contend that there is just too much lumber chasing the available volume of orders. . . . recently released production data showing that mills in the Western U.S. made 12.5% more lumber through the first two months of 2000 than during a similar period of 1999. . . . And while no 2000 production figures are yet available from Canada, there is no indication that production there is slackening." (emphasis in original)); RISI Lumber Commentary, at 1 and 10 (June 2000) ("In the area of domestic supply. . . U.S. lumber production over the first four months of the year was up 6% and Canadian production in January-February (the only available data) was up 4% over year-earlier levels."); Forest Products Monthly (December 2000) ("The lumber market's current malaise came from the supply side – too much production, both in the U.S. and in Canada."). CLTA's Posthearing Brief, Vol. 2, Tab A at 7-10.

[238]USITC Pub. 3509 at 34. The Commission also recognized that while quarterly price fluctuations for domestically produced and subject imports of softwood lumber products also reflected in part cyclical and seasonal factors in U.S. demand and supply for softwood lumber, these factors could not alone account for the magnitude of the price decline. Id. at 34, n.213, citing, USITC Pub. 3509 at V-11.

[239]Petitioners' Posthearing Brief, at 1-2, 11-13, and Appendix B-1 - B-11; Petitioners' Final Comments at 3-6; CLTA's Prehearing Brief, Vol. 1 at 26-30, and Vol. 3, Exh. 28 at 16-22; CLTA's Posthearing Brief, Vol. 1 at 4-6, and Vol. 2 at Tab A; Hearing Transcript at 125, 168, 258, and 328.

[240]USITC Pub. 3509 at Tables C-1.

[241]The Commission referred to the evidence in the record and also provided numerous examples in notes 212, 214 and 217 of the original Views of the Commission. For instances, the Commission provided the following examples of the evidence in footnote 217:

CLTA's Prehearing Brief, Vol. 3, Exh. 28 at 19 and 20 –

- "However, despite strong demand, lumber prices declined due to an excess supply. Lumber production in both the Southern and Western United States during the first quarter of 2000 increased by over 5% compared to the same period

the declining prices.

In the present material injury analysis, the Commission found that the substantial volume of subject imports at significantly declining prices had *some* adverse effects on prices for the domestic product.[242] However, because the substantial price decline in 2000, which led to the deterioration in the condition of the domestic industry, was due to excess supply from both

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in 1999." *Plum Creek Timber Company, Inc. 2nd Quarter 2000 Quarterly Report*;

- "Lumber prices deteriorated further during the third quarter due to a demand-supply imbalance. . . . North American lumber production during the first half of 2000 was 3% above production for the same period in the prior period and was at a ten-year record high. At the same time lumber demand was weakening, with housing starts 3% lower than the prior year." *Plum Creek Timber Company, Inc. 3rd Quarter 2000 Quarterly Report*;

CLTA's Posthearing Brief, Vol. 2, Tab A at 11 –

- "To supply growing new housing and record remodeling markets over the past several years, the industry ramped up production only to see both markets fall as a result of several interest rate increases by the Federal Reserve. The resulting oversupply has led to near-record low pricing for most lumber and panel products." *Louisiana Pacific 2000 Annual Report*;

Hearing Transcript at 126 –

- "We had so much lumber because we were geared up, and 200[0] came. . . .";

Petitioners' Posthearing Brief at 2 and Appendix H, Exh. 2 at 11

- "The U.S. industry was widely criticized in years passed for lumber overproduction . . . . This behavior has been curbed considerably here, but remains a problem in Canada, where Provincial forestry officials must also protect pulp mill employment, which is the lifeblood of many small towns. However, as the Canadian softwood lumber industry ships 65% of its output to the U.S., its general failure to manage production to new order volumes and its capacity growth in its eastern provinces have both undermined prices in recent years." *Bank of America, "Wood & Building Products Quarterly*," at 11 (Nov. 2001).

[242]USITC Pub. 3509 at 34-35.

subject imports and domestic production, the Commission did not conclude that subject imports had had *significant* price effects and an adverse impact.

The evidence regarding supply at the end of the period of investigation, however, indicated that U.S. producers had curbed their production, but that overproduction remains a problem in Canada. We find that the evidence demonstrates that domestic supply would not be a contributing causal factor in the imminent future, as it had been in the 1999-2000 period,[243] and that in the imminent future likely substantial increases in subject imports with likely price depressing effects would cause material injury to the domestic industry. Specifically, while domestic overproduction had contributed to adverse price effects in 2000, the evidence demonstrates that it is no longer contributing to excess supply, while Canadian imports continue to oversupply. The evidence demonstrates that domestic production capacity was fairly level during the period of investigation, following a small but steady increase between 1995 and 1999, as apparent consumption increased.[244] Domestic capacity utilization was 87.4 percent in 2001 and, with the exception of a peak in 1999 at 92 percent, had consistently held this level from

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[243]The Commission had found in its present material injury analysis that excess domestic supply was a factor that contributed, in conjunction with excess import supply, to the decline in prices and the injury to the domestic industry, particularly in the 1999-2000 period.

[244]USITC Pub. 3509 at Table III-6 and C-1 (public data). Public data show domestic producers' production capacity at 39,800 mmbf in 1999, 40,100 mmbf in 2000, and 40,040 mmbf in 2001. Id. Domestic producers' questionnaire responses reported production capacity of 22,847 mmbf in 1999, 24,233 mmbf in 2000, and 24,709 mmbf in 2001, but the industry coverage for those responses differs from that for, and is not necessarily comparable to, the public data. Id. at Table III-7 and C-1.

1995-2001.[245] In contrast, Canadian capacity utilization had declined in 2001 to 83.7 percent, a rate substantially lower than that reported for any other year in the 1995-2001 period.[246] Thus, in 2001, excess Canadian capacity had increased to 5,343 mmbf, which was equivalent to 10 percent of U.S. apparent consumption.[247] Moreover, in spite of this decline in capacity utilization rates from 90 percent in 1999 to about 84 percent in 2001, Canadian producers projected slight increases in capacity, increases in production, and a return of capacity utilization to 90.4 percent in 2003.[248] Thus, Canadian producers expected to further increase their ability to supply the U.S. softwood lumber market.

In addition to the evidence regarding production, we considered evidence from industry analysts indicating that U.S. production had been curbed at the end of the period of investigation. For example, an industry report at the end of the period of investigation (November 2001) stated:

> *The U.S. industry was widely criticized in years passed for lumber overproduction in order to secure wood chips for pulp and paper manufacturing.* This behavior has been

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[245]USITC Pub. 3509 at Tables III-6 and C-1 (public data). Domestic capacity utilization, based on public data, was 86.1 percent in 1995, 87.6 percent in 1996, 89.9 percent in 1997, 88.5 percent in 1998, 92.0 percent in 1999, 89.7 percent in 2000 and 87.4 percent in 2001. Id. Domestic producers' questionnaire responses reported similar capacity utilization rates: 92.8 percent in 1999, 88.5 percent in 2000, and 86.1 percent in 2001. Id. at Tables III-7 and C-1.

