

## VIEWS OF THE COMMISSION<sup>1</sup>

On July 27, 2004, the Commission received a written request from the United States Trade Representative (“USTR”) to issue a determination under section 129(a)(4) of the Uruguay Round Agreements Act (URAA)<sup>2</sup> that would render the Commission’s action in connection with Softwood Lumber from Canada<sup>3</sup> not inconsistent with the findings of the World Trade Organization (“WTO”) panel in its report in *United States-Softwood Lumber*.<sup>4</sup> In response to USTR’s request, we hereby issue our determination and views.

On the basis of the record in the Commission’s original Softwood Lumber investigations, the report of the WTO Panel in *United States-Softwood Lumber*, additional information gathered in this Section 129 proceeding,<sup>5</sup> and comments received in response to the Commission’s notice published in

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<sup>1</sup>Commissioner Pearson dissenting. See Additional and Dissenting Views of Commissioner Daniel R. Pearson.

<sup>2</sup>19 U.S.C. § 3538(a)(4).

<sup>3</sup>This proceeding involves the Commission’s original affirmative threat of material injury determination in Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928 (Final), USITC Pub. 3509 (May 2002).

<sup>4</sup>*United States - Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R (26 April 2004). On October 1, 2004, the United States and Canada informed the Dispute Settlement Body (DSB) that they had agreed to a reasonable period of time of nine months from the April 26 date of adoption of the report by the DSB to January 26, 2005 to bring its measure into conformity with the panel report. See DSU Article 21.3.

<sup>5</sup>See Statement of Administrative Action to the Uruguay Round Agreements Act of 1994, H.R. Rep. No. 103-316, Vol. 1 (“SAA”) at 1024. The SAA is the authoritative interpretation of the Uruguay Round Agreements Act. See 19 U.S.C. § 3511(a)(2).

the *Federal Register* on August 26, 2004,<sup>6</sup> 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”).

## **I. Background**

**Original Investigation.** In April 2001, the Coalition for Fair Lumber Imports Executive Committee, the United Brotherhood of Carpenters and Joiners, and the Paper, Allied-Industrial, Chemical and Energy Workers International Union filed a petition alleging that an industry in the United States was materially injured and threatened with material injury by reason of imports of subsidized and less-than-fair-value (“LTFV”) imports of softwood lumber from Canada under Title VII of the Tariff Act of 1930.<sup>7</sup> On May 16, 2002, the Commission determined that an industry in the United States was threatened with material injury by reason of imports from Canada of softwood lumber found to be subsidized and sold in the United States at LTFV.<sup>8</sup>

**Request for WTO Panel Review.** In April 2003, the Government of Canada requested panel review of the determination under the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”). A WTO dispute settlement panel was thereafter established by the DSB. The WTO Panel issued its final report, and found, *inter alia*, that action by the Commission in connection with its Softwood Lumber investigation under Title VII of the Tariff Act

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<sup>6</sup>69 Fed. Reg. 52525 (Aug. 26, 2004); see also 69 Fed. Reg. 47461 (Aug. 5, 2004).

<sup>7</sup>19 U.S.C. §§ 1671 and 1673 *et seq.*

<sup>8</sup>Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928, USITC Pub. 3509 (May 2002).

of 1930, ITC Investigation Nos. 701-TA-414 and 731-TA-928, is not in conformity with the obligations of the United States under the *WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* and the *WTO Agreement on Subsidies and Countervailing Measures*. The panel report was adopted by the WTO Dispute Settlement Body on April 26, 2004.

**Section 129 Request and Procedures.** Section 129 of the URAA (19 U.S.C. § 3538) addresses WTO panel or Appellate Body reports that find an ITC determination is not in conformity with obligations of the United States under the WTO Agreements. Section 129 provides that “if a majority of the Commissioners issues an affirmative report under paragraph (1) [an advisory report on whether the statute permits the Commission to take steps], the Commission, upon written request of the Trade Representative, shall issue a determination in connection with the particular proceeding that would render the Commission’s action . . . not inconsistent with the findings of the panel. . . .”<sup>9</sup> On July 27, 2004, the USTR transmitted his request for this determination under section 129(a)(4) of the URAA.<sup>10</sup> The Commission must issue its Section 129 consistency determination not later than 120 days after the request from the USTR, in this case by November 24, 2004.<sup>11</sup>

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<sup>9</sup>19 U.S.C. § 3538(a)(4). The SAA recognizes that “[m]any of the ITC’s proceedings are time-limited by statute, and the ITC cannot revisit its actions in those proceedings in the absence of the authority provided by subsection (a)(4) or a remand. A written request by the Trade Representative under subsection (a)(4) will provide authority for the ITC to take action with respect to such matters.” SAA at 1024.

<sup>10</sup>On July 14, 2004, the Commission issued an advisory report under section 129(a)(1) stating that Title VII of the Tariff Act of 1930 permits it to take steps in connection with its action in Softwood Lumber from Canada, Investigation Nos. 701-TA-414 and 731-TA-928.

<sup>11</sup>19 U.S.C. § 3538(a)(4).

The Commission is tasked in a Section 129 proceeding with making a determination that would render its original action not inconsistent with the findings of the WTO panel. Thus, we address in this determination only the issues related to the WTO Panel's findings as set forth by USTR's request.<sup>12</sup> This determination does not address issues that were not in dispute in the WTO proceeding or as to which the WTO dispute settlement panel found the United States in conformity with its obligations under the WTO.<sup>13</sup>

After receiving the Section 129(a)(4) request from USTR, the Commission issued a notice of institution in the *Federal Register* on August 5, 2004 and a notice of scheduling in the *Federal Register* on August 26, 2004. In these notices, the Commission established procedures for conducting this Section 129 proceeding, including reopening the record to gather additional information (from public data sources and from questionnaires sent to domestic producers and Canadian producers) to be used to supplement the information gathered in the original investigations.<sup>14</sup> In addition, the Commission held a public hearing and provided parties to the proceeding three opportunities to submit written comments in the form of prehearing briefs, posthearing briefs, and final comments.

**The Basis of This Proceeding – The WTO Panel Report.** The WTO Panel's unfavorable

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<sup>12</sup>Letter from Ambassador Robert B. Zoellick to the Honorable Stephen Koplan, dated July 27, 2004 ("The panel's findings in this regard are set out in paragraphs 7.87 to 7.96 and 7.122 of the panel report. Its conclusions based on these findings are set out in paragraphs 8.1 and 8.2 of the report.").

<sup>13</sup>Thus, this determination does not address issues relating to the Commission's definitions of the domestic like product and domestic industry (including related parties), and the Commission's findings regarding the Maritime Provinces, effects of the subsidies or dumping, consideration of the nature of the subsidy and its likely trade effects, and cross-cumulation.

<sup>14</sup>See 19 U.S.C. §§ 3538(a)(4) and (d); SAA at 1024 and 1026.

findings specific to the threat and causal relationship analyses in the Commission’s original determination are set out in paragraphs 7.87 to 7.96, 7.122, and 7.137 of the WTO Panel report. The Panel’s conclusions based on these findings are set out in paragraphs 8.1 and 8.2 of the panel report.

The Panel found that “the USITC did not violate Articles 3.7 and 15.7 of the AD and SCM Agreements by failing to properly consider the factors listed therein,”<sup>15</sup> but found that “in light of the totality of the factors considered and the reasoning in the USITC’s determination, we cannot conclude that the finding of a likely imminent substantial increase in imports is one which could have been reached by an objective and unbiased investigating authority.”<sup>16</sup> The WTO Panel makes clear that its findings are based on what it sees as “no rational explanation in the USITC determination, based on the evidence cited, for the conclusion that there would be a substantial increase in imports imminently.”<sup>17</sup> The Panel repeats this concern regarding insufficient explanation for several of the factors considered by the Commission in its original threat of material injury determination.<sup>18</sup>

Given these repeated statements, the Commission understands that the WTO Panel wants the

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<sup>15</sup>Para. 7.87 of the WTO panel report.

<sup>16</sup>Para. 7.96 of the WTO panel report.

<sup>17</sup>Para. 7.89 of the WTO panel report. The WTO Panel adds, “[i]n reaching this decision we have kept in mind that we may not substitute our judgment for that of the USITC, but must nonetheless carry out a detailed and searching analysis of the evidence relied upon and the reasoning and explanations given.” *Id.* The WTO Panel indicates that its conclusions “rest on our examination of the USITC’s published determination . . . . No additional materials have been cited to us with respect to the determination for consideration in determining whether or not the USITC’s determination are consistent with the relevant provisions of the Agreements.” *Id.* at para. 7.41.

<sup>18</sup>See, e.g., para. 7.92 (export-orientation); para. 7.93 (the effects of the expiration of the SLA); para. 7.94 (import trends during periods when the SLA was not in effect); para. 7.95 (forecasts for demand in the U.S. market); and para. 7.137 (non-attribution analysis) of the WTO panel report.

Commission to provide more explanation and reasoning for its decision. The WTO Panel recognized that while the consistency of a determination is based on the entirety of that determination, “that does not excuse the investigating authority from the necessity of, at the time of its determination, providing an adequate explanation of its analysis such that a Panel can, with confidence, understand the reasoning underlying the decision that was actually made in order to be able to assess its consistency with the relevant provisions of the Agreements.”<sup>19 20</sup>

On the basis of the record in the Commission’s original Softwood Lumber investigations, the report of the WTO Panel in *United States-Softwood Lumber*, additional information gathered in this Section 129 proceeding, and comments received in response to the Commission’s notice published in the *Federal Register* on August 26, 2004, 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”).

We adopt from the original Commission report our prior views and findings in their entirety regarding domestic like product, domestic industry and related parties, use of publicly available information, conditions of competition, cross-cumulation, Maritime Provinces, effects of subsidies or dumping, and

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<sup>19</sup>Para. 7.136 of the WTO panel report.

<sup>20</sup>Canada contends that a “negative threat determination in this proceeding is the only determination that is consistent with the record and the WTO Panel Report.” Govt. of Canada’s Posthearing Brief at 2. Canada further contends that “the WTO Panel Report must be treated as what it is: a conclusion that neither the Commission’s determination nor its analysis of the facts is consistent with the Antidumping Agreement or the SCM Agreement.” *Id.* at 4. The Commission does not read the Panel Report to require a particular outcome, but rather, as discussed above, to require further explanation and reasoning for its decisions.

consideration of the nature of the subsidy and its likely trade effects.<sup>21</sup>

In these Views of the Commission, we articulate reasoned and detailed explanations for issues material to our determination so that our decisional path “may reasonably be discerned” by the Panel.<sup>22</sup>

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## **II. Data Issues**

In establishing the procedures for conducting this section 129 proceeding, we determined it appropriate to reopen the record to gather additional information to supplement the information gathered in the original investigation. Such additional information was sought primarily to provide us with a more complete data series for the period closest to the Commission’s original determination, and thereby to assist us in considering and addressing issues raised by the WTO Panel regarding the imminent future. The Commission gathered additional information from public data sources and from questionnaires sent to domestic producers and Canadian producers requesting specific additional

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<sup>21</sup>See USITC Pub. 3509 at 3-13, 16-27, 27-29, 30-31, and 39.

<sup>22</sup>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).

<sup>23</sup>Accord Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Panel Report, WT/DS132/R, adopted February 24, 2000, n. 592 (“Mexico-HFCS”) (The underlying rationale for requiring an investigating authority to set forth its explanations in a published notice and/or report is to provide transparency and thus the reasoning that led to its conclusions.); EC-Bed Linen, Panel Report, para. 6.163 (The availability of explanations makes it possible for those involved to understand the results and makes it possible for a Panel to review an authority’s findings and determine whether it complied with specific requirements.).

data.<sup>24 25</sup> All of the data collected for consideration in this Section 129 proceeding covers a period prior to the Commission's original determination; no data for periods subsequent to the original determination has been used.<sup>26</sup>

Canadian parties have alleged that the Commission did not have the authority to reopen the record in this proceeding, or in the alternative should not have done so.<sup>27</sup> However, U.S. law clearly provides the Commission the discretion to reopen the record to collect additional data in this

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<sup>24</sup>In the original investigation, we collected data from questionnaires for the period of January 1999-December 2001 and considered information from public data sources for the period of 1995 to 2001. Public sources provide the most comprehensive data series in all areas, except financial performance, both in this proceeding and in the original investigation. Since we relied on data from both public sources and questionnaires in the original investigation, we also sought limited additional data from questionnaire respondents for this proceeding.

<sup>25</sup>In the original determination, data for Jan.-March 2002 was not requested in our questionnaires, as it would have been impractical for the parties to respond. Accord Chr. Bjelland Seafoods A/S v. United States, 19 CIT 35, 43-44 n.22 (1995) (A determination of present material injury does not require the ITC to collect and examine data up until vote day . . . without considering whether the reliability of such data is suspect. . . .Nor is the ITC required to base its determination of present material injury upon inferences about a period most nearly contemporaneous with vote day, during which time data cannot, as a practical matter, be collected.”). However, the Commission also generally did not include in the original investigation record data available from public sources for any part of 2002, although January and February data were available at the time. In the original investigation, parties submitted some 2002 data, including a partial pricing series submitted by CLTA, which it relied on in arguments before the WTO Panel.