[246]USITC Pub. 3509 at Tables VII-1 (public data). Canadian capacity utilization, based on public data, was 87.8 percent in 1995, 87.7 percent in 1996, 87.4 percent in 1997, 87.3 percent in 1998, 90.5 percent in 1999, 88.9 percent in 2000 and 83.7 percent in 2001. Id. Canadian producers' questionnaire responses reported similar capacity utilization rates: 90.3 percent in 1999, 88.8 percent in 2000, 84.4 percent in 2001 and projections of 88.5 percent in 2002, and 90.4 percent in 2003. Id. at Table VII-2.

[247]USITC Pub. 3509 at Tables VII-1 and C-1.

[248]USITC Pub. 3509 at Table VII-2.

> curbed considerably here, but remains a problem in Canada, where Provincial forestry officials must also protect pulp mill employment, which is the lifeblood of many small towns. However, as the Canadian softwood lumber industry ships 65% of its output to the U.S., its general failure to manage production to new order volumes and its capacity growth in its eastern provinces have both undermined prices in recent years.[249]

In the remand opinion, the Panel questioned the relevance of this evidence that U.S. overproduction of lumber had been curbed, but Canadian had not, because lumber "overproduction was in order to secure wood chips for pulp and paper manufacturing."[250] We note that, while the motivation for lumber overproduction may be for a byproduct, wood chips, it does not eliminate or lessen the central problem – lumber itself is still being overproduced by Canadian producers, although U.S. producers have curbed such overproduction. Moreover, it actually is more problematic, because it indicates that the Canadian overproduction of lumber is not tied exclusively to the demand for lumber. Thus the overproduction will continue even after the lumber market has been substantially oversupplied.

Therefore, we find that the additional subject imports, which we conclude are likely, would further increase the excess supply in the market, putting further downward pressure on prices. Moreover, the evidence demonstrates that pressure would come from excess Canadian supply rather than a combination of import and domestic supply, as it had in 2000, thereby resulting in a threat of material injury to the U.S. industry by reason of Canadian imports.

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[249]See, e.g., Bank of America, "Wood & Building Products Quarterly," at 11 (Nov. 2001) (emphasis added) in Petitioners' Posthearing Brief at 2 and Appendix H, Exh. 2 at 11.

[250]Panel Decision at 101-102 (excerpt referred to "*overproduction in order to secure wood chips for pulp and paper manufacturing* and not the oversupply of softwood lumber for uses other than pulp and paper manufacturing." (emphasis added)).

The statute regarding threat of material injury states that the Commission "shall consider, among other factors . . . whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports."[251] Thus, the statutory factor for a threat of material injury analysis does not require consideration of present underselling.[252] While consideration of both price underselling and price depression or suppression is required in a present material injury analysis,[253] the statute clearly states that "[t]he presence or absence of any factor which the Commission is required to evaluate under subparagraph (C) or (D) shall not necessarily give decisive guidance with respect to the determination by the Commission of material injury."[254] This shows a recognition that price depression or suppression may occur whether or not there is price underselling.[255] All parties to the investigations agreed that making direct cross-species price comparisons in order to

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[251]19 U.S.C. § 1677(7)(F)(i)(IV).

[252]In conducting a price underselling analysis, the Commission makes direct comparisons of prices for a comparable product, i.e., same model, same size and grade of a species of lumber, etc., and calculates a margin of underselling or overselling for the import prices relative to the domestic prices.

[253]19 U.S.C. § 1677(7)(C)(ii).

[254]19 U.S.C. § 1677(7)(E).

[255]Accord Cemex, 790 F. Supp. at 298-299 (CIT 1992) ("a finding of underselling is not crucial to an affirmative determination. A finding of suppressive price effects may be sufficient."). Moreover, the Commission's reviewing courts have not precluded findings of likely price effects in a threat analysis because present price effects were not found, particularly when, as here, prices declined at the end of the period of investigation. See Dastech Int'l, 963 F. Supp. at 1228-1229 (CIT 1997); NEC Corp., 36 F. Supp.2d at 393-394 (CIT 1998).

assess underselling was inappropriate.[256]

However, the fact that the differences in species of softwood lumber does not lend itself to direct price comparisons[257] does not preclude a price trends analysis to consider whether significant price suppression or depression by subject imports is likely.[258] First, despite the differences in many of the imported and domestic species of softwood lumber, the evidence indicates that prices of a particular species will affect the prices of other species, particularly

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[256]The parties agreed that, in this industry, accurate price comparisons are difficult to compile. See, e.g., Hearing Transcript at 93, 269-273; Dealers/Builders' Posthearing Brief at 12-14. The Commission encountered similar problems obtaining useful pricing data for assessing underselling in prior Softwood Lumber cases.

[257]USITC Pub. 3509 at 34-34. In the original Views of the Commission, the Commission found that because of the nature of this market, direct price comparisons between domestic products and subject imports are problematic whether based on questionnaire or public data. While the Commission collected pricing data for six specific softwood lumber products from purchasers, the Commission placed little weight on this information because the reported quantities of softwood lumber involved in the delivered price comparisons are very limited. The Commission concluded that it could not draw any conclusions regarding underselling from the questionnaire data in these investigations.

While there are a number of different sources of public pricing information regarding softwood lumber products (including Random Lengths, Crow's, Madison's, and the Southern Pine Bulletin), these data series do not yield improved comparisons, despite their much broader coverage. As discussed below, the record indicates that prices of one species affect those of others; however, absolute price levels differ, making direct cross-species comparisons inappropriate for purposes of an underselling analysis. Thus, the Commission concluded that it could not determine, based on this record, whether there has been significant underselling by subject imports. USITC Pub. 3509 at V-3 - V-5.

[258]A price suppression or depression analysis considers trends for import and domestic prices to determine certain specific correlations between them. The pricing trend data are not necessarily limited to a size/grade or model. Using this trends analysis and other evidence, the Commission determines whether imports have prevented increases in prices for domestic products that otherwise would have occurred (suppression) or whether imports have exerted downward pressure on domestic prices (depression).

those that are used in the same or similar applications.[259] Such pricing effects between species were repeatedly evident in industry reports. Moreover, both the questionnaire and public data on the record permit an analysis of price trends. In particular, we consider pricing information for softwood lumber published in Random Lengths, which is the source that both the domestic and Canadian industries cited most frequently throughout this investigation as a pricing guide.[260] As discussed above, we find, based on the price trends evidence, that subject imports are likely to have a significant depressing effect on domestic prices.

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[259]See USITC Pub. 3509 at 26-27, 32-35, and 43. See, e.g., Random Lengths:

- "Competition from Canadian S-P-F prevented ES-LP narrows from rallying from $5 drops early in the week." at 9, Oct. 26, 2001;
- "Warmer weather, a drop in interest rates, and an abrupt rise in S-P-F prices all got credit for boosting buyer interest in Southern Pine." at 4, Apr. 20, 2001;
- "As SPF prices climbed and supplies tightened in Canada, more buyers turned to U.S. produced Hem-Fir and ES-LP." at 4, Apr. 13, 2001;
- "Western and Eastern S-P-F were the leaders, pulling other dry species along." at 4, Feb. 2, 2001).

See, e.g., Wickes:

- "Species switching by many long-term purchasers of S-P-F forced most North of the border to finally return prices to a more realistic level as the need to move wood into the inventory pipeline became evident." Sept. 5, 2001;
- "Producers in the U.S. secured most of the available business from buyers who had no qualms in switching species to take advantage of the pricing discrepancies. Truss manufacturers started the charge as they switched from S-P-F MSR to alternative #2 grade SYP helping mills in the South post increases across the board." Aug. 21, 2001.

Petitioners' Prehearing Brief at 13 and Appendix C.

[260]USITC Pub. 3509 at V-4-5. Random Lengths, Inc. collects weekly price data from suppliers and purchasers and calculates weighted-average prices based on such factors as the size of the transaction and the quality of the lumber. Random Lengths publishes these data in its weekly and annual publications. Id.

The evidence demonstrates that imported and domestic softwood lumber, notwithstanding differences in species, are interchangeable and compete with each other. The evidence provided by purchasers and home builders shows that subject imports and domestic species of softwood lumber are used in the same applications and that regional preferences merely reflect availability of species.[261] We consider all record evidence and not only the single anecdotal quote from the preliminary investigation referred to in the remand decision.[262]

Imports from Canada are primarily SPF, which accounts for more than 85 percent of Canadian product imported into the United States. Claims regarding attenuated competition center on whether Canadian SPF, which accounted for 84.6 percent of Canadian production in 2001, and U.S. Southern Yellow Pine (SYP), which accounted for about 45 percent of U.S. production,[263] are interchangeable and compete. The Panel has referred to a single quote from an employee of Home Depot, a large U.S. retailer. However, another employee of Home Depot from Texas testified on behalf of Canadian exporters at the Commission's hearing in these investigations. He and three other lumber purchasers provided responses to a question from one of the Commissioners regarding which lumber species – SPF or SYP – is used for four major applications in their region. Their responses are tabulated in Exhibit 1, which is attached to this

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[261]*See* USITC Pub. 3509 at 25-27, 33, and 43, incorporated by reference here.

[262]Panel Decision at 75.

[263]USITC Pub. 3509 at Tables III-11 and VII-6. In Canada, SPF is the predominant species of softwood lumber (84.6 percent in 2001), followed next by hem-fir (6.6 percent) and Douglas fir (3.7 percent) lumber, and then by a variety of other lumber species. Id.

opinion.[264]

The evidence shows that both SPF and SYP are used for each of the four major applications. For example, at the Commission's hearing home builders and purchasers provided the following break-out by region of the products used for floor joists, wall/framing, headers, and trusses: Florida: floor joists - SYP, wall/framing - SPF, headers - SYP, trusses - SYP[265]; Texas: floor joists - SYP, wall/framing - SYP, headers - SYP, trusses - SYP;[266] Indiana and West: floor joists - SPF, wall/framing - SPF, headers - SPF, trusses - SPF[267]; Massachusetts: floor joists - SPF, wall/framing - SPF, headers - SYP, trusses - SYP.[268] Thus, these regional preferences do not reflect a lack of substitutability but simply a predisposition toward locally-milled species.[269]

While regional preferences exist – species often are used in close proximity to where they are milled – we find that these preferences simply reflect the availability of species in certain

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[264]See Hearing Transcript at 185-190 and 204-209.

[265]Hearing Transcript at 185-190, 204.

[266]Hearing Transcript at 205.

[267]Hearing Transcript at 205-207.

[268]Hearing Transcript at 206.

[269]We note that the evidence presented to the Commission, even by representatives of some of the so-called "Big Boxes" retailers, show that regional preferences reflect the local availability of species. For example, ***. INV-Z-049 (4/19/02) at II-11 and II-12. Other purchasers' comments on species preferences include: ***. Id. at II-11; see also Dealers/Builders' Prehearing Brief at Exhs. 2, 3, 4, 6, 8, 9, 11, 13, 14 15, 16, 17, 21, and 23; Petitioners' Posthearing Brief at 5-6.

areas, which is affected by transportation costs.[270] [271] Moreover, there are other products, such as Douglas fir (22.7 percent of U.S. production in 2000 and 3.7 percent of Canadian production in 2001) and hem-fir (12.5 percent of U.S. production in 2000 and 6.6 percent of Canadian production in 2001),[272] that both countries' industries produce that compete with each other, as well as with SPF and SYP.

In addition, there was significantly more evidence in the record demonstrating the interchangeability of the species, some of which is confidential. In particular, the Annual Builders Survey by the National Association of Home Builders Research Center (NAHBRC) provided clear evidence that SPF, SYP, and Douglas fir/hem fir are all used in such same construction applications as lumber joists, light frame exterior walls, roof trusses, and roof rafters.[273] This survey provided the following results for use of different species for certain construction applications in the United States in 2000 -- ***.[274]

Thus, as the Commission has recognized in prior investigations, Canadian softwood lumber and the domestic like product generally are interchangeable, notwithstanding differences

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[270]USITC Pub. 3509 at II-8-9, V-2, V-3, and V-5.

[271]Hearing Transcript at 185-190 and 204-209; USITC Pub. 3509 at II-8 and II-9, INV-Z-049 (4/19/02) at II-11 and II-12, and Dealers/Builders' Prehearing Brief at Exhs. 2, 3, 4, 6, 8, 9, 11, 13, 14 15, 16, 17, 21, and 23; Petitioners' Posthearing Brief at 5-6.

[272]USITC Pub. 3509 at Tables III-11 and VII-6.

[273]Dealers/Builders' Posthearing Brief at Exhibit 3 at 5, 10, and 15.

[274]Dealers/Builders' Posthearing Brief at Exhibit 3 at 5, 10, and 15.

in species and regional preferences.[275] This is further supported by responses to Commission questionnaires. A majority of purchasers (36 of 51) responding to the Commission questionnaire reported that U.S. and Canadian softwood lumber can be used in the same general applications, recognizing that performance characteristics and customer preferences place some limitations on interchangeability among species.[276]

The evidence clearly demonstrates that virtually all Canadian lumber in the United States is employed for the same end uses for which domestic products compete. Canadian SPF and U.S. SYP are used for many of the same applications, and therefore these products compete. Moreover, Canada also exports Douglas fir, hem-fir, western red cedar, and a few other products; all of these species also are produced in the United States.

We find, based on consideration of the entire record, including the evidence provided by purchasers and home builders, that Canadian softwood lumber and the domestic like product generally are interchangeable; subject imports and domestic species are used in the same applications; regional preferences do not reflect a lack of substitutability, but instead simply reflect a predisposition toward locally-milled species; there are other products that both countries

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[275]See, e.g., Softwood Lumber III, USITC Pub. 2530 at 28-29, and 34, aff'd in part, In the Matter of Softwood Lumber from Canada, USA-92-1904-02, Decision of the Panel Reviewing the Final Determination of the U.S. International Trade Commission , at 25-28 (July 26, 1993)

[276]USITC Pub. 3509 at II-6, II-8, and Table II-5. In Commission questionnaire responses, 32 of 57 purchasers indicated that they have switched between different species of softwood lumber for use in the same application, citing availability and price as factors in their substitution decisions and citing most frequently substitution between Douglas fir, hem-fir, and SPF. Id. at II-8. Purchasers' questionnaire responses indicated that all eight major species groups are used in residential and commercial construction and in construction of prefabricated components, such as joists and trusses. Id. at Table II-5; Petitioners' Prehearing Brief, Vol. II at Exhibit 85.

produce that compete with each other; and evidence demonstrated that prices of different species have an effect on other species' prices, particularly those that are used in the same or similar applications.