<sup>26</sup>In the original investigation, the Commission closed its record on April 25, 2002, voted on May 2, 2002, and issued its determination on May 16, 2002.

<sup>27</sup>Govt. of Canada's Prehearing Brief at 2, and 5-6; Govt. of Canada's Posthearing Brief at 5-6; Tembec's Prehearing Brief at 7 and 13 (“ITC's section 129 must address the same record evidence that the [WTO] Panel analyzed” and that “ITC's ability to gather additional information. . . cannot mean that the ITC may generate a new administrative record. . . .”); Tembec's Posthearing Brief at 1-2.



proceeding, even if the WTO Panel did not find the record deficient.<sup>28</sup> The SAA states that the “120-day limit [for Section 129 proceedings] will provide the ITC sufficient time to gather additional information if necessary for it to decide on appropriate implementing action.”<sup>29</sup> Considered in context it is evident that the SAA grants the discretion to the ITC to gather additional information i.e., reopen the record, during a section 129 proceeding.<sup>30</sup>

Canadian parties have also objected to using certain data that may not have been available at the time of the Commission’s original determination.<sup>31</sup> Limiting our analysis to data available at the time of the original determination would preclude the use of public data for March 2002 (which is included in

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<sup>28</sup>See SAA at 1024; Nippon Steel Corp. v. United States, 345 F.3d 1379, 1382 (Fed. Cir. 2003).

<sup>29</sup>SAA at 1024.

<sup>30</sup>Well-settled U.S. case law explicitly grants the authority solely to the Commission to decide whether to reopen the record in order to respond to a remand from a U.S. court. Most recently, in vacating a Court of International Trade (CIT) decision on the basis that the CIT had exceeded its authority in directing a negative Commission determination, the Court of Appeals for the Federal Circuit in Nippon Steel stated: “[w]hether on remand the Commission reopens the evidentiary record, while clearly within its authority, is of course solely for the Commission itself to determine.” Nippon Steel, 345 F.3d at 1382 (Fed. Cir. 2003). The WTO Agreements do not speak to the issue. Thus, in order to make its determination consistent with the WTO Panel’s findings, it is solely for the Commission to decide whether additional information is necessary.

<sup>31</sup>Canada argued that “[i]f the Commission nonetheless chooses to rely on new information obtained in this proceeding, it must limit its consideration to information that *would have been available* at the time of the Commission’s vote” and specifically not consider revised public Canadian production data. Govt. of Canada’s Posthearing Brief, Response to Questions at 2-3. We note that Canada made the opposite argument in the NAFTA proceedings before the Commerce Department regarding the same revised Statistics Canada production data, insisting in that proceeding that Commerce make its subsidy calculations based on the revised post-decision day data that it contends the ITC should not consider here. Coalition’s Posthearing Brief at 10 and Appendix B-15 and Exhibit 4 (Letter from Weil, Gotshal & Manges LLP to Department of Commerce, No. C-122-839 (Remand) at 4 (Dec. 23, 2003)).

data totals for the first quarter of 2002), data for first quarter 2002 submitted in questionnaire responses in this section 129 proceeding,<sup>32</sup> public data from Statistics Canada for the years 2000 and 2001 that was revised in 2004,<sup>33</sup> and public data on U.S. production for 2001 that was revised in 2002.<sup>34</sup>

The data at issue therefore cover the years during the period of investigation and first quarter of 2002. While some of the data may not have been available at the time of the original determination, all of the data at issue covers a period prior to that original determination. Neither U.S. law or WTO

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<sup>32</sup>Canadian parties have alleged that responses to qualitative questions, compiled in pages 63-82 of the Staff Report, may involve knowledge of later events. See, e.g., CLTA's Prehearing Brief at 8. We note, however, that all arguments and analysis provided by parties in submissions to the Commission in this proceeding, even those provided by Canadian parties, benefit from and have been fine tuned by subsequent events even if limited to a critique of the original period. In addition, the Coalition pointed out that the financial data requested for the first quarter of 2002 in this proceeding would not have been compiled in the form requested, or for March, may not have been available, by "vote day" in the original investigation. Coalition's Posthearing Brief at 9.

<sup>33</sup>Statistics Canada appears to have changed its methodology in 2000, specifically changing the "sample universe and questionnaires used for the Annual Survey of Manufactures." Govt. of Canada' Prehearing Brief at Exhibit 2, paras. 6 and 9 (Affidavit of Joe St. Lawrence). In an effort to avoid any comparability concerns, we consider separately the revised data for 2000 and 2001, the revised data for 1995-1999, as well as the original data for the 1995-2001 period. While the Canadian parties did not provide any reasoning for this change in methodology, the Coalition indicated that the revised data is more accurate than the original because it was done to correct systematic errors that resulted in under reporting of production for small sawmills. According to the Coalition, the reporting methodology previously used by Statistics Canada erroneously omitted the output of smaller sawmills, representing about 7 percent of Canadian softwood lumber production, because they did not fully complete the long-form questionnaires used by Statistics Canada. They add that "[b]eginning in 2002, all sawmills now receive the 'long form' of the annual survey. Undoubtedly, this expanded data collection is the basis for the upward revisions in the more recent Statistics Canada production data." Coalition's Posthearing Brief at Appendix B-14 and 15.

<sup>34</sup>Coalition's Posthearing Brief at 11-12 and Exhibit I-5; Coalition's Prehearing Brief at Chart 2.

Agreements preclude us from considering this information.<sup>35</sup> Therefore, we base our determination on the record in its entirety.

### **III. Material Injury and Threat of Material Injury by Reason of Subject Imports**

In this Section 129 proceeding, the Commission is to determine whether an industry in the United States is materially injured or threatened with material injury by reason of subject imports of softwood lumber from Canada.<sup>36</sup> The U.S. statute and the Antidumping and SCM Agreements allow appropriate measures to be taken when either present material injury or a threat of material injury has been found. The inclusion of the threat provision in the statute and the WTO Agreements is a recognition that material 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 rise from a threat of material injury to actual present material injury if an order is not issued.<sup>37</sup> Threat of material injury is material injury that has not yet occurred,

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<sup>35</sup>A basic tenet of U.S. administrative law is that agencies should be free to fashion their own rules of procedure. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543 (1978) (“[A]dministrative agencies ‘should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.’”), quoting FCC v. Schreiber, 381 U.S. at 290, quoting from FCC v. Pottsville Broadcasting Co., 309 U.S. at 143, quoted in Avesta AB v. United States, 689 F. Supp. 1173, 1188 (CIT 1988) (The Commission has “broad discretion to fashion its own rules of administrative procedure. . .”).

<sup>36</sup>19 U.S.C. §§ 1671d(b) and 1673d(b). Accord Articles 3.2, 3.4, 3.5, and 3.7 of the WTO Antidumping Agreement and Articles 15.2, 15.4, 15.5, and 15.7 of the WTO SCM Agreement.

<sup>37</sup>The GATT Committee on Anti-dumping Practices adopted “Recommendation concerning Determination of Threat of Material Injury” on 21 October 1985, which provided the following further clarification on the progression from threat to injury:

5. It is important to domestic producers that anti-dumping procedures and anti-dumping relief be available in cases where dumping and threat of material injury are present but before injury

but remains a future event whose actual materialization cannot, in fact, be assured with certainty, although the determination must be based on evidence that is real and not mere conjecture or supposition.<sup>38 39</sup> Thus, the threat of material injury and present material injury analyses necessarily are intertwined,<sup>40</sup> and many of the same factors weigh into our analysis for both.

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has actually materialized, as Article VI of the General Agreement recognizes. However, as the Anti-Dumping Code provides, anti-dumping relief based on the threat of injury must be confined to those cases where the conditions of trade clearly indicate that material injury will occur imminently if demonstrable trends in trade adverse to domestic industry continue, or if clearly foreseeable adverse events occur.

GATT Doc. No. ADP/25, BISD 32/182-183.

<sup>38</sup>See 19 U.S.C. § 1677(7)(F)(ii) and SAA at 854. 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.” SAA at 855. See also *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 818 F. Supp. 348, 353 (CIT 1993). The reviewing courts, however, have acknowledged that “[a]s it deals with the projection of future events . . . [the Commission’s threat] analysis is inherently less amenable to quantification . . . .” *NEC Corp. v. United States*, 36 F. Supp.2d 380, 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). According to the Federal Circuit, 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 Elec. Industrial Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). Projections involve extrapolations from existing data.

<sup>39</sup>Accord Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement; *US-Softwood Lumber*, Panel Report, paras. 7.53-7.60. See *United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, AB Report, WT/DS177/AB/R, para. 125 (“*US-Lamb Meat*”) (“. . . ‘threat of serious injury’ . . . is concerned with ‘serious injury’ which has *not* yet occurred, but remains a future event whose actual materialization cannot, in fact, be assured with certainty.”). While we find that the WTO threat analysis involving the Safeguards Agreement provides some guidance regarding the distinctions between threat and present injury, we recognize that the WTO Agreements have different purposes and requirements.

<sup>40</sup>The WTO Appellate Body has recognized generally that there is a continuum of an injurious condition of a domestic industry that ascends from a threat of injury up to injury. See, e.g., *United*

Our analysis must include consideration of all the facts in the record, particularly regarding the volume of subject imports, their effect on prices of the domestic like product, and their consequent impact on the domestic industry.<sup>41</sup> Consideration of these facts establishes the background against which we evaluate the threat factors and whether subsidized and dumped imports will imminently affect the industry's condition in such a manner that material injury would occur in the absence of protective action.<sup>42</sup>

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*States –Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Appellate Body Report, WT/DS202/AB/R, para. 170 (“*US-Line Pipe*”) (“In terms of the rising continuum of an injurious condition of a domestic industry that ascends from a “threat of serious injury” up to “serious injury”, we see “serious injury” – because it is something *beyond* a “threat” – as necessarily *including* the concept of a “threat” and *exceeding* the presence of a “threat” . . .”).

<sup>41</sup>Thus, in this analysis, we consider the present and past evidence regarding the factors listed in 19 U.S.C. § 1677(7)(C). See also Articles 3.2 and 3.4 of the Antidumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement. Accord *Mexico-HFCS*, Panel Report, para. 7.132 The U.S. statute defines “material injury” as “harm which is not inconsequential, immaterial, or unimportant.” 19 U.S.C. § 1677(7)(A). In assessing whether the domestic industry is materially injured by reason of subject imports, we consider all relevant economic factors that bear on the state of the industry in the United States. No single factor is dispositive, and all relevant factors are considered “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.” 19 U.S.C. § 1677(7)(C)(iii).

<sup>42</sup>19 U.S.C. § 1677(7)(F). 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. 19 U.S.C. § 1677(7)(F)(ii). In making our determination we considered all statutory factors that are relevant to these proceedings. 19 U.S.C. § 1677(7)(F)(ii). See also Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement. Article 3.7 of the Antidumping Agreement provides as follows:

A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the authorities

In our initial determination, we concluded that the volume of subject imports during the period of investigation – which accounted for between 33.2 percent and 34.3 percent of the U.S. market – was already significant, and increased during the period of investigation, even with the restraining effect of the Softwood Lumber Agreement (SLA).<sup>43</sup> However, mindful of our obligations under U.S. law and

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should consider, *inter alia*, such factors as:

- (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
- (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
- (iii) 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; and
- (iv) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

Article 15.7 of the SCM Agreement mirrors this wording, with the exception of the addition of a fifth listed factor for authorities to consider, involving “the nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom.” Article 15.7(i) of the SCM Agreement. We adopt our discussion of this factor (nature of the subsidy) in the original report since the Commission's consideration of this factor in the original investigation was found by the WTO Panel to be consistent with the WTO Agreements and we again do not rely on it for our determination here.

<sup>43</sup>On May 29, 1996, the United States and Canada formally entered into the U.S./Canada Softwood Lumber Agreement (“SLA”), which remained in effect for five years, from April 1, 1996 until March 31, 2001. Under the SLA, in exchange for commitments from the United States not to initiate or otherwise take action under several U.S. trade statutes with respect to imports of softwood lumber from Canada, Canada agreed to place softwood lumber on its export control list and to collect a fee on issuance of a permit for export to the United States of softwood lumber first manufactured in the

the WTO Agreements, we found that, while the record presented clear evidence that the significant volume of subject imports had *some* price effects, we could not conclude that price effects were yet *significant* within the meaning of the law, given the excess supply in the market from both subject imports and domestic production. Similarly, there was evidence that the condition of the domestic industry had deteriorated, primarily as a result of substantial declines in prices, and thus was in a vulnerable state; while subject imports had *some* impact on the domestic industry, we could not conclude that the impact was yet *significant*. A key element to our analysis was the restraining effect of the SLA on the volume of subject imports and thus their impact on prices and the condition of the domestic industry. The pendency of the investigation and preliminary duties also had a restraining effect on subject imports and their impact. In short, the domestic industry was about to experience material injury, which would have occurred without the restraining effects of the SLA and the pendency of these investigations.