We considered allegations raised by Canadian exporters that the integrated companies in the North American lumber industry would not harm related U.S. producers.[277] [278] Yet, no evidence whatsoever was presented to support this supposition that integrated firms will not harm their related parties. Moreover, this integration is not new, which raises the question of why it would have a different effect in the future than during the period of investigation, when, with integration in place, the evidence demonstrated that import volumes were significant, and imports had some adverse price effects.

As discussed above, we reject the theory about the effects of demand on future prices proffered by Canadian exporters because it is not supported by the facts. Having reviewed the evidence, we find that demand is not likely to increase in the manner Canadian exporters suggests or to have the effects that they posit. Contrary to the Canadian exporters' theory, strong demand did not translate into price improvements during the period of investigation. In fact, the evidence demonstrates that it had been excess supply rather than demand that had played a

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[277]In the original Views of the Commission, the Commission conducted a detailed analysis of related parties and determined that appropriate circumstances did not exist to exclude any firms from the domestic industry. No Canadian exporters, nor any other party, advocated that any firms be excluded as related parties. Nor did any party provide evidence that integrated domestic producers are shielded from harm. See USITC Pub. 3509 at 16-19; Conference Transcript at 108 (CLTA).

[278]CLTA's Prehearing Brief at 30-32.

pivotal role in the price declines of softwood lumber in the U.S. market, as the excess supply had resulted in price declines through 2000. Even with strong demand during the period of investigation, prices declined and the condition of the domestic industry deteriorated, effects opposite to those Canadian exporters speculate should occur in the future. This evidence supports our finding that substantial increases in subject imports likely will have adverse price effects in the imminent future.

In conclusion, given our finding of likely significant increases in subject import volumes, our finding of at least moderate substitutability, our finding that prices of a particular species affect the prices of other species, our finding that the substantial volume of subject imports presently had *some* adverse effects on prices for the domestic product, and our finding that prices declined substantially at the end of the period of investigation, we conclude that subject imports' prices are likely to have a significant price-depressing or suppressing effect on domestic prices in the imminent future, and are likely to increase demand for further imports. The evidence at the end of the period of investigation shows substantial declines in prices in the third and fourth quarters of 2001. Evidence regarding likely excess supply, which generally caused the substantial price declines in 2000 that led to the deterioration in the condition of the domestic industry, indicates that U.S. producers have curbed their production, but that overproduction remains a problem in Canada. Therefore, we find that the additional subject imports, which are likely, will further increase the excess supply in the market, putting further downward pressure on prices that already had declined at the end of the period of investigation, thereby resulting in a threat of material injury to the U.S. industry by reason of subject imports.

3. Inventories of Subject Merchandise

The statute indicates that in making a determination regarding the existence of a threat of material injury "the Commission shall consider, among other relevant economic factors –

(V) inventories of subject merchandise.[279]

There is no other guidance provided regarding the inventory factor in the statute, legislative history, or case law. In fact, unlike other threat factors (such as capacity), the statute does not even provide a context, e.g., relative to likely increases in imports, for which the Commission is to consider inventories.

While the statute requires the Commission to consider all relevant statutory factors, it does not require the Commission to make findings on each factor. Congress has directed the Commission to consider numerous factors, and delegated to the Commission the discretion to determine the weight to be accorded each factor set forth in the statute.[280] Moreover, the Commission is not required to make findings on each factor, but instead is only directed to

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[279]19 U.S.C. § 1677(7)(F)(i)(V).

[280]Specifically, Congress has stated that:

> [n]either the presence nor the absence of any [particular] factor listed . . . 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.

S. Rep. No. 96-249, at 87-88 (1979); U.S. Steel Group, 96 F.3d at 1362 (Fed. Cir. 1996); Iwatsu Elec., 758 F. Supp. at 1510-1511 (CIT 1991); R-CALF, 74 F. Supp.2d at 1375-76 (CIT 1999). The Commission's reviewing courts have repeatedly affirmed that "[t]he Commission has the discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis." Chilean Salmon, 180 F. Supp. 2d at 1370 (CIT 2002), quoting Goss Graphics System, 33 F. Supp. 2d at 1100 (CIT 1998), aff'd, 216 F.3d 1357 (Fed. Cir. 2000).

consider the statutory threat factors "as a whole in making a determination."[281]

We consider the evidence regarding inventories of subject merchandise and recognize that inventories generally are not substantial in the softwood lumber industry. The evidence shows that Canadian producers' inventories as a share of production had increased, albeit slightly, and were consistently higher than that reported by U.S. producers during the period of investigation.[282] Canadian producers' inventories, which consistently were about 10 percent of their production compared to 6.4-7 percent for their U.S. counterparts, will continue to provide Canadian producers with an added ability to increase imports of softwood lumber to the U.S. market. Thus, while we have considered the inventory factor, we have not relied on the level of inventories in determining the existence of a threat of material injury to the domestic industry.

4. Actual and Potential Negative Effects on Existing Development and Production Efforts

The statute indicates that in making a determination regarding the existence of a threat of

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[281]19 U.S.C. § 1677(7)(F)(ii). Nippon Steel Corp., 19 CIT at 468-469 (1995) ("Joint respondents mistakenly construe the statute to require the Commission to delineate its reasoning under each factor in § 1677(7)(C)(iii). The statute requires only that the Commission explain its analysis with respect to elements in § 1677(7)(B). '[T]he Commission may not need or be able to consider each listed factor[,]' and only need provide an adequate explanation of the 'core factors directed by the statute.' *See Trent Tube Div. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 814 (Fed.Cir.1992).").

[282]USITC Pub. 3509 at Tables III-16 and VII-2. Canadian producers' reported inventories as a share of production were 9.6 percent in 1999, 10.6 percent in 2000, and 10.2 percent in 2001, compared to 6.4 percent, 7.0 percent, and 6.6 percent in the same years as reported by U.S. producers. Id. This comparison provides context for the Canadian softwood lumber inventories data. Moreover, the fact that Canadian inventory levels are consistently higher shows that Canadian producers, compared to their U.S. counterparts, have a greater ability to supply product immediately from inventory to the U.S. softwood lumber market. See Panel Decision at 79.

material injury "the Commission shall consider, among other relevant economic factors –

> (VIII) the actual and potential negative effects on the existing development and production efforts to develop a derivative or more advanced version of the domestic like product.[283]

There is no other guidance provided regarding this factor in the statute, legislative history, or case law. While the statute requires the Commission to consider all relevant statutory factors, it does not require the Commission to make findings on each factor. Congress has directed the Commission to consider numerous factors, and delegated to the Commission the discretion to determine the weight to be accorded each factor set forth in the statute.[284] Moreover, the Commission is not required to make findings on each factor, but instead is only directed to consider the statutory threat factors "as a whole in making a determination."[285]

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[283]19 U.S.C. § 1677(7)(F)(i)(VIII).

[284]Specifically, Congress has stated that:

> [n]either the presence nor the absence of any [particular] factor listed . . . 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.

S. Rep. No. 96-249, at 87-88 (1979); U.S. Steel Group, 96 F.3d at 1362 (Fed. Cir. 1996); Iwatsu Elec., 758 F. Supp. at 1510-1511 (CIT 1991); R-CALF, 74 F. Supp.2d at 1375-76 (CIT 1999). The Commission's reviewing courts have repeatedly affirmed that "[t]he Commission has the discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis." Chilean Salmon, 180 F. Supp. 2d at 1370 (CIT 2002), quoting Goss Graphics System, 33 F. Supp. 2d at 1100 (CIT 1998), aff'd, 216 F.3d 1357 (Fed. Cir. 2000).

[285]19 U.S.C. § 1677(7)(F)(ii). Nippon Steel Corp., 19 CIT at 468-469 (1995) ("Joint respondents mistakenly construe the statute to require the Commission to delineate its reasoning under each factor in § 1677(7)(C)(iii). The statute requires only that the Commission explain its analysis with respect to elements in § 1677(7)(B). '[T]he Commission may not need or be able to consider each listed factor[,]' and only need provide an adequate explanation of the 'core factors

A number of domestic producers reported actual and potential adverse effects on their development and production efforts, growth, investment, and ability to raise capital due to subject imports of softwood lumber from Canada. The record includes a substantial number of comments made by domestic producers reporting these actual and potential adverse effects.[286] The majority of the comments report actual and potential adverse effects, although there are a few that do not. Regarding actual negative effects, 64 of the 72 responding U.S. producers reported negative effects as a result of imports of softwood lumber from Canada.[287] Moreover, regarding potential negative effects, 66 of the 75 responding U.S. producers reported potential negative effects as a result of imports of softwood lumber from Canada.[288]

While the majority of the comments reported adverse effects, we recognize that this

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directed by the statute.' *See Trent Tube Div. v. Avesta Sandvik Tube AB*, 975 F.2d 807, 814 (Fed.Cir.1992).").

[286]INV-Z-049 (4/19/02) at Appendix G.

[287]INV-Z-049 (4/19/02) at Appendix G-3 - G-13. We note that the statute does not include in the present material injury analysis a factor for the Commission to consider similar to threat factor VIII regarding the "actual and potential negative effects on the existing development and production efforts of the domestic industry." Compare 19 U.S.C. § 1677(7)(C) with 19 U.S.C. § 1677(7)(F); see also Panel Decision 81. Moreover, in the Commission's present material injury analysis, we found that the condition of the domestic industry had deteriorated and thus it was in a vulnerable state. However, largely because both subject imports and domestic supply had contributed to the significant price effects during the period of investigation, we concluded that subject imports had not yet had a significant impact on the domestic industry. USITC Pub. 3509 at 36. This present material injury finding would not preclude a finding that subject imports have actual and potential negative effects on the existing development and production efforts of the domestic industry.

[288]INV-Z-049 (4/19/02) at Appendix G-13 - G-24. See, e.g., the following representative statements by U.S. producers: ***.

anecdotal information is, by its nature, largely "unsubstantiated." Thus, while we have considered this threat factor, we have not relied on these unsubstantiated comments in determining the existence of a threat of material injury to the domestic industry.

B. Alleged Potential Other Factors

The statute states that the Commission is to determine whether the domestic industry is threatened with material injury by reason of subject imports.[289] Congress has directed, as affirmed by the Federal Circuit, that the Commission in making this determination "need not isolate the injury caused by other factors from injury caused by unfair imports" rather it "must examine other factors to ensure that it is not attributing injury from other sources to the subject imports."[290] Such an analysis, however, only is warranted if an alleged other factor is in fact having a causal, or threatening to have a causal, impact. If an alleged other factor is found not to have or threaten to have injurious effects to the domestic industry, i.e., it is not an "other causal factor," then there is nothing to further examine regarding attribution to injury.[291]

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[289]See 19 U.S.C. §§ 1671d(b)(1) and 1673d(b)(1).

[290]SAA at 851-852. The Federal Circuit has affirmed in a threat analysis that: "[T]he Commission need not isolate the injury caused by other factors from injury caused by unfair imports. . . . Rather, the Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports." Taiwan Semiconductor Industry Ass'n v. USITC, 266 F.3d 1339, 1345 (Fed. Cir. 2001)(emphasis in original); see also Chilean Salmon, 180 F. Supp. 2d at 1375 (CIT 2002) (CIT affirmed in the context of a threat analysis that "[t]he Commission is not required to isolate the effects of subject imports from other factors contributing to injury" or make "bright line distinctions" between the effects of subject imports and other causes. Id.).

[291]We note that, even if an alleged factor is found to be a causal factor (i.e., more than "tangential or minor cause") our analysis would consider such causal factor only to ensure that we are not attributing the injury from other sources to subject imports. See Gerald Metals, Inc. v.

Canadian parties to these investigations alleged that a number of potential other factors were threatening injury to the domestic industry. Pursuant to the Panel's remand, we consider whether any of the following alleged potential other factors is an other causal factor in the context of our threat analysis: (1) the excess supply from the domestic industry itself; (2) third-country or non-subject imports; (3) the growth in importance of engineered wood products ('EWPs'); (4) constraints on domestic production/insufficient timber supplies in the U.S.; and (5) the cyclical nature of the softwood lumber industry.[292]

We have considered the evidence in these investigations regarding all of these potential other factors allegedly causing injury to the domestic industry in the context of our threat analysis and in accordance with the statute and case law. Based on our analysis, as discussed below, we find that these alleged other factors are not causal factors; thus, we have no basis to undertake a further examination to ensure that injury from them is not attributed to subject imports.

United States, 132 F.3d 716, 722 (Fed. Cir. 1997) (the statute "does not suggest that an importer of LTFV goods can escape countervailing duties by finding some tangential or minor cause unrelated to the LTFV goods that contributed to the harmful effects on domestic market prices."); Nippon Steel Corp. v. United States, Sl. Op. 03-1018, -1019 at 5 (Fed. Cir., Oct. 3, 2003) ("As long as its effects [dumped imports] are not merely incidental, tangential or trivial, the foreign product sold at less than fair value meets the causation requirement."); Taiwan Semiconductor, 266 F.3d at 1345 (Fed. Cir. 2001) ("to ensure that the subject imports are causing the injury, not simply contributing to the injury in a tangential or minimal way."). Compare CLTA's Prehearing Brief at 8; Govt. of Canada's Prehearing Brief at 4-11.

[292]Panel Decision at 99-107. The Panel's remand assumes on the basis of the mere allegations by the parties that each of these alleged other factors is an other causal factor and thus that an analysis must be undertaken to ensure we are not attributing any injury from these alleged other factors to subject imports. But, as discussed below, we find that none of these alleged other factors is a causal factor and thus we have no basis to undertake a further examination to ensure injury from them is not attributed to subject imports.

Excess supply from the domestic industry. We discussed this alleged other factor in detail in the context of our threat of material injury analysis regarding likely prices effects and incorporate it by reference here. While we found that excess supply from both subject imports and the domestic industry were contributing factors to current price declines in our present material injury analysis,[293] we find that the evidence demonstrates that domestic supply would not be a causal factor in the imminent future, as it had been in the 1999-2000 period. As discussed above, we base this finding on evidence regarding domestic production and capacity as well as evidence indicating that the domestic producers had curbed their production, but that overproduction remains a problem in Canada.[294] Thus, while domestic overproduction had contributed to adverse price effects in 2000, the evidence demonstrates that domestic producers no longer are contributing to excess supply and are not likely to in the imminent future, while Canadian producers continue to overproduce and Canadian imports are likely to continue to oversupply the U.S. market.