We therefore found a threat of material injury in our original investigations due to the imminently foreseeable progression of market factors that had already occurred – a large and increasing volume of subject imports, the existence of some price effects from those subject imports, and a deteriorating, vulnerable domestic industry already feeling some impact from subject imports. Similarly, Canadian industry projections in both the original and expanded record provide positive evidence supporting our

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provinces of Ontario, Quebec, British Columbia, or Alberta (“the covered provinces”), for quantities above a negotiated baseline. Under the SLA, up to 14.7 billion board feet of softwood lumber could be exported to the United States from the covered provinces duty-free, a fee of US\$50 per thousand board feet applied to annual exports between 14.7 and 15.35 billion board feet, and a fee of US\$100 per thousand board feet applied to annual exports that exceeded 15.35 billion board feet.

determination that the domestic industry was threatened with material injury by reason of the dumped and subsidized softwood lumber imports from Canada.

Our analysis of material injury and threat of material injury in this Section 129 determination takes into account and addresses the concerns expressed by the WTO Panel. The Panel found that the evidence relied upon by the Commission, and its reasoning, could at most support a conclusion that imports of softwood lumber would continue at the historical levels and might increase somewhat in keeping with increased demand. In reaching this conclusion, the WTO Panel made a number of findings which we address fully in our determination.

The Panel found that the Commission did not rely on a significant rate of increase during the period of investigation as support for its conclusion that subject imports would increase substantially in the future. The Panel also found that the Commission did not address why the expiration of the SLA would result in a further substantial increase in imports, rather than a reallocation of imports from non-covered to previously covered provinces or merely a shift in timing of imports to avoid duties. We have provided further analysis of the significance of the import levels and increases in imports during the period of investigation, taking into account the significant restraining effect of the SLA. We have also further considered the impact that the expiration of that agreement would have on the market for softwood lumber, analyzing import trends before and during the period of investigation under prevailing market conditions. The record evidence indicates that there was a significant rate of increase of imports during the period examined, especially considering that the baseline volume was significant, and that there was an even greater increase during periods with no import restraints in place. The record also indicates that imports increased after bonding requirements associated with preliminary CVD



duties were imposed, thereby dispelling the theory that a shift in timing accounted for the higher level of imports immediately following the expiration of the SLA. Similarly, when the expiration of the SLA left no restraint on imports from any of the Canadian provinces, imports from the formerly covered provinces increased, but imports continued at near SLA levels from the non-covered provinces as well, resulting in an overall increase in subject imports. Based on this analysis, we find the likelihood of substantially increased imports.

The Panel also found that the Commission did not make any findings that imports from Canada would increase more than demand, thereby accounting for an increased share of the U.S. market, and that the Commission did not discuss market share at all in the context of its threat of material injury determination. We have considered and provided analysis of this issue. The record evidence shows that there is no basis to conclude that likely substantial increases in subject imports will only be to meet increased demand. Demand was high by historical standards, but relatively stable during the period. Forecasts expected it to be relatively unchanged until the second half of 2002, and then would begin to increase in 2003 as the U.S. economy rebounded from a recession. Record evidence shows that increases in subject imports significantly outstripped the small increases in demand during the period of investigation. Similarly, record evidence shows that subject imports after expiration of the SLA have increased at a significantly higher rate than any forecasts for increases in demand for softwood lumber for 2002 and 2003. Based on this analysis, we find that subject imports would increase their market share in the imminent future.

The Panel found that available excess Canadian capacity, and the Commission's findings on the Canadian industry's export orientation, did not support the conclusion that excess capacity would be

exported to the United States beyond the “historical” level. We have analyzed capacity and found that Canadian producers had sufficient excess capacity, and projected increases in capacity and production in 2002 and 2003, to substantially increase exports to the United States beyond the historical level. The record indicates that Canadian production is tied to the U.S. market, which continues to be the most important market for Canadian producers. The U.S. market accounts for about two-thirds of Canadian production and shipments, whereas in 2001 other export markets accounted for only 8 percent of Canadian production and the Canadian home market accounted for only about 24 percent of production. Therefore, there are limited other markets to absorb the projected increase in production of Canadian softwood lumber. The record in this Section 129 proceeding provides further support for this finding: in first quarter 2002, as apparent Canadian consumption declined, Canadian producers shifted sales from the home market to the U.S. market. Given the positive record evidence to the contrary, we discounted Canadian producers’ projections that less than the historical levels of additional Canadian production would be exported to the United States. Significantly, the record is devoid of evidence, such as new supplier contracts or evidence of increased demand in or sales to another country, that would indicate that increased production was likely to deviate substantially from past shipment patterns. Indeed, the record suggests that imports will increase beyond historical levels.

The evidence on the record, particularly with regard to current subject import trends, the restraining effect of the SLA, excess Canadian capacity and projected increases in capacity, capacity utilization and production, and demand projections support our conclusion that imports will increase at a substantial rate in the imminent future beyond historical levels.

Finally, the Panel stated that the Commission failed to discuss other factors potentially causing

injury in the future. We have analyzed and discussed these factors below.

**A. Likelihood of Substantially Increased Imports**

Two of the factors considered in a threat of material injury analysis focus on the likelihood of substantially increased subject imports.<sup>44</sup> These two factors (*i.e.*, significant rate of increase in imports and whether there is sufficient freely disposable unused production capacity) must be considered in the context of the already substantial and increasing volume of imports.<sup>45</sup>

As discussed below, our analysis of likely substantial increases in subject imports first takes into account the fact that subject import volumes already were at significant levels during the investigative period. The evidence shows volume increases from Canada even with the restraining effect of the SLA in place and significant increases in subject import volume at the end of the period of investigation when such imports were no longer subject to the SLA, including when they were not yet subject to

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<sup>44</sup>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,

(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.

19 U.S.C. § 1677(7)(F)(i)(II) and (III). See also Article 3.7(i) and (ii) of the Antidumping Agreement and Article 15.7(ii) and (iii) of the SCM Agreement.

<sup>45</sup>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.’”); Mitsubishi Materials Corp. v. United States, 820 F. Supp. 608, 627 (CIT 1993) (“the court determines that the record viewed *in toto* [specifically capacity utilization and increases in imports during the period of investigation] demonstrates that substantial evidence supports Commissioner Rohr’s findings that the regional industry was threatened with material injury.”).

preliminary antidumping or countervailing duties. Moreover, Canadian producers had increasing excess capacity during the period of investigation. Central to a threat analysis is the assessment of whether subject imports, which in this case already were at significant levels, 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 their already significant and increasing volume level, but are projected to increase substantially beyond this level.

**1. Volume of Imports is Already Significant and is Likely to Increase Substantially in the Imminent Future**

Subject imports of softwood lumber from Canada were already at a significant level during the investigation period, increasing during 1999 to 2001 from 17,983 to 18,483 million board feet (mmbf) out of a total U.S. market of about 54,000 mmbf.<sup>46</sup> Subject imports held a consistently large and increasing share of the U.S. market, accounting for 33.2 percent to 34.3 percent of the U.S. market for softwood lumber in the 1999-2001 period of investigation.<sup>47</sup> Simply stated, one-third of the U.S. market, or one out of every three boards of softwood lumber purchased in the United States, is an import from Canada.

Even under the restrictive impact of the SLA, the volume of subject imports from Canada

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<sup>46</sup>Section 129 Report at Tables IV-2 and C-1; USITC Pub. 3509 at Table IV-2 and C-1. The data collected in this Section 129 proceeding show further increases from 4,141 mmbf in the first quarter of 2001 to 4,745 mmbf in the first quarter of 2002. Section 129 Report at Table C-1B.

<sup>47</sup>Section 129 Report at Tables IV-2 and C-1; USITC Pub. 3509 at Table IV-2 and C-1. Based on the revised U.S. production data for 2001, subject imports market share was 34.6 percent in 2001. Calculated from Table IV-2 in INV-BB-138 (Oct. 29, 2004). The data collected in this Section 129 proceeding show an increasing trend between first quarters, with subject imports accounting for a 31.9 percent market share in the first quarter of 2000, increasing to 33.2 percent and 34.7 percent in the first quarters of 2001 and 2002, respectively. Section 129 Report at Table C-1B.

increased by 500 mmbf, or 2.8 percent, from 1999 to 2001 while apparent U.S. consumption declined slightly by 201 mmbf, or 0.4 percent.<sup>48</sup> While 2.8 percent is a significant rate of increase when the baseline volume is already so significant,<sup>49</sup> the even more telling evidence is the significant rate of increase in the volume of subject imports following the expiration of the SLA on March 31, 2001. For example, from 1999 to 2000, during the SLA, subject imports increased from 17,983 to 18,052 mmbf, or by 0.4 percent.<sup>50</sup> In 2001, when subject imports were subject to the restraining effects of the SLA only in the first quarter, they increased to 18,483 mmbf, or by 2.4 percent, from the 2000 level of 18,052 mmbf; in contrast, apparent U.S. consumption increased by only 117 mmbf, or by 0.2 percent.<sup>51</sup> The rate of increase for the April-December 2001 period, after expiration of the SLA, was even more significant, – 692 mmbf, or 4.9 percent, compared with the same period in 2000.<sup>52</sup> The additional evidence gathered in this Section 129 proceeding shows subject imports continuing to

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<sup>48</sup>Section 129 Report at Tables IV-1, IV-2, and C-1; USITC Pub. 3509 at Tables IV-1, IV-2, and C-1.

<sup>49</sup>We note that even substantial increases in absolute volume from a significant baseline will not result in large percentage increases. This, however, does not mean that such absolute volume increases are not significant. Increases of the same absolute volume over a small baseline will result in substantially higher percentage rates of increase than those same volume increases over a large baseline.

<sup>50</sup>Section 129 Report at Table C-1; USITC Pub. 3509 at Table C-1. Apparent U.S. consumption declined by 0.6 percent from 1999 to 2000. *Id.*

<sup>51</sup>Section 129 Report at Table C-1; USITC Pub. 3509 at Table C-1.

<sup>52</sup>Section 129 Report at Table C-1 and Official import statistics. We note that during part of this period (August-December) imports were subject to the August CVD preliminary finding. As discussed below, during the April-August 2001 period, when subject to the pending investigation but free of any preliminary measures associated with the investigation, subject imports increased by 11.3 percent compared with the same period in 2000. Official import statistics.

increase rapidly, by 604 mmbf or 14.6 percent, during the first quarter of 2002 compared with the first quarter of 2001.<sup>53</sup>

We therefore find that the consistently large volume and market share of imports from Canada were significant,<sup>54 55</sup> and that the increases in the volume and market share of subject imports were

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<sup>53</sup>Section 129 Report at Table C-1B (129). While apparent U.S. consumption also increased, it did so at a substantially lower rate, 9.7 percent for first quarter 2002 compared with first quarter 2001, leading subject import market share to be higher at 34.7 percent in first quarter 2002 compared with 33.2 percent in first quarter 2001. Moreover, subject imports were 6.2 percent higher in the first quarter of 2002 compared with the first quarter of 2000, while apparent U.S. consumption declined by 2.3 percent for the first quarter 2002 compared with first quarter 2000. *Id.*

<sup>54</sup>19 U.S.C. § 1677(7)(C)(i) (“In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.”). Article 3.2 of the Antidumping Agreement states in relevant part regarding consideration of the volume of imports in the investigating authority’s present injury analysis that:

With regard to the volume of the dumped [subsidized] imports, the investigating authorities shall consider whether there has been a significant increase in dumped [subsidized] imports, either in absolute terms or relative to production or consumption in the importing Member. . . . No one or several of these factors can necessarily give decisive guidance.

The same provision in Article 15.2 of the SCM Agreement applies to subsidized imports.

<sup>55</sup>While the additional factors the Commission takes into account in making a threat of material injury determination include examining the rate of increase of the volume or market penetration of imports, nothing in the statute or the WTO Agreements suggests that the Commission must (or indeed can) ignore the already existing volume of imports or that in applying these provisions, the Commission should not consider what the total volume of imports would likely be, examining both the current level of imports and any projections for further increased imports in the future that are supported by substantial evidence. See *Mitsubishi Materials*, 820 F. Supp. at 627 (CIT 1993) (“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.”). 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.” *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). See also H.R. Rep. No. 96-317, at 46 (1979); S. Rep. No. 96-249, at 88 (1979) (“For one industry, an

significant.<sup>56</sup> The evidence demonstrates, and no party disputes, that subject imports will continue to enter the U.S. market at a large and significant level, and that they are projected to increase from that already large and significant level. In particular, the significant rate of increase in the subject imports in the most recent periods, after expiration of the SLA, is a clear indicator of likely substantial increases in imports in the imminent future and serves as a basis for our determination that subject imports threaten material injury to the domestic industry. Other evidence in the record regarding the restraining effect of the SLA and the import trends during periods of no import restraints further indicate the likelihood of substantial increases in imports of softwood lumber from Canada in the imminent future.