The Commission considered and assessed the remaining four alleged other factors in its Conditions of Competition section of the original Views of the Commission, as incorporated by

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[293]USITC Report at 34-35.

[294]See, e.g., Bank of America, "Wood & Building Products Quarterly," at 11 (Nov. 2001) ("as the Canadian softwood lumber industry ships 65% of its output to the U.S., its general failure to manage production to new order volumes and its capacity growth in its eastern provinces have both undermined prices in recent years.") in Petitioners' Posthearing Brief at 2 and Appendix H, Exh. 2 at 11.

reference here.[295] However, pursuant to the Panel's remand, we discuss each of these alleged potential other factors in the context of our threat analysis.

Third-country or nonsubject imports. The evidence demonstrates that there is no basis for allegations that nonsubject imports, which were not an "other causal factor" at present, would be an other causal factor in the imminent future. While nonsubject imports were present in the U.S. market during the period of investigation, they never exceeded 3 percent of apparent domestic consumption. We recognize that the volume of nonsubject imports (from Brazil, Chile, New Zealand, Germany, Sweden, Austria, and other countries) increased from 937 mmbf in 1999 to 1,378 mmbf in 2001, and that as share of apparent domestic consumption, nonsubject imports increased from 1.7 percent in 1999 to 2.6 percent in 2001.[296] Canadian parties, and the Panel, emphasize that the incremental increase in subject import volume in mmbf between 1999 and 2001 was approximately the same as the increase in nonsubject import volume.[297] However, this comparison must be placed in perspective: subject imports are responsible for an enormous volume of imports during the period of investigation, accounting for 33.2 percent to 34.3 percent

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[295]USITC Pub. 3509 at 21-27. We reiterate that our analysis in Section III. Conditions of Competition of the original Views of the Commission is a distinct section of our opinion and applies to both our Section V. Present Material Injury analysis and our Section VI. Threat of Material Injury analysis. Moreover, if it is evident that an alleged other factor is not an other causal factor at all and respondents offer no positive evidence, only speculative theories about the future, duplicative analyses of the same alleged other factors in both the present material injury analysis and the threat of material injury analysis would serve no purpose.

[296]USITC Pub. 3509 at II-7, n.23 and Tables IV-1 and C-1.

[297]Panel Decision at 103. We note that the Panel's analysis on this issue refers, as does CLTA's, to data outside the 1999-2001 period of investigation, e.g., 1998-2001. Id.

of U.S. apparent consumption in the 1999-2001 period, compared with nonsubject imports, which never exceeded 2.6 percent of apparent domestic consumption.[298] Furthermore, individual country non-subject imports would have been deemed negligible, with no individual country accounting for more than 1.3 percent of total imports while Canadian imports account for about 93 percent of all imports.[299] Finally, subject imports were subject to import restraints for most of the period of investigation; nonsubject imports were not so restrained. Thus, the 2.6 percent market share held by nonsubject imports in 2001 is not likely to increase in contrast to restrained subject imports.

Canadian parties' speculative theories fail to explain why any significant increase in nonsubject imports would be imminent, and how any likely imminent increase in such a small volume of nonsubject imports relative to apparent consumption might rise to the level of having a causal impact on the domestic industry. Their speculation is particularly unconvincing when these parties acknowledge that Canadian exports to the U.S. market will continue at, and even increase above, the already significant level of imports (which is well over a thousand times as large as the level of nonsubject imports) during the period of investigation. Moreover, increases, and not even significant increases, in nonsubject imports have been alleged to be likely only if

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[298]USITC Pub. 3509 at Tables IV-2 and C-1..

[299]USITC Pub. 3509 at II-7, n. 23 ("Official statistics from the Department of Commerce reveal that nonsubject imports accounted for 6.9 percent of the overall quantity of softwood lumber imports into the U.S. market in 2001, with Brazil, Chile, and New Zealand accounting for 1.3, 1.1, and 1.0 percent, respectively. Germany, Sweden, and Austria accounted for 1.0, 0.8, and 0.5 percent, respectively, while Lithuania, the Czech Republic, Mexico, and all other countries accounted for the remaining 1.2 percent of 2001 softwood lumber imports.").

trade remedies were imposed against Canadian imports.[300] The statute, however, directs us to consider "whether material injury by reason of the [subject] imports would occur unless an order is issued;"[301] not that we consider the events that would occur only if an order is imposed.

We have thus considered, in the context of our threat of material injury analysis, the evidence regarding nonsubject imports and find them not likely to be an other factor potentially causing injury to the domestic industry in the imminent future. Thus, there is no basis to examine whether any injury can be attributed to nonsubject imports in the imminent future.

Engineered Wood Products ("EWPs") and Other Substitute Products. The evidence demonstrates that there is no basis for allegations that EWPs and other substitute products, which were not an "other causal factor" at present, would be an other causal factor in the imminent future. We consider whether substitute products for softwood lumber have, or are likely to have, an affect on demand for softwood lumber. A number of products, such as EWPs, steel studs for framing, brick and block for exterior uses, and composites and plastic resins for decking and fencing, may substitute for softwood lumber.[302] While these substitute products may have

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[300]Importers of softwood lumber stated that "any restrictions on the supply of Canadian softwood lumber to the U.S. market would result in an increased supply of imports from other sources, particularly European sources, to meet U.S. demand for softwood lumber." USITC Pub. 3509 at II-3. The evidence also shows the share of U.S. imports held in 2001 by European countries was only 2.3 percent of total imports; i.e., Germany, 1.0 percent; Sweden, 0.8 percent, Austria, 0.5 percent. All nonsubject imports accounted for only 6.9 percent of the overall quantity of softwood lumber imports into the U.S. market in 2001 (and only 2.6 percent of apparent consumption). Id. at II-7, n. 23.

[301]19 U.S.C. § 1677(7)(F)(ii).

[302]USITC Pub. 3509 at II-4.

increased in availability and importance over the last few years, Commission questionnaire responses indicate that such products still account for a small share of the market traditionally utilizing softwood lumber.[303] We recognize that use of EWPs has gradually increased and will likely continue to increase, but we find that the evidence shows it will continue to account for a relatively small share of the market.[304] The evidence demonstrates that use of EWPs "constitutes 5 % of North American softwood dimension/structural lumber (sawnwood) consumption."[305] [306] Furthermore, increased use of EWPs does not entirely "replace" softwood lumber because softwood lumber is an input into some EWPs.[307] Rather it may shift the demand for softwood

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[303]USITC Pub. 3509 at II-4.

[304]We note that the Panel's decision on this issue refers, as does CLTA, to data outside the 1999-2001 period of investigation, e.g., 1992-2000. Panel Decision at 104, referring to Exhibits 21 and 22 to CLTA ITC Prehearing Brief. Moreover, we note that the rate of increase between 1992 to 2000, referred to by the Panel, involves the total rate of increase for a small quantity over a 9 year period. Thus, even with this increase, EWPs still account for a small share of the market traditionally utilizing softwood lumber.

[305]CLTA's Prehearing Brief, Vol. 3, Exh. 21 at 1 and 3 (section 11.2.1 of Chapter 11, ECE/FAO Forest Products Annual Market Review, 1999-2000) ("Softwood dimension lumber is sawnwood produced to standard sizes for construction purposes." Id. at 1).

[306]Canadian exporters (CLTA) estimated that EWPs account for 5 percent of this U.S. market. CLTA's Prehearing Brief at 22; USITC Pub. 3509 at II-4 and n.15. Petitioners maintain that it is only in residential housing floor applications, which make up less than 6.5 percent of total softwood lumber consumption, that substitute products hold anything more than a minimal share. Petitioners' Prehearing Brief at 40-44; Petitioners' Posthearing Brief at Appendix A-28 - A-33.

[307]CLTA's Prehearing Brief, Vol. 3, Exh. 21 at 3 ("The wood products industry wants to hold onto its most important market – residential construction – and it believes that modern EWPs will help fend off non wood building materials such as steel and concrete.") and at 5 ("events helped the EWPs industry tap into vast volumes of underutilized, fast growing, relatively inexpensive fibre. . . . [and] allowed the industry to transform what were formerly

lumber from larger to smaller dimensions.[308]

We have considered, in the context of our threat of material injury analysis, the evidence regarding EWPs and find them not likely to be an other factor potentially causing injury to the domestic industry in the imminent future. Thus, there is no basis to examine whether any injury can be attributed to EWPs in the imminent future.

Alleged Constraints on Domestic Production or Insufficient Timber Supplies. The evidence demonstrates that there is no basis for allegations that alleged constraints on domestic product or insufficient timber supplies, which were not an "other causal factor" at present, would be an other causal factor in the imminent future. We note at the outset that neither the parties nor the Panel seem to recognize that this alleged potential other factor, i.e., alleged constraints on domestic production, could not be operative at the same time as the first alleged potential other factor, i.e., excess domestic supply,[309] in a way that would threaten injury.

In considering any constraints on the domestic producers' ability to supply demand, we recognize that the United States is not self-sufficient in the production of lumber since subject

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'weed species' such as aspen, birch, red maple and sweetgum, into EWPs with superior performance properties.").

[308]USITC Pub. 3509 at II-4 and nn. 14 and 15. At the Commission's hearing, the representative from Wickes stated that smaller sized lumber inputs are used for EWPs and thus EWPs tend to displace wider width 2 x12 lumber. Hearing Tr. at 211. Petitioners estimate the net displacement of solid softwood lumber consumption by I-joists and laminated veneer lumber to be 3.3 percent. Petitioners' Posthearing Brief at Appendix A-29-A-31.

[309]The first alleged other factor assumes that the U.S. industry has the capability to contribute to excess supply in the future and would be the cause of any injury. The facts do not support either theory.

imports from Canada have accounted for about one-third of U.S. consumption for more than seven years. However, the evidence does not support allegations that there are constraints on domestic production which would render the U.S. industry unable to increase supply, if demand increases substantially.[310] The domestic industry's production capacity is not fully utilized. As discussed above, the evidence demonstrates that domestic production capacity was fairly level during the period of investigation, following a small but steady increase between 1995 and 1999, as apparent consumption increased.[311] Domestic capacity utilization was 87.4 percent in 2001. With the exception of a peak in 1999 at 92 percent, it has consistently held this level for the 1995-2001.[312]

Allegations about whether the U.S. industry is self-sufficient in the production of softwood lumber also rely on an overly simplistic theory about the effects that growth in demand would have on the U.S. industry's financial performance and on insulating it from any further adverse effects from additional subject imports from Canada. But, as discussed above, the allegations and theory are not supported by the facts. We find, having reviewed the evidence,

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[310]We note that there is no short supply provision in the statute. Moreover, the fact that the domestic industry may not be able to supply all of demand does not mean the industry may not be materially injured or threatened with material injury by reason of subject imports.

[311]USITC Pub. 3509 at Tables III-6, III-7, and C-1.

[312]USITC Pub. 3509 at Tables III-6, III-7, and C-1. In contrast, Canadian capacity utilization had declined in 2001 to 83.7 percent, a rate substantially lower than that reported for any other year in the 1995-2001 period. Id. at Tables VII-1 and VII-2. As discussed above, in spite of this decline in capacity utilization rates, Canadian producers projected slight increases in capacity, increases in production, and a return of its capacity utilization to 90.4 percent in 2003. Id. at Table VII-2.

that demand is not likely to increase in the manner Canadian parties suggest or to have the effects that they posit. The facts show that, even with strong demand during the period of investigation, prices declined and the condition of the domestic industry deteriorated; effects opposite to those Canadian parties speculate should occur in the future. In fact, these allegations about whether the U.S. industry is self-sufficient in the production of lumber ignore the facts regarding the price effects of increases in the volume of subject imports in a market where demand is either static or improving slightly.

We have considered, in the context of our threat of material injury analysis, the evidence regarding the U.S. industry's ability to supply the U.S. market and find them not likely to an other factor potentially causing injury to the domestic industry in the imminent future. Thus, there is no basis to examine whether any injury can be attributed to alleged constraints on domestic production in the imminent future.

Cyclical Demand and Housing Construction Cycles. The evidence demonstrates that there is no basis for allegations that cyclical demand and housing construction cycles, which were not an "other causal factor" at present, would be an other causal factor in the imminent future.

We consider the relationship between apparent domestic consumption and housing construction in our analysis.[313] The evidence does not support claims by Canadian exporters that

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[313]The evidence demonstrates that demand for softwood lumber is derived primarily from demand for construction uses, including new home construction, repairs and remodeling, and commercial construction (respectively accounting for 38 percent, 30 percent, and 14 percent of demand in 2000). These end use demands for softwood lumber are determined by such factors as the general strength of the overall U.S. economy (which can be measured by the growth of GDP), with residential construction also affected by the level of long-term and home mortgage interest rates. During the period of investigation, domestic softwood lumber consumption remained

alleged cyclical demand and housing construction cycles are an other potential factor having a causal impact on the domestic industry.

In evaluating the data, we note that the consumption of softwood lumber in the United States has remained relatively flat during the period of investigation, but was higher than it was during the preceding years.[314] While apparent domestic consumption had declined slightly by 0.4 percent from 1999-2001, it was 13.1 percent higher in 2001 compared with 1995. Thus, demand was relatively strong and relatively stable. The evidence also demonstrates that the increases in apparent domestic consumption for softwood lumber of 13.1 percent from 1995 to 2001 had not kept pace with its primary end use, new residential construction, which had increased by 18.3 percent from 1995 to 2001.[315]

In considering demand forecasts, we find that, in response to Commission questionnaires, most producers and importers indicate that they believe overall demand would remain relatively unchanged until the second half of 2002 or the beginning of 2003, and then would begin to

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relatively level, and housing starts declined overall but remained at historically high levels at a time of low mortgage rates and continued increases in real GDP. USITC Pub. 3509 at II-3 and Table I-1.