**The SLA had a Restraining Effect on Subject Imports.**<sup>57</sup> The volume of subject imports increased even with the restraining effect of the SLA in place, and substantial increases occurred during periods when such imports were not subject to import restraints. Despite the restraining effect of the SLA, which imposed \$50-100 fees per thousand board feet on imports over specified levels,<sup>58</sup> the

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apparently small volume of imports may have a significant impact on the market; for another, the same volume might not be significant.”).

<sup>56</sup>We note that we would find these significant increases and consistently large level of subject imports to be injurious for purposes of a present material injury determination if combined with sufficient evidence of significant price effects and an adverse impact on the domestic industry.

<sup>57</sup>These investigations, in contrast to most original antidumping or countervailing duty investigations, involved imports that during the period of investigation were subject to a trade restraining agreement, and immediately thereafter, were subject to these investigations (the SLA expired on March 31, 2002; the petition was filed on April 2, 2002, the following business day). Thus, to place subject imports in the appropriate context, we consider the restraining effects of the SLA on imports and trends in subject imports during periods when such imports were not subject to some type of restraint, in making our findings.

<sup>58</sup>The SLA set a limit for imports on a fee-free basis and two levels of quotas for imports above the fee-free level. Each year during the pendency of the SLA, Canadian producers used their fee-free

volume of subject imports from Canada increased above the already significant level by 500 mmbf, or 2.8 percent, from 1999 to 2001, while U.S. apparent consumption remained essentially flat.<sup>59</sup> While imports of softwood lumber from Canada held a consistently large and increasing share of the domestic market, at 34 percent during the period of investigation,<sup>60</sup> it had been higher (35.7 percent) prior to the imposition of the SLA.<sup>61</sup>

Evidence in the original record demonstrates the impact of the SLA on the domestic market,<sup>62</sup>

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quota, substantially all of their \$50 fee quota in every year except 2000-2001 (ranging from 207.3 mmbf to 617.3 mmbf in subject imports), and in each year, including 2000-2001, exported significant quantities of softwood lumber with \$100 fees (ranging from 68.3 mmbf to 476.9 mmbf of subject imports). Canadian producers also shipped significant quantities of bonus exports each year, e.g., 297.5 mmbf in 2001. (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.) See, e.g., USITC Pub. 3509 at Table IV-3 and Petitioners' Original Prehearing Brief at Exh. 62.

<sup>59</sup>The volume of imports of softwood lumber from Canada increased from 17,983 mmbf in 1999 to 18,483 mmbf in 2001. Section 129 Report at Tables IV-1 and C-1; USITC Pub. 3509 at Tables IV-1 and C-1.

<sup>60</sup>As a share of apparent domestic consumption, subject imports from Canada increased from 33.2 percent in 1999 to 34.3 percent in 2001. Section 129 Report at Tables IV-2 and C-1; USITC Pub. 3509 at Table IV-2 and C-1. Based on the revised U.S. production data for 2001, subject imports held a U.S. market share of 34.6 percent in 2001. Calculated from Table IV-2 in INV-BB-138 (Oct. 29, 2004).

<sup>61</sup>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 under the SLA (1997), subject imports declined to a U.S. market share of 34.3 percent, the same market share held in 2001, and market share ranged between 33.2 percent to 34.6 percent during the SLA period. USITC Pub. 3509 at Table IV-2.

<sup>62</sup>We note that studies (conducted outside the context of these proceedings) in the original record, that appraise or quantify the magnitude or impact of the SLA, are consistent with our findings that the SLA had constrained subject imports. See, e.g., Zhang, Daowei, "Welfare Impacts of the 1996 United States - Canada Softwood Lumber (trade) Agreement," *Canadian Journal of Forest Research*, Vol. 31 at 1958-1967 (2001), in Petitioners' Original Prehearing Brief, Vol. II at Exh. 16;



including evidence that the constraints on the volume of imports resulted in higher prices for such imports and higher costs for construction than in the absence of the SLA. For example, respondents estimated that increases in prices caused by the SLA added about \$50/mbf to the average price of framing lumber which translated into increasing the cost of a typical new home by \$1,000.<sup>63</sup> Moreover, prior to the SLA, the price for Eastern SPF lumber in Toronto was about \$20 less (in U.S. dollars) than the price for delivery in the Great Lakes area of the United States. The average difference in 1999, with the SLA in effect, was \$91.<sup>64</sup> Quite simply, the SLA restrained Canada's exports to the United States, increasing supply in Canada and resulting in a widening gap between U.S. and Canadian prices.

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R&S Rogers Consulting, "West Central B.C. Mountain Pine Beetle Strategic Business Recommendations Report," prepared for the Province of British Columbia Ministry of Forests, at 18 (September 2001) in Petitioners' Original Prehearing Brief, Vol. II at Exh. 72. Moreover, additional studies provided in the context of the Section 129 proceeding provide additional support for our finding that the SLA constrained subject imports and affected the prices of subject imports. EC-BB-037 (Oct. 29, 2004); Coalition's Prehearing Report at Appendix B ("Economic Impact of the Expiration of the SLA"). We note that Canadian parties provided limited or no comments in this proceeding, or the original investigation, on the studies already in the original record or added in this proceeding, despite a specific request for such comments by the Commission.

<sup>63</sup>Letter of National Association of Home Builders ("NAHB") to the U.S. Trade Representative ("USTR") at 2-3 and 6 (April 14, 2000) ("The Softwood Lumber Agreement adversely affects the U.S. trade balance. . . . Even though imports from Canada are somewhat lower in terms of physical volume than they would be without trade barriers, the higher prices paid for those imports increases the total cost paid for imported lumber.") in Petitioners' Original Posthearing Brief, Vol. II, Exh. 54 at 2-3 and 6; National Lumber and Building Materials Dealers Association ("NLBMDA")/NAHB's Original Posthearing Brief at 5 (" . . . simple common sense suffices to show that when the supply of something is restricted, its price will be higher than if no restriction existed. The supply of lumber from Canada is presently restricted under the SLA; consequently, the price of lumber, and therefore of housing is higher than it otherwise would be.").

<sup>64</sup>Letter of NAHB to USTR at 6 and Figure 1 (comparison is based on Random Lengths pricing data) in Petitioners' Original Posthearing Brief, Vol. II, Exh. 54 at 6.

Additional evidence in the original record further demonstrates the restraining effect of the SLA. Increases in subject imports while the SLA was in effect did not keep pace with increases in demand from 1995 to 2001; subject imports increased by 8.8 percent while apparent U.S. consumption increased by 13.1 percent.<sup>65</sup> Moreover, the anecdotal information reported to the Commission by importers of subject merchandise and Canadian producers regarding the effects of the SLA also supports a conclusion that it had a restraining effect on the volume of subject imports and their effect on prices in the U.S. market.<sup>66 67</sup>

The record does not show that the SLA merely led to a redistribution of exports from Canadian provinces not covered by the SLA, particularly the Maritime Provinces, and that upon its expiration, pre-SLA provincial trade patterns returned.<sup>68</sup> During the pendency of the SLA, Canadian shipments

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<sup>65</sup>USITC Pub. 3509 at Table IV-2.

<sup>66</sup>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 regarding the effects of the expiration of the SLA. 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. USITC Pub. 3509 at Appendix E.

<sup>67</sup>See also CLTA's Original 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.").

<sup>68</sup>See CLTA's Original Prehearing Brief, Vol. 1 at 36-37.

from non-covered provinces to the United States more than doubled.<sup>69</sup> However, when the expiration of the SLA left no restraint on imports from any of the provinces, imports from the provinces formerly under the SLA increased, but imports continued to the non-covered provinces at levels much higher than those prior to the SLA.<sup>70</sup> For example, while subject imports from the Maritime Provinces, which had not been covered by the SLA, declined by 289 mmbf from 2000 to 2001, subject imports from the rest of Canada increased by 720 mmbf for the same period.<sup>71</sup> Moreover, subject imports from the Maritime Provinces, even with the decline in 2001, were almost three times the level prior to the SLA in 1995.<sup>72</sup> Canadian exporters' theory about redistribution also fails to take into account the vast difference in volume of production and consequent exports to the U.S. market between 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, whereas three of the four formerly covered provinces (British Columbia, Quebec, and Ontario) accounted for more than 80 percent.<sup>73</sup>

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<sup>69</sup>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, and were 1,841 mmbf in 2001. Thus, the subject imports from the Maritime Provinces increased by nearly 129 percent from 1996 to 2000, and by nearly 98 percent from 1996 to 2001. *Id.* See also USITC Pub. 3509 at Table VII-5 and Petition at Exh. I-B-62 (regarding production increases in Manitoba and Saskatchewan).

<sup>70</sup>USITC Pub. 3509 at Table IV-3.

<sup>71</sup>USITC Pub. 3509 at Table IV-3.

<sup>72</sup>USITC Pub. 3509 at Table IV-3.

<sup>73</sup>USITC Pub. 3509 at Tables VII-5 and VII-7. Based on revised Canadian production data, the Maritime Provinces accounted for only between 6.4 and 6.9 percent of Canadian production for the 1999-2001 period, whereas three of the four formerly covered provinces (British Columbia,

We therefore find that the SLA had significantly constrained the volume and market share of subject imports, and substantial evidence supports this finding.

**During Periods with No Import Restraints, There Were Substantial Increases in Subject Imports.** Subject imports increased substantially after the SLA expired and between 1994 and 1996 prior to its adoption; this behavior is highly probative of how subject imports have entered the U.S. market, and would enter the U.S. market in the imminent future, when not subject to trade restraints.

During the period between expiration of the SLA (April 2001)<sup>74</sup> and before suspension of liquidation resulting from the investigation (August 2001), subject import volume was substantially higher, by a range of 738 mmbf to 959 mmbf, or by 9.2 percent to 12.3 percent, than the comparable April-August period in each of the preceding three years (1998-2000).<sup>75</sup> While the rate of increase in imports slowed when bonding requirements associated with the preliminary countervailing duties were imposed in August 2001, subject imports entered the U.S. market in the April-December 2001 period

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Quebec, and Ontario) accounted for between 81.8 and 83.1 percent for the 1999-2001 period. Calculated from Section 129 Report at Tables VII-5. and VII-7. The fourth province covered by the SLA was Alberta; production data for Alberta is included with the data for the other non-covered Prairie Provinces (Manitoba and Saskatchewan), which accounted for about 11 percent of Canadian production based on both the original and revised Canadian production data. Id.

<sup>74</sup>The SLA expired on March 31, 2001; thus, over the period of investigation, the SLA was in effect for 1999, 2000, and the first quarter of 2001.

<sup>75</sup>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. Monthly subject import volumes were higher in each month between April and August 2001 than the comparable month in 2000, with the exception of June, by a range of 7.5 percent to 25.6 percent. Id.

at a rate 4.9 percent higher than the comparable 2000 period.<sup>76</sup> The evidence in this proceeding demonstrates an even more significant increase of 14.6 percent for the first quarter of 2002 compared with the first quarter of 2001, and a significant increase of 6.2 percent compared with the first quarter of 2000.<sup>77</sup> During these periods, market conditions other than the expiration of the SLA, such as increases in consumption, do not lessen the impact of these significant increases in subject imports. For example, while apparent U.S. consumption for first quarter 2002 increased compared with first quarter 2001, it was at a substantially lower rate, 9.7 percent, than the 14.6 percent increase in subject imports.<sup>78</sup> Moreover, subject imports were 6.2 percent higher in the first quarter of 2002 compared with the first quarter of 2000, while apparent U.S. consumption declined by 2.3 percent for first quarter 2002 compared with first quarter 2000.<sup>79</sup>

Claims that the substantial increase in imports during the April-August 2001 period only reflects “a shift in the timing of imports” fail to address the simple fact that subject imports increased *both* during this period *and* afterward. Imports increased after expiration of the SLA and have continued to substantially increase, even after bonding requirements associated with the preliminary CVD findings were imposed. Thus, the evidence does not support a theory that a shift in timing accounted for the higher level of imports immediately after the SLA expired; rather, it indicates a change in import

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<sup>76</sup>Subject imports increased by 429 mmbf, or 2.4 percent, from 2000 to 2001, and by only 69 mmbf, or 0.4 percent, from 1999 to 2000. USITC Pub. 3509 at Table C-1 and Official import statistics.

<sup>77</sup>Section 129 Report at Table C-1B.

<sup>78</sup>Section 129 Report at Table C-1B (129).

<sup>79</sup>Section 129 Report at Table C-1B (129).

behavior.

We find these import trends during the most recent period in which there were no trade restraints to be highly indicative of whether imports are likely to substantially increase in the imminent future. The fact that subject imports increased substantially after expiration of the SLA and have continued to increase affirms our conclusion that subject imports threaten material injury to the domestic industry.

We also consider the similar pattern of increases in subject imports during 1994-1996, immediately prior to the adoption of the SLA, increases which stopped when the SLA was imposed. During the seven quarters between August 1994 and April 1996, with no restraints in effect, subject import market share increased from 32.6 percent in the third quarter 1994 to 37.4 percent in first quarter 1996.<sup>80</sup> During the first full year under the SLA (1997), subject imports declined to a U.S. market share of 34.3 percent, and remained within a range from 33.2 percent to 34.6 percent during the SLA period.<sup>81</sup>

We also consider subject import trends for the pre-SLA period in the context of concurrent market conditions. The evidence in the original record for 1995 to 1996 shows that subject import volume rose at a rate higher than increases in U.S. apparent consumption.<sup>82</sup> The additional evidence in this Section 129 proceeding demonstrates that while subject imports increased substantially by 1,700

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<sup>80</sup>Petitioners' Original Prehearing Brief at Exh. 65.

<sup>81</sup>USITC Pub. 3509 at Table IV-2.

<sup>82</sup>Subject imports increased by 4.8 percent from 1995 to 1996, exceeding the U.S. apparent consumption increase of 4.0 percent and the U.S. production increase of 3.2 percent. USITC Pub. 3509 at Table IV-2.

mmbf, or 10.6 percent, from 1994 to 1996, and increased their market share from 32.6 percent in third quarter 1994 to 37.4 percent in first quarter 1996, apparent U.S. consumption increased by only 1,241 mmbf, or 2.5 percent.<sup>83</sup> Moreover, from 1994 to 1995, when apparent U.S. consumption declined by 707 mmbf, or 1.5 percent, and U.S. production declined by 1,875 mmbf, or 5.6 percent, subject imports which at the time were free of import restraints, increased by 890 mmbf, or 5.5 percent.<sup>84</sup> Therefore, the data on market conditions during 1994-1996 provide further support to our finding that the lack of import restraints after expiration of the SLA led to increases in subject imports and thus threaten material injury to the U.S. industry.

In sum, without restraints in place, subject imports increased from an already high level; increases stopped when the SLA was imposed; substantial increases in imports occurred when the SLA expired; and increases in imports slowed again when preliminary countervailing duties were imposed. Substantial evidence clearly shows that there is a distinction in the level of subject imports depending on whether the SLA was in place, and that the import volumes are substantially higher during periods when they are not subject to the restraining effects of the SLA. This evidence supports our finding that subject imports are likely to increase substantially in the imminent future, exacerbating the adverse impact of already significant subject import volumes.

**2. The Canadian Producers Had Sufficient Freely Disposable Excess Capacity, and Projected Increases in Capacity and Production in 2002 and 2003.**

The evidence in the original investigation regarding Canada's capacity, capacity utilization and

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<sup>83</sup>Section 129 Report at Table 3 and Petitioners' Original Prehearing Brief at Exh. 65.

<sup>84</sup>Section 129 Report at Table 3.

production levels is extensive, and includes both questionnaire data from Canadian producers as well as public data from the Canadian government and the U.S. Department of Commerce. The record indicates clearly that Canada has substantial capacity to produce softwood lumber, equal to about 60 percent of U.S. consumption.<sup>85</sup> Canadian producers projected increases in capacity, capacity utilization and production in 2002 and 2003, despite having sufficient freely disposable excess production capacity (*i.e.*, excess capacity) in 2001, as capacity utilization declined to 84 percent from 90 percent in 1999.<sup>86</sup> This contrasted with the relatively stable level for Canadian capacity utilization in the three years prior to the period of investigation, when the SLA was in place.<sup>87</sup> Excess Canadian capacity in 2001 had increased to 5,343 mmbf, which was equivalent to 10 percent of U.S. apparent consumption.<sup>88</sup> Moreover, the Canadian producers expected to further increase their ability to supply

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<sup>85</sup>USITC Pub. 3509 at Tables IV-2, VII-1 and VII-7. Public data showed that there had been a steady increase in Canadian producers' capacity from 1995 to 1999 (29,700 mmbf to 32,100 mmbf), with a more gradual increase from 1999 to 2001 (32,800 mmbf), with Canadian production capacity 10.4 percent higher in 2001 than in 1995. USITC Pub. 3509 at Tables VII-1. Canadian producers' questionnaire responses (covering nearly 80 percent of production in Canada) followed similar trends from 1999 to 2001. *Id.* at Table VII-2. Canadian production in 2001 was 1,364 mmbf, or 5.2 percent, higher than it had been in 1995, although it declined from 1999 to 2001. *Id.* at Tables VII-1 and VII-2.

<sup>86</sup>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.

<sup>87</sup>In the three years prior to the period of investigation, 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.

<sup>88</sup>USITC Pub. 3509 at Tables VII-1 and C-1. The evidence in the original record showed that this increase in excess capacity could not be attributed to declines in home market shipments from 1999



the U.S. softwood lumber market, projecting increases in production of 8.9 percent from 2001 to 2003 and increases in their capacity utilization to 90 percent in 2003 (from 84 percent in 2001).<sup>89</sup> The projected increase in production was significant enough to result in substantial projected increases in capacity utilization, resulting in additional lumber available for export to the U.S. market. These increases were projected at the same time that demand in the U.S. market was forecast to remain relatively unchanged or increase only slightly.<sup>90</sup>

We have considered the data regarding Canadian production, capacity and capacity utilization collected in this Section 129 proceeding from public sources and questionnaire responses. Data from public sources for Canadian production have been revised from our original record and questionnaire

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to 2001, since increases in imports to the U.S. market for that period were nearly equal to the declines in home market shipments. *Id.* 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.*

<sup>89</sup>USITC Pub. 3509 at Tables VII-1 and VII-2. Canadian producers projected production increases from 21,770 mmbf in 2001 to 23,698 mmbf in 2003, capacity utilization increases from 84.4 percent in 2001 to 90.4 percent in 2003, and capacity increases from 25,804 mmbf in 2001 to 26,206 mmbf in 2003. *Id.* at Table VII-2 (Canadian producers' questionnaire responses covering nearly 80 percent of production in Canada). We recognize that, in contrast to our questionnaire data, RISI forecasts predicted slight declines in capacity from 2001 to 2003, with further increases in 2004, 2005, and 2006. CLTA's Original Posthearing Brief, Vol. 2, Tab C, Attachment 4 at 2 (RISI North American Lumber Forecast, January 2002 at 61-62). We note that these RISI forecasts were based on forecasts of 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 by Canadian parties about substantial growth in demand and resultant effects. The RISI forecasts do 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.

<sup>90</sup>USITC Pub. 3509 at II-3 - II-4; CLTA's Original Posthearing Brief, Vol. 2, Tab R at 1 and 3; Petitioners' Original Posthearing Brief, Vol. II, Appendix H, Exhibit 28 at 5 (Table 3).

responses are limited because the majority of Canadian producers either refused to answer, or simply did not respond to, requests in this proceeding for additional data.<sup>91</sup> Data from public sources and questionnaire responses in this proceeding, therefore, are not necessarily comparable with data from the original investigation.

While revisions to the public data series resulted in substantial increases in reported Canadian production (with increases to original reported levels of 1,850 mmbf (6.4 percent) in 1999, 2,820 mmbf (9.7 percent) in 2000, and 3,070 mmbf (11.2 percent) in 2001), the Canadian production capacity data were not revised.<sup>92</sup> As noted above, the Canadian parties did not provide a full explanation for the revisions in response to questions from the Commission, stating only that it was a change in methodology.<sup>93</sup> Other evidence indicates that the revisions were made to correct systematic

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<sup>91</sup>In the original investigation, 27 Canadian producers, accounting for 79 percent of production in 2001, provided requested information; only six of those Canadian producers responded to the Commission's supplemental questionnaire, accounting for 20 percent of production for the January-March 2002 period. Section 129 Report at 6 and 41. Counsel for at least two Canadian parties informed the Commission by letters that they would not respond to the supplemental questionnaires, and counsel for four other Canadian parties as well as four Canadian producers informed Commission staff directly that they would not respond to supplemental questionnaires; other Canadian parties simply did not respond. See, e.g., Letter to Marilyn Abbott from Elliot J. Feldman of Baker & Hostetler, counsel for Tembec, dated Sept. 17, 2004. In accord with Article 6.1.1 of the Antidumping Agreement and Article 12.1.1 of the SCM Agreement, Canadian producers were provided more than 37 days to respond to these limited three-page supplemental questionnaires. See also Article 6.8 and Annex II, paragraph 1, of the WTO Antidumping Agreement; Article 12.7 of the WTO Agreement on Subsidies and Countervailing Measures.

<sup>92</sup>Calculated from Section 129 Report at Tables VII-1 (Original) and VII-1 (129). RISI is the source of the public Canadian production capacity data; the production capacity data generally is calculated by RISI from Statistics Canada production data. The record contains original and revised Canadian production data, but only the original RISI production capacity data.

<sup>93</sup>Govt. of Canada's Prehearing Brief at 7 and Exhibit 2; Tr. at 180-181, 197-201, and 206-209; Govt. of Canada's Posthearing Brief, and Response to Questions at 2-6.

errors that omitted the production data of smaller sawmills representing at least 5-7 percent of Canadian softwood lumber production.<sup>94</sup> If the basis for the revisions was to include producer data for previously omitted small sawmills, one would expect that a corresponding change would also have been made to total industry capacity, but this appears not to be the case. Canadian parties have not addressed this issue and have only indicated that the Commission should not consider any of the revised Canadian production data in this proceeding, despite arguing for its use in a related Commerce proceeding.<sup>95</sup> In light of these issues, we give reduced weight to the capacity and capacity utilization data derived from the revised Canadian production data<sup>96</sup>

In sum, Canadian producers already possess excess capacity, equivalent to 10 percent of apparent U.S. consumption in 2001, and increases in capacity and production were projected for 2002

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<sup>94</sup>Coalition's Posthearing Brief at Appendix B-14 and 15.

<sup>95</sup>In the Commerce NAFTA proceedings, the Government of Canada insisted that Commerce use the revised production data in its subsidy calculations. Coalition's Posthearing Brief at 10 and Appendix B-15 and Exhibit 4 (Letter from Weil, Gotshal & Manges LLP to Department of Commerce, No. C-122-839 (Remand) at 4 (Dec. 23, 2003)).

<sup>96</sup>We note that the revised data still show a significant decline in capacity utilization (and therefore a significant increase in excess capacity) during the period of investigation; capacity utilization initially rose from 96.2 percent in 1999 to 97.5 percent in 2000, but then declined to 93.0 percent in 2001. Section 129 Report at Table VII-1 (129). Moreover, the revised quarterly data shows a lower capacity utilization rate in first quarter 2002 (90 percent) compared with first quarter 2001 (93.1 percent) and first quarter 2000 (97.9 percent). *Id.* at Table VII-1B (129). Moreover, while Canadian production in the first quarter of 2002 was 2.6 percent lower compared with the first quarter of 2001, subject imports were 14.6 percent higher. *Id.* at Tables VII-1B and C-1B. While only accounting for 20 percent of Canadian production, we note that questionnaire responses also show capacity utilization lower at 86.6 percent in first quarter 2002 compared with about 96 percent in both first quarter 2001 and 2000. *Id.* at Table VII-2B. The first quarter data provide further confirmation that, even without adjustments to the capacity levels, Canadian producers had increasing excess capacity to use to increase exports to the U.S. market.

and 2003. As discussed below, there is both substantial evidence on the record of Canada's likelihood of substantial and increasing exports to the United States, and a lack of any substantial evidence to demonstrate that a shift to other markets could absorb the very significant volume of Canada's exports to the United States.

**Canadian Production Is Tied to the U.S. Market.** The statute, and WTO Agreements, contemplate that the Commission will consider the importance of the export industry's markets in determining threat of material injury.<sup>97</sup> In this case, the U.S. market has been, and is expected to continue to be, the most important market for Canadian producers. Canadian producers rely on the U.S. market for about two-thirds of their production and shipments; exports to the United States ranged from 63.1 percent to 68.1 percent of Canadian production from 1995 to 2001.<sup>98</sup> Other export markets accounted for only 8 percent of Canadian production and the Canadian home market accounted for about 24 percent in 2001.<sup>99</sup> Therefore, the availability of markets other than the U.S.

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<sup>97</sup>19 U.S.C. § 1677(7)(F)(i)(II); see also Article 3.7(ii) fo the Antidumping Agreement and Article 15.7(iii) of the SCM Agreement.

<sup>98</sup>USITC Pub. 3509 at Table VII-7. Revisions to the public data for Canadian production resulted in slightly lower levels for exports to the United States as a share of revised Canadian production, ranging from 57.5 percent to 61.3 percent for the 1999-2001 period compared with the range reported in the original investigation (63.1 percent to 68.1 percent). Id. and Section 129 Report at Table VII-7. The absolute volume of subject imports did not change and Canadian producers still rely on United States as their primary market, even with the revisions to Canadian production. We also note the revised percentages are consistent with those reported by Canadian producers in questionnaire responses in the original investigation. USITC Pub. 3509 at Table VII-2.

<sup>99</sup>Calculated from USITC Pub. 3509 at Table VII-7. Based on the revised Canadian production data, the share of Canadian production directed to the home market is slightly higher, ranging from 32 percent to 35 percent, for the 1999-2001 period compared with 24 percent to 29 percent for the same period as reported in the original investigation. Id. and Section 129 Report at Table VII-7. Canadian producers' questionnaire responses in the original investigation reported that

market (whether other export or home) to absorb additional Canadian production of softwood lumber is limited. As discussed earlier, Canadian softwood lumber production is projected to increase,<sup>100</sup> and the U.S. market would be the most likely target of those additional goods, given the historical role that the U.S. market has played as the principal market for Canadian softwood lumber production.

The U.S. export-orientation of the Canadian producers clearly ties the excess capacity and projected increases in capacity and production to a likely substantial increase in subject imports in the imminent future. Moreover, the evidence in this Section 129 proceeding provides further support that an increasing share of Canadian production would enter the U.S. market. In the first quarter of 2002, as apparent Canadian consumption declined by 23 percent compared with first quarter 2001, Canadian producers shifted sales from the home market to the U.S. market.<sup>101</sup> In the first quarter of 2002, Canadian exports to the U.S. market accounted for 63.8 percent of Canadian production compared with 54.2 percent for the first quarter of 2001 and 55.8 percent for the first quarter of 2000.<sup>102</sup>

Questionnaire responses in the Section 129 proceeding, while accounting for only 20 percent of Canadian production, show exports to the United States as a share of total Canadian shipments at 62.8 percent in the first quarter of 2002, compared to 55.5 percent in the first quarter of 2001 and 53.0

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home market shipments as a share of total Canadian shipments ranged from 31.3 percent in 1999 to 28.9 percent in 2001. USITC Pub. 3509 at Table VII-2.

<sup>100</sup>Canadian producers themselves projected their production would increase from 2001 to 2003 by 8.9 percent, or 1,928 mmbf between 2001 and 2003. USITC Pub. 3509 at Table VII-2.

<sup>101</sup>Section 129 Report at Table VII-7B.

<sup>102</sup>Section 129 Report at Table VII-7B.

percent in the first quarter of 2000.<sup>103</sup> Moreover, home market shipments as a share of total Canadian shipments dropped to 26.7 percent in the first quarter of 2002 compared with 33.4 percent in the first quarter of 2001 and 34.4 percent in first quarter of 2000.<sup>104</sup>

Furthermore, the evidence demonstrates that Canadian producers have incentives to produce more softwood lumber and export it to the U.S. market. 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.<sup>105</sup> These mandatory cut requirements stimulate increased production even when Canadian 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.<sup>106</sup> 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 the U.S. market.<sup>107</sup>

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<sup>103</sup>Section 129 Report at Table VII-2B.

<sup>104</sup>Section 129 Report at Table VII-2B.

<sup>105</sup>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’ Original Prehearing Brief at 89-92; Petitioners’ Original Posthearing Brief at Appendix B-23.

<sup>106</sup>For most of the period of investigation imports were subject to the SLA or preliminary antidumping duty and countervailing duty measures.

<sup>107</sup>USITC Pub. 3509 at Tables VII-5 and VII-7.

## Canadian Producers' Export Projections Are Inconsistent with Other Record

**Evidence.** Canadian producers' export projections implausibly posited that the U.S. market would suddenly no longer account for at least 60 percent of additional Canadian production, consistent with historical levels, but rather that only 20 percent of additional Canadian production would be exported to the United States.<sup>108</sup> The Canadian producers projected that export shipments to the U.S. market would increase, but only by 3 percent, while exports to non-U.S. markets would increase by 21 percent, and shipments to the home market would increase by 13 percent from 2001 to 2003.<sup>109</sup> Thus, the Canadian home market and non-U.S. markets were predicted to receive substantially higher shares of projected production increases, shares wholly inconsistent with historic trends.

Given the inconsistencies with other record evidence, it is reasonable to discount the Canadian producers' unsupported expectations regarding export projections and we therefore 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 seven years.<sup>110</sup> Parties offer no positive evidence to refute our conclusion; that is, no positive evidence, such

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<sup>108</sup>USITC Pub. 3509 at Table VII-7. Over the period of investigation, exports to the U.S. market accounted for 63 - 68 percent of Canadian production, the Canadian home market accounted for about 24 - 29 percent of Canadian production, and non-U.S. export markets accounted for about 8 percent of Canadian production. Id.

<sup>109</sup>USITC Pub. 3509 at Table VII-2.

<sup>110</sup>From 1995 to 2001, exports to the U.S. market as a share of Canadian production ranged from 63.1 percent to 68.1 percent, for an average of 65.5 percent. USITC Pub. 3509 at Table VII-7. Revisions to the public data for Canadian production resulted in slightly lower levels for exports to the United States as a share of revised Canadian production, ranging from 57.5 percent to 61.3 percent for the 1999-2001 period compared with the range reported in the original investigation (63.1 percent to 68.1 percent). Id. and Section 129 Report at Table VII-7.

as a new supplier contract, or evidence of increased demand in or sales to another specific country, that would indicate that a large share of the increased production was likely to shift disproportionately to markets other than the U.S. market. Even though Canadian demand had declined by almost 20 percent from 2000 to 2001 and was not forecast to return imminently to 2000 levels, the Canadian producers projected that home market shipments would somehow increase beyond 2000 levels.<sup>111</sup> The evidence in the first quarter of 2002 demonstrated that when Canadian consumption declined by 23 percent, shipments shifted to the U.S. market and not to other markets.<sup>112</sup> Given the evidence from all sources pointing to significant and increasing exports to the U.S. market, and the lack of substantial evidence of a marked shift in shipment patterns, the Commission's conclusions are supported by substantial evidence.

**Conclusion.** In conclusion, we find a likelihood of substantially increased imports based on consideration of several factors, including: the significant volume of subject imports and their likely substantial increase in the imminent future; the increase in subject imports over the period of investigation and particularly the significant rate of increase after expiration of the SLA; the restraining effects of the SLA; subject import trends during periods when there were no import restraints; Canadian producers' excess capacity and projected increases in capacity, capacity utilization, and production; and the export orientation of Canadian producers to the U.S. market.

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<sup>111</sup>USITC Pub. 3509 at Tables VII-2 and VII-7.

<sup>112</sup>Section 129 Report at Tables VII-7B and C-1B. When Canadian apparent consumption declined by 23.2 percent from first quarter 2001 to first quarter 2002, exports to the U.S. market increased by 14.6 percent and exports to other markets declined by 21.6 percent; the share of Canadian production to the home market also declined by 23.3 percent from the first quarter of 2001 to the first quarter of 2002. *Id.*



## **B. Likely Adverse Price Effects**

In analyzing likely adverse price effects, we first evaluate price trends for softwood lumber during the period of investigation<sup>113</sup> and then consider whether imports are entering at prices that will be likely to have a significant depressing or suppressing effect on domestic prices.<sup>114</sup>

**Prices Declined During the Period of Investigation.** During the period of investigation,

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<sup>113</sup>19 U.S.C. § 1677(7)(C)(ii). In evaluating the price effects of the subject imports, the Commission shall consider whether –

(I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

Article 3.2 of the Antidumping Agreement states in relevant part regarding consideration of the price effects in the present injury analysis that:

. . . With regard to the effect of the dumped [subsidized] imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped [subsidized] imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

The same provision in Article 15.2 of the SCM Agreement applies to subsidized imports.

<sup>114</sup>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.

19 U.S.C. § 1677(7)(F)(i)(IV). See also Article 3.7(iii) of the Antidumping Agreement and Article 15.7(iv) of the SCM Agreement.

prices for softwood lumber declined substantially, particularly in 2000.<sup>115</sup> Notably, prices of both the domestically-produced and imported Canadian softwood lumber products increased through April-June or July-Sept. 1999 (depending on the specific product), before falling substantially through July-Sept. and Oct.-Dec. 2000, despite near record consumption,<sup>116</sup> to their lowest point for the period.<sup>117</sup> Both Commission and public data show<sup>118</sup> that the price declines in 2000 were the result of excess supply in the price sensitive U.S. market.<sup>119 120</sup> As discussed below, the evidence indicates that during

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<sup>115</sup>USITC Pub. 3509 at Tables IV-2, V-1, and V-2, and Figures V-3 - V-5.

<sup>116</sup>USITC Pub. 3509 at Tables C-1.

<sup>117</sup>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.

<sup>118</sup>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 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 Original Posthearing Brief, Vol. 2, Tab A at 7-10.

<sup>119</sup>While quarterly price fluctuations for domestically produced and subject imports of softwood lumber products also reflect 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. USITC Pub. 3509 at V-11.

<sup>120</sup>Petitioners’ Original Posthearing Brief, at 1-2, 11-13, and Appendix B-1 - B-11; Petitioners’ Original Final Comments at 3-6; CLTA’s Original Prehearing Brief, Vol. 1 at 26-30, and Vol. 3, Exh. 28 at 16-22; CLTA’s Original Posthearing Brief, Vol. 1 at 4-6, and Vol. 2 at Tab A;

this period both subject imports and the domestic producers contributed to the excess supply,<sup>121</sup> and thus the declining prices.

While prices for softwood lumber increased in mid-2001, at a time of considerable uncertainty

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Original Hearing Transcript at 125, 168, 258, and 328.

<sup>121</sup>Such evidence includes:

CLTA's Original 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 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. 3<sup>rd</sup> Quarter 2000 Quarterly Report*;

CLTA's Original 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*;

Original Hearing Transcript at 126 (Mr. Wood) –

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

Petitioners' Original 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).

in the market due to the expiration of the SLA and the commencement of these investigations,<sup>122</sup> prices began to decline in July-Sept. 2001 and fell substantially in Oct.-Dec. 2001 to levels as low as those in 2000.<sup>123</sup> Even with an improvement in Jan.-March 2002, prices were still near the lowest levels reported during the period of investigation. The price increase in the first quarter of 2002 was largely due to an increase in consumption,<sup>124</sup> but this improvement was not likely to be sustained, in light of the sharp decline in housing starts in March 2002 from the record high reported for February 2002.<sup>125</sup> Further, record U.S. housing starts throughout the period clearly did not guarantee higher prices in the U.S. market, given price competition and excess supply.

Furthermore, quarterly composite pricing data (as set forth in Exhibit 1, attached to this opinion) show that the price for Jan.-March 2002 – \$318 – was lower than the price for the July-

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<sup>122</sup>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’ Original Posthearing Brief at Appendix B-18 - B-19, and Appendix H, Exh. 7.

<sup>123</sup>USITC Pub. 3509 at V-11, Tables V-1 and V-2, and Figures V-3 - V-5. These price declines occurred while demand, considered on a seasonal basis, remained relatively stable at historically very high levels.

<sup>124</sup>While apparent U.S. consumption was 9.7 percent higher in the first quarter of 2002 compared with the first quarter of 2001, it was 2.3 percent lower compared with the first quarter of 2000. Section 129 Report at Table C-1B.

<sup>125</sup>Section 129 Report at Tables 1 and 2.

Sept. 2001 – \$322 – and substantially lower than in April-June 2001 – \$364.<sup>126</sup> Moreover, we recognize that seasonality generally affects quarterly price comparisons,<sup>127</sup> i.e., prices for Oct.-Dec. in 1999, 2000, and 2001 were lower than those for Jan.-March in 2000, 2001, and 2002, respectively.<sup>128</sup> While the price for Jan.-March 2002 at \$318 was higher than in the same quarter of 2001 at \$284, it was substantially lower than the price of \$384 in Jan.-March of both 1999 and 2000. Prices for Jan.-March 2001 had not yet recovered from the low levels of July-Sept. and Oct.-Dec. of 2000 (\$294 and \$277, respectively) and were subject to considerable uncertainty in the market due to the pending expiration of the SLA.<sup>129</sup>

Thus, the fact that the price for Jan.-March 2002 was higher than Oct.-Dec. 2001 does not undermine our conclusion that imports at the end of the period are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase

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<sup>126</sup>Section 129 Report at Tables V-1 and V-2.

<sup>127</sup>See, e.g., USX Corp. v. United States, 682 F. Supp. 60, 75-76 (CIT 1988) (“reliance on customary annual data is especially warranted in this case given seasonal fluctuations in production levels which likely skew the reliability of quarterly figures.”).

<sup>128</sup>The composite prices for the fourth quarter in 1999 (\$375), 2000 (\$277), and 2001 (\$279) were lower than those for the first quarter in 2000 (\$384), 2001 (\$284), and 2002 (\$318), respectively. Section 129 Report at Tables V-1 and V-2.

<sup>129</sup>Other evidence such as average unit values for imports and domestic shipments confirms these declining price 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; the average unit value essentially remained at the 2001 level in the first quarter of 2002, \$324.94. USITC Pub. 3509 at Table C-1 and Section 129 Report at Table IV-2B. 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. The average unit value of softwood lumber was lower at \$338.45 in first quarter 2002 according to questionnaire responses in the Section 129 proceeding. Section 129 Report at Table C-1B.

demand for further imports.

**Imports are Entering at Prices Likely to Have a Significant Depressing or Suppressing Effect on Domestic Prices.** We find that the substantial and increasing volume of subject imports at significantly declining prices during the period of investigation adversely affected the prices for the domestic product. We recognize that the substantial price declines in 2000, and resulting deterioration of the condition of the domestic industry, were due to excess supply from both subject imports and domestic production. Thus, while the evidence supports a finding that subject imports had *some* adverse price effect, we do not conclude that during the period of investigation, they had yet had a *significant* price effect so as to be a substantial cause of material injury to the domestic industry. However, we also find that the prices at the end of the period of investigation (e.g., July-Sept. and Oct.-Dec. 2001 and Jan.-March 2002) were at levels as low as those in 2000, and that subject import prices, combined with the imminent significant increase in subject import volume, are likely to have a significant depressing or suppressing effect on domestic prices in the imminent future. Moreover, as discussed above, the record indicates that the SLA had a significant restraining effect on the volume of subject imports and therefore limited the effect of subject imports on prices in the U.S. market.<sup>130</sup>

**While Direct Price Comparisons Between Species Are Inappropriate, Evidence Indicates Price Effects.** While the statute and the Agreements require consideration of both price underselling<sup>131</sup> and price depression or suppression in a present material injury analysis,<sup>132</sup> price

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<sup>130</sup>See Section III.A.1, “The SLA had a Restraining Effect on Subject Imports,” supra.

<sup>131</sup>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

depression or suppression may occur whether or not there is price underselling.<sup>133</sup> Consideration of price underselling is not set forth as a listed factor for a threat of material injury analysis.<sup>134</sup> All parties to the investigations agreed that making direct cross-species price comparisons in order to assess underselling was inappropriate.<sup>135</sup>

Although the differences in species of softwood lumber limit the meaningfulness of any direct price comparisons,<sup>136</sup> they do not preclude a price trends analysis to consider whether significant price

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prices.

<sup>132</sup>19 U.S.C. § 1677(7)(C)(ii).

<sup>133</sup>19 U.S.C. § 1677(7)(E). 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).

<sup>134</sup>19 U.S.C. § 1677(7)(F)(i)(IV) (“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.”). See also Article 3.7(iii) of the Antidumping Agreement and Article 15.7(iv) of the SCM Agreement.

<sup>135</sup>The parties agreed that, in this industry, accurate price comparisons are difficult to compile. See, e.g., Original Hearing Transcript at 93, 269-273; Dealers/Builders’ Original Posthearing Brief at 12-14. The Commission encountered similar problems obtaining useful pricing data for assessing underselling in prior Softwood Lumber cases.

<sup>136</sup>We find 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, we place little weight on this information because the reported quantities of softwood lumber involved in the delivered price comparisons are very limited. We conclude that we can 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

suppression or depression by subject imports is likely.<sup>137</sup> First, despite differences in many of the imported and domestic species of softwood lumber, the evidence indicates competition across species, such that prices of a particular species will affect the prices of other species, particularly those that are used in the same or similar applications.<sup>138</sup> Such pricing effects between species were repeatedly

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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, we conclude that we can not determine, based on this record, whether there has been significant underselling by subject imports. USITC Pub. 3509 at V-3 - V-5.

<sup>137</sup>A price suppression or depression analysis considers trends for import and domestic prices to determine certain 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).

<sup>138</sup>See USITC Pub. 3509 at 26-27. 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’ Original Prehearing Brief at 13 and Appendix C.



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.<sup>139</sup> 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.

**Imported and Domestic Softwood Lumber are Interchangeable and Substitutable.** The evidence demonstrates that imported and domestic softwood lumber, notwithstanding differences in species, are interchangeable and compete with each other. Canadian spruce-pine-fir (SPF) accounted for more than 85 percent of Canadian product imported into the United States, and U.S. Southern Yellow Pine (SYP) accounted for about 45 percent of U.S. production.<sup>140</sup> Evidence provided by purchasers and home builders confirms that subject imports and domestic species of softwood lumber are used in the same applications.

While regional preferences exist – species often are used in close proximity to where they are

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<sup>139</sup>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.

<sup>140</sup>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, and thus there is direct competition between subject imports and domestic product. In the United States, the leading species, or species groups, of softwood lumber produced are SYP (45.2 percent in 2000), Douglas fir (22.7 percent) and hem-fir (12.5 percent) lumber, as well as a variety of other lumber species, including ponderosa pine, SPF, WRC and redwood. 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. USITC Pub. 3509 at Tables III-11 and VII-6.

milled – these preferences simply reflect the availability of species in certain areas, which is affected by transportation costs.<sup>141 142</sup> These regional preferences do not reflect a lack of substitutability but simply a predisposition toward locally-milled species.<sup>143</sup>

In response to a direct question from a Commissioner regarding which lumber species – SPF or SYP – is used for four major applications in their region, four lumber purchasers testifying on behalf of the respondents at the Commission’s original hearing stated that SPF and SYP are both used in each

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<sup>141</sup>See USITC Pub. 3509 at 25-27, incorporated by reference here. *Id.* at II-8-9, V-2, V-3, and V-5. For example, in his affirmative testimony, Mr. Jarvis of Home Depot stated:

There is a strong regional component to species preferences. The overwhelming majority of our customers around the country will not buy Southern Yellow Pine studs even if they are less expensive than Spruce because they do not provide the desired result in that application. The exception is in the southern regions where Southern Yellow Pine grows.

Our customers buy many more SPF studs than SYP studs there even though the SYP is cheaper almost day in and day out. We do not sell a single Southern Yellow Pine stud anywhere else in the U.S. What this tells you is that in the South some builders prefer Southern Yellow Pine studs and will not switch. But even in the South, most builders prefer SPF and will not switch to a cheaper species like SYP.

In the West and pockets of the Northeast builders prefer Green Doug Fir. In other regions some builders prefer SPF, some prefer Hem Fir, but most do not switch.

Original Hearing Transcript at 199.

<sup>142</sup>Original 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 NLBMDA/NAHB’s Original Prehearing Brief at Exhs. 2, 3, 4, 6, 8, 9, 11, 13, 14 15, 16, 17, 21, and 23; Petitioners’ Original Posthearing Brief at 5-6.

<sup>143</sup>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. See INV-Z-049 (4/19/02) at II-11 and II-12; see also NLBMDA/NAHB’s Original Prehearing Brief at Exhs. 2, 3, 4, 6, 8, 9, 11, 13, 14 15, 16, 17, 21, and 23; Petitioners’ Original Posthearing Brief at 5-6.

of the four major applications – floor joists, wall/framing, headers, and trusses.<sup>144</sup> Specifically, as shown in Exhibit 2 to this opinion, these home builders and purchasers provided the following break-out by region of the products used for floor joists, wall/framing, headers, and trusses: Florida (Rutenberg): floor joists - SYP, wall/framing - SPF, headers - SYP, trusses - SYP<sup>145</sup>; Texas (Jarvis): floor joists - SYP, wall/framing - SYP, headers - SYP, trusses - SYP;<sup>146</sup> Indiana and Northwest (Hussey): floor joists - SPF, wall/framing - SPF, headers - SPF, trusses - SPF<sup>147</sup>; Massachusetts

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<sup>144</sup>See Original Hearing Transcript at 185-190 and 204-209.

<sup>145</sup>Original Hearing Transcript at 185-190 (“we have a Southern Yellow Pine sill plate . . . . This is a Southern Yellow Pine floor joist . . . this model will show Spruce and SBF [sic] going vertically on the walls. . . .We now have over the window, this will be called a header. We use Southern Yellow Pine for those in short and medium length. We will also use Southern Yellow Pine in forming the concrete foundation, and that wood can be taken from here, the form board, and used up here as a header over the windows. . . . the Southern Yellow Pine trusts [sic] in my market and in the Southeast and many other markets across the country, Southern Yellow Pine is the preferred product. We do not see our producers switching between Fir, Spruce, and Southern Yellow Pine. In other parts of the country there is a preference for other species, but in my market it’s Southern Yellow Pine.”) and 204 (“MR. RUTENBERG: This was actually done in D.C., an [sic] it was done without my direction. It just happens to be the same as what I would do in Florida with the exception of the header which would make you think that my practice is more widespread. It was done in D.C. without any direction from me. VICE CHAIRMAN OKUN: But other than the header it would be typical, the Southern Yellow Pine truss, the Spruce Pine Framing, the things you described would be typical of – MR. RUTENBERG: Yes, ma’am.”).

<sup>146</sup>Original Hearing Transcript at 205 (“MR. JARVIS: Yes, ma’am. Ron Jarvis with the Home Depot. We do have certain pockets in the South where we do sell Southern Yellow Pine studs, but even if you look at Texas and Louisiana area we’ll sell non-Southern Yellow pine studs four to one to Southern Yellow Pine even though Southern Yellow Pine is cheaper. VICE CHAIRMAN OKUN: But in Florida you could see this house with, I’m looking now at the wall framing with that says Spruce Pine Fir, that would be Southern Yellow Pine studs in some places? MR. JARVIS: Just in pockets of Texas. In Florida it’s almost for us 99 percent of what we sell down there is SPF or another type of U.S. inland studs.”).

<sup>147</sup>Original Hearing Transcript at 205-207 (“VICE CHAIRMAN OKUN: Okay. If I could have Mr. Hussey, Indiana, is that right? Liberty Homes are in Indiana? MR. HUSSEY: That’s correct.

(Fritz): floor joists - SPF, wall/framing - SPF, headers - SYP, trusses - SYP.<sup>148</sup>

The record contains further evidence of substitutability and interchangeability. For example, 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.<sup>149</sup>

In addition, the confidential results in the Annual Builders Survey by the National Association of Home Builders Research Center (NAHBRC) provides positive 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

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Ed Hussey. VICE CHAIRMAN OKUN: If you were building this home in your region, how would it look different in terms of, give me the main structurals. The trusses would be – MR. HUSSEY: The trusses would be Spruce Pine Fir rather than Southern Yellow Pine and the headers generally also would be Spruce Pine Fir.” . . . VICE CHAIRMAN OKUN: Representatives here, is there anyone who builds in the West? MR. HUSSEY: We build in the Northwest, in Oregon. . . . VICE CHAIRMAN OKUN: So in the West what would this structure look like, trusses, floor joist and frames? MR. HUSSEY: Again, our floor trusses, our roof trusses and our framing lumber would all be SPF.”)

<sup>148</sup>Original Hearing Transcript at 206 (“MR. FRITZ: That’s correct. Mr. Fritz from Greenfield, Massachusetts. Ours would be relatively the same except there would be no Southern Pine joists used in the floor framing for the home. That would be SPF, or as you see there, the manufactured product. The roof trusses in my case are all Southern Yellow Pine. We specify that product. And I do know the largest manufacturer of roof trusses in New England, I sure in Maine and probably in New England is Wood Structures from Bedeford, Maine, and they use exclusive Southern Yellow Pine for trusses.”).

<sup>149</sup>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’ Original Prehearing Brief, Vol. II at Exhibit 85.

trusses, and roof rafters.<sup>150</sup>

When all the evidence provided by purchasers and home builders is considered, there is substantial evidence that subject imports and domestic species of softwood lumber are used in the same applications and that regional preferences merely reflect availability of species.<sup>151</sup> 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 and that prices of different species have an effect on other species' prices.<sup>152</sup> Canadian SPF and U.S. SYP are used for many of the same applications, and therefore these products compete. We therefore find, based on the information in the record, including the evidence provided by purchasers and home builders, that Canadian softwood lumber and the domestic like product generally are interchangeable.

**Conclusion.** In sum, during the period of investigation, the substantial and increasing volume of subject imports had *some* adverse effects on prices for the domestic product. Moreover, as discussed above, there is evidence that the SLA had an effect on prices in the U.S. market.<sup>153</sup> As discussed below, the condition of the domestic industry, and in particular its financial performance, deteriorated

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<sup>150</sup>NLBMDA/NAHB's Original Posthearing Brief at Exhibit 3 at 5, 10, and 15.

<sup>151</sup>In prior investigations, the Commission also has recognized that Canadian softwood lumber and the domestic like product generally are interchangeable, notwithstanding differences in species and regional preferences. 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)

<sup>152</sup>See USITC Pub. 3509 at 27 and n.166.

<sup>153</sup>See Section III.A.1, "The SLA had a Restraining Effect on Subject Imports," supra.

over the period of investigation, largely a result of the substantial decline in prices. The declines in the industry's performance, particularly its financial performance, made it vulnerable to future injury. Thus, the price trend evidence, particularly the fact that prices reached their lowest levels as imports increased significantly after expiration of the SLA, supports our conclusion that subject imports are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices.

### **C. Inventories of Product Being Investigated**

The statute and Agreements indicate that in making a determination regarding the existence of a threat of material injury the Commission shall consider inventories of the product being investigated.<sup>154</sup> There is no other guidance provided regarding the inventory factor. In fact, unlike other threat factors (such as capacity), the consideration of this factor is not placed in any context, *e.g.*, relative to likely increases in imports. Further, while the Commission is required to consider all relevant statutory factors “as a whole in making a determination”<sup>155</sup> it is not required to make findings on each factor considered.<sup>156</sup>

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<sup>154</sup>19 U.S.C. § 1677(7)(F)(i)(V) (“the Commission shall consider, among other relevant economic factors – . . . (V) inventories of subject merchandise.”). *See also* Article 3.7(iv) of the Antidumping Agreement and Article 15.7(v) of the SCM Agreement.

<sup>155</sup>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).”).

<sup>156</sup>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

Inventories of softwood lumber generally are not substantial in the softwood lumber industry, and thus we have not relied on the level of inventories in determining the existence of a threat of material injury to the domestic industry.<sup>157</sup> We note, however, that Canadian producers' inventories as a share of production increased, albeit slightly, and were consistently higher than that reported by U.S. producers during the period of investigation.<sup>158</sup> Canadian producers' inventories consistently were about 10 percent of their production compared to 6.4-7.0 percent for their U.S. counterparts.

**D. Impact of the Subject Imports on the Domestic Industry and**

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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 v. United States, 96 F.3d 1352,1362 (Fed. Cir. 1996); Iwatsu Elec. v. United States, 758 F. Supp. 1506,1510-1511 (CIT 1991); Ranchers-Cattlemen Action Legal Foundation v. United States, 74 F. Supp.2d 1353,1375-76 (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." Association de Productores de Salmon Y Trucha de Chile AG v. USITC, 180 F. Supp. 2d 1360, 1370 (CIT 2002) ("Chilean Salmon"), quoting Goss Graphics System v. United States, 33 F. Supp. 2d 1082, 1100 (CIT 1998), aff'd, 216 F.3d 1357 (Fed. Cir. 2000).

<sup>157</sup>U.S. importers' inventories as a share of Canadian imports ranged from 1.1 percent in 1999 to 1.7 percent in 2001. USITC Pub. 3509 at Table VII-10.

<sup>158</sup>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. The evidence in this Section 129 proceeding shows similar levels for U.S. producers' reported inventories as a share of production, 7.1 percent in first quarter 2002 compared with 7.6 percent and 6.5 percent in first quarters 2001 and 2000, respectively. Section 129 Report at Table III-16B. The reported inventories as a share of production reported in the limited responses for Canadian producers was 7.5 percent in first quarter 2002 compared with 8.0 percent and 7.2 percent in first quarters 2001 and 2000, respectively. Id. at Table VII-2B.

### **Vulnerability to Threat of Injury**

In analyzing the vulnerability of the domestic industry to the threat of material injury, we first evaluate the impact of the subject imports on the domestic industry during the period of investigation.<sup>159</sup> Based on the evidence in the record, we conclude that the deterioration in the performance of the domestic industry, particularly its financial performance, makes it vulnerable to injury.

We consider all relevant economic factors that bear on the state of the industry in the United States.<sup>160 161</sup> These factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive and all relevant factors are considered

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<sup>159</sup>On consideration of the impact of subject imports in the present injury analysis, Article 3.4 of the Antidumping Agreement states:

The examination of the impact of the dumped [subsidized] imports on the domestic industry concerned shall include an examination of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

A similar provision in Article 15.4 of the SCM Agreement applies to subsidized imports.

<sup>160</sup>19 U.S.C. § 1677(7)(C)(iii). See also SAA at 851 and 885 (“In material injury determinations, the Commission considers, in addition to imports, other factors that may be contributing to overall injury. While these factors, in some cases, may account for the injury to the domestic industry, they also may demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports.” Id. at 885.).

<sup>161</sup>The evaluation of all relevant factors does not necessarily require an explicit separate evaluation of a factor if the analysis of the factor is implicit in the analyses of other factors. *EC-Pipe*, AB Report, paras. 160-161.



“within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”<sup>162</sup> <sup>163</sup> <sup>164</sup>

The record indicates deterioration in the domestic industry’s overall condition, and in particular in its financial performance, over the period of investigation.<sup>165</sup> Many indicators of the industry’s performance declined significantly from 1999 to 2000, and then declined slightly or stabilized with relatively weak performance from 2000 to 2001. After expiration of the SLA, subject import volumes and market share increased significantly and prices declined substantially to levels as low as those in

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<sup>162</sup>19 U.S.C. § 1677(7)(C)(iii). See also SAA at 851, 885; Live Cattle from Canada and Mexico, Inv. Nos. 701-TA-386 and 731-TA-812-813 (Preliminary), USITC Pub. 3155 (Feb. 1999) at 25, n.148.

<sup>163</sup>The Panel in *Mexico-HFCS* specifically recognized that the Article 3.4 factors all relate to an evaluation of the general condition and operations of the domestic industry and that their consideration is “necessary in order to establish a background against which the investigating authority can evaluate whether imminent further dumped imports will affect the industry’s condition in such a manner that material injury would occur in the absence of protective action, as required by Article 3.7.” *Mexico-HFCS*, Panel Report, para. 7.132. See also *Mexico-HFCS*, Panel Report, para. 7.126 (“it is precisely this latter question – whether the ‘consequent impact’ of continued dumped imports is likely to be material injury to the domestic industry – which must be answered in a threat of material injury analysis.”).

<sup>164</sup>The statute and the Agreements instruct the Commission to consider the magnitude of the dumping margin in an antidumping proceeding as part of its consideration of the impact of imports. See 19 U.S.C. § 1677(7)(C)(iii)(V); Article 3.4 of the Antidumping Agreement and Article 15.4 of the SCM Agreement.. In its amendments to its affirmative final antidumping determination, Commerce found a 12.44 percent dumping margin for Abitibi, a 5.96 percent dumping margin for Canfor, a 7.71 percent dumping margin for Slocan, a 10.21 percent dumping margin for Tembec, a 2.18 percent dumping margin for West Fraser, a 12.39 percent dumping margin for Weyerhaeuser, and a 8.43 percent dumping margin for all others. Letter to Chairman Koplun from Commerce Deputy Assistant Secretary Bernard T. Carreau regarding Correction of Ministerial Errors in the final determination of sales at less than fair value and attached memorandum at 18, dated April 25, 2002.

<sup>165</sup>USITC Pub. 3509 at Tables VI-1 and C-1; Section 129 Report at Tables VI-1, VI-1B, C-1, and C-1B.

2000, when the substantial declines in prices had resulted in significant deterioration in the condition of the domestic industry. Over the period of investigation demand remained relatively stable. Because we find that excess supply from both subject imports and domestic production led to declines in price and deterioration in the domestic industry's condition in 2000, we do not conclude that subject imports had a significant impact resulting in present material injury to the domestic industry.<sup>166</sup> However, in light of this deterioration, we find that the domestic industry producing softwood lumber is vulnerable to injury from the significant increases in subject imports at depressed prices.

Public data indicate that domestic production of softwood lumber steadily declined from a peak of 36,606 mmbf in 1999 to 34,996 mmbf in 2001, a decline of 4.4 percent.<sup>167</sup> The revised public U.S. production data collected in this Section 129 proceeding show a similar trend, with a larger decline of 5.5 percent from 36,606 mmbf in 1999 to 34,579 mmbf in 2001.<sup>168</sup> While domestic production in the

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<sup>166</sup>Petitioners argued that the leveling off of declines in industry performance indicators in 2001 and the mid-2001 increases in prices were the result of the pendency of these investigations and expiration of the restraining effect of the SLA. In particular, Petitioners allege that "the three major price increases in 2001 . . . were all related to the present investigation." Petitioners' Original Posthearing Brief at Appendix B-16 - B-22. The statute directs us to consider any change in volume, price effects and impact of the subject imports after the filing of the petition. 19 U.S.C. § 1677(7)(I). The record indicates that prices did increase in the second quarter of 2001, coincident with the filing of the petition, and this price increase abated some of the domestic industry's declining performance indicators. USITC Pub. 3509 at V-11. For example, the declines in such indicators as operating income and net income displayed during 1999 and 2000 leveled off in 2001. Thus, the record evidence is consistent with such effects related to the pendency of the investigation and expiration of the SLA.

<sup>167</sup>USITC Pub. 3509 at Tables III-6 and C-1 (public data). On the other hand, domestic producers' questionnaire responses (covering approximately 63 percent of domestic production) indicated an increase of 1.9 percent in production from 21,758 mmbf in 1999 to 22,163 mmbf in 2001. Id. at Tables III-7 and C-1.

<sup>168</sup>INV-BB-138 at Tables III-6 and IV-2.

first quarter of 2002 was 4.9 percent higher than the first quarter of 2001, apparent U.S. consumption was 9.7 percent higher; moreover, domestic production in the first quarter of 2002 was 9.3 percent lower than in the first quarter of 2000.<sup>169</sup> Domestic capacity utilization peaked in 1999 at 92.0 percent, and was 89.7 percent in 2000 and 87.4 percent in 2001;<sup>170</sup> based on revised U.S. production data, domestic capacity utilization was 86.4 percent in 2001.<sup>171</sup> Domestic production capacity was fairly level during the period of investigation, following a small but steady increase between 1995 and 1999 (when apparent consumption increased).<sup>172</sup> Domestic producers' U.S. shipments by quantity declined by 3.2 percent and by value fell by 25.6 percent from 1999 to 2001.<sup>173</sup> Between 1999 and 2001, the

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<sup>169</sup>Section 129 Report at Tables III-6B and C-1B. Domestic producers' questionnaire responses in the Section 129 proceeding (covering approximately 60 percent of the domestic production) reported production in the first quarter of 2002 at 8.2 percent higher than first quarter 2001 and 1.4 percent higher than first quarter 2000. *Id.* at Tables III-7B and C-1B.

<sup>170</sup>USITC Pub. 3509 at Tables III-6 and C-1 (public data). Domestic producers' questionnaire responses reported similar declines in 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.

<sup>171</sup>INV-BB-138 at Tables III-6 and IV-2. Domestic capacity utilization rates collected in this Section 129 proceeding for first quarter 2000, 2001, and 2002 were 96.1 percent, 83.2 percent and 87.5 percent, respectively. Section 129 Report at Tables III-6B (public data) and C-1B. Domestic producers' questionnaire responses reported similar trends in capacity utilization rates: 84.1 percent in first quarter 2002, 78.3 percent in first quarter 2001, and 88.4 percent in first quarter 2000. *Id.* at Tables III-7B and C-1B.

<sup>172</sup>USITC Pub. 3509 at Table III-6 and C-1 (public data). Domestic producers' questionnaire responses, with lower coverage than the public data, indicated increases in capacity from 22,847 mmbf in 1999 to 24,709 mmbf in 2001. USITC Pub. 3509 at Table III-7 and C-1.

<sup>173</sup>USITC Pub. 3509 at Table C-1 (public data). Domestic producers' U.S. shipments steadily decreased from 35,175 mmbf in 1999 to 34,034 mmbf in 2001, a decline of 3.2 percent. Domestic producers' U.S. shipments by value decreased from \$13.9 billion in 1999 to \$10.4 billion in 2001, a decline of 25.6 percent. *Id.* Questionnaire responses, with lower coverage than the public data, show domestic producers' U.S. shipments increasing each year of the period of investigation from 21,504

number of domestic mills decreased from 795 to 779, down from 816 in 1995.<sup>174</sup>

Domestic producers' share of apparent domestic consumption decreased from 65.0 percent in 1999 to 64.4 percent in 2000 and to 63.1 percent in 2001.<sup>175</sup> The data collected in this Section 129 proceeding show a similar trend, with domestic producers accounting for a 62.3 percent market share in the first quarter of 2002, down from 64.6 percent and 66.2 percent in the first quarters of 2001 and 2000, respectively.<sup>176</sup> The end-of-period inventories reported by the domestic industry fluctuated between years, but increased overall by 6.2 percent from 1999 to 2001.<sup>177</sup> The domestic industry's number of production workers, hours worked, and wages paid declined from 1999 to 2001, while productivity and hourly wages improved, and unit labor costs declined during the period of

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mmbf in 1999 to 22,301 mmbf in 2001, and shipments by value falling from \$8.9 billion in 1999 to \$7.8 billion in 2001, a decline of 13.3 percent. USITC Pub. 3509 at Tables III-13 and C-1. While domestic producers' U.S. shipments were 5.8 percent higher by quantity and 20.2 percent higher by value in the first quarter of 2002 compared with the first quarter of 2001, they still were 8.1 percent lower by quantity and 24.1 percent lower by value compared with the first quarter of 2000. Section 129 Report at Table C-1B.

<sup>174</sup>USITC Pub. 3509 at Table III-2. The parties disagreed about the extent to which the decline in the number of U.S. mills was attributable to mergers, permanent closure of older facilities, installation of new equipment, maintenance, or competition with subject imports in the U.S. market, but