[314]USITC Pub. 3509 at Table IV-2. The evidence shows that during the period of investigation, apparent domestic consumption fluctuated between years and declined slightly (by 0.4 percent) from 54,095 mmbf in 1999 to 53,894 mmbf in 2001. However, apparent domestic consumption increased every year between 1995 and 1999, from 47,641 mmbf in 1995 to a peak of 54,095 mmbf in 1999, an overall increase of 13.5 percent. Id.

[315]USITC Pub. 3509 at IV-3 and Table IV-6. Housing starts reached a peak in 1999 at 1.66 million units, declining to 1.59 million units in 2000 and remaining relatively flat at 1.60 million units in 2001. Housing starts were 23.0 percent higher in 1999 and 18.3 percent higher in 2001 compared with housing starts in 1995. Id.

increase as the U.S. economy rebounded from recession.[316] We also consider the demand forecasts from industry analysts; these forecasts show somewhat mixed results.

In an attempt to place these mixed demand forecasts for softwood lumber in perspective, we consider data regarding the primary end-use -- new residential construction -- which accounted for about 38 percent of demand for softwood lumber in 2000.[317] The forecasts for U.S. housing starts do not correlate to the forecasts for demand for softwood lumber or to the actual data for 1995 to 2001, where U.S. housing starts (i.e., new residential construction) substantially outpaced softwood lumber demand. For example, while industry analysts Clear Vision forecasted that demand for softwood lumber from 2001-2002 would increase by 3.7 percent,[318] its forecast for U.S. housing starts for the same period was slightly lower at 3 percent.[319] In contrast, RISI forecasted higher U.S. housing start increases for 2001-2002 (4.3 percent) compared with its demand forecasts for softwood lumber (1 percent),[320] but its related

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[316]USITC Pub. 3509 at II-3-4.

[317]USITC Pub. 3509 at Table I-1.

[318]Industry analyst Clear Vision Associates forecasted U.S. demand for softwood lumber to increase by 3.7 percent from 53.6 mmbf in 2001 to 55.6 mmbf in 2002, and then further increase by 4.7 percent to 58.2 mmbf in 2003. CLTA's Prehearing Brief, Vol. 3, Tab 1 at 1 and 3; CLTA's Posthearing Brief, Vol. 2, Tab R at 1-3.

[319]Industry analyst Clear Vision Associates forecasted U.S. housing starts to increase by 3 percent from 1.6 million units in 2001 to 1.65 million units in 2002, and then further increase by 6 percent to 1.75 million units in 2003. CLTA's Prehearing Brief, Vol. 3, Tab 1 at 1 and 2; CLTA's Posthearing Brief, Vol. 2, Tab R at 1-3.

[320]Industry analyst RISI forecasted U.S. demand for softwood lumber to increase by 1.0 percent from 53.2 mmbf in 2001 to 53.7 mmbf in 2002, and then further increase by 4.0 percent to 56 mmbf in 2003. Petitioners' Posthearing Brief, Vol. II, Appendix H, Exhibit 28 at 5 (Table

forecasts for the 2002-2003 period showed the opposite correlation (1.89 percent for U.S. housing starts compared with 4 percent for softwood lumber demand).[321]

Moreover, in examining the most recent actual data, we find that while U.S. housing starts increased in January and February of 2002 to the highest levels for single-family home starts in over 20 years, they then fell by 7.8 percent in March 2002 to the lowest level in two years.[322] There also is evidence in the record that this decline in housing starts might be a signal that the market was giving back some of the strong gains made during the mild winter of 2001-2002.[323]

We conclude that the mixed evidence does not support a finding that the softwood lumber industry is subject to, or is likely to be subject to in the imminent future, substantial changes in cyclical demand resulting from housing construction cycles. Thus, we find, in the context of our threat of material injury analysis, that alleged cyclical demand and housing construction cycles are not likely to be an other factor potentially causing injury to the domestic industry in the imminent future; there is not basis then to examine whether any injury can be attributed to alleged cyclical demand in the imminent future.

3; CLTA's Posthearing Brief, Vol. 2, Tab R at 2.

[321]Industry analyst RISI forecasted U.S. housing starts to increase by 4.3 percent from 1.61 million units in 2001 to 1.68 million units in 2002, and then further increase by 1.8 percent to 1.71 million units in 2003. Petitioners' Posthearing Brief, Vol. II, Appendix H, Exhibit 28 at 3 (Table 2); CLTA's Posthearing Brief, Vol. 2, Tab R at 1.

[322]USITC Pub. 3509 at II-3-4, n.10.

[323]USITC Pub. 3509 at II-3-4, n.10.

C. Conclusion

In the original Views of the Commission, we assessed the condition of the domestic industry, as incorporated by reference here.[324] We found that the domestic industry "is vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance."[325] In brief, the evidence shows that many performance indicators declined significantly from 1999 to 2000, and then declined slightly or stabilized from 2000 to 2001.[326] With respect to the domestic industry's financial performance in particular, the evidence also generally shows declines during the period of investigation, with a dramatic drop from 1999 to 2000, as prices declined.[327]

We consider the consequent impact of the likely substantial increases in imports and likely price effects on the domestic industry. The evidence demonstrates that subject imports, already at significant levels, will continue to enter the U.S. market at significant levels and are projected to further increase substantially. The additional subject imports will increase the excess supply in the market, putting further downward pressure on prices. Prices at the end of the period of investigation, in the third and fourth quarters of 2001, had substantially declined to levels as low as they had been in 2000. Evidence regarding likely excess supply, which generally

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[324]USITC Pub. 3509 at 37-39.

[325]USITC Pub. 3509 at 37. The Commission's analysis of the vulnerable condition of the domestic industry is on pages 36-39 of the USITC Pub. 3509.

[326]See USITC Pub. 3509 at 37-38.

[327]See USITC Pub. 3509 at 38-39.

caused the substantial price declines in 2000 that led to the deterioration in the condition of the domestic industry, indicates that U.S. producers have curbed their production, but that overproduction remains a problem in Canada and that the likely market for this excess production is the U.S. market. Thus, we find that subject imports were likely to increase substantially and were entering at prices, particularly to substantial declines at the end of the period of investigation, that are likely to have a significant depressing or suppressing effect on domestic prices, are likely to increase demand for further imports, and thereby adversely impact the U.S. industry. The ITC's findings support the existence of a threat of material injury caused by subject imports.

For the foregoing reasons, we determine that an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada that are subsidized and sold in the United States at less than fair value.[328]

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[328]Based on the record of these investigations, we do not find that material injury by reason of subject merchandise that is subsidized and sold at less than fair value would have been found but for any suspension of liquidation of entries of such merchandise. 19 U.S.C. §§ 1671d(b)(4)(B) and 1673d(b)(4)(B).

ITC Exhibit 1

Home Builders' and Purchasers' Break-Out by Region of Lumber Species Used for 4 Applications[1]

Region	**Floor Joist**	**Wall/Framing**	**Headers**	**Trusses**
Florida	SYP	SPF	SYP	SYP
Texas	SYP	SYP	SYP	SYP
Indiana and West	SPF	SPF	SPF	SPF
Massachusetts	SPF	SPF	SYP	SYP
Totals	2-SYP 2-SPF	1-SYP 3-SPF	3-SYP 1-SPF	3-SYP 1-SPF

[1]Source: Commission Hearing Transcript at 185-190 and 204-207; USITC Pub. 3509 at 26, n.162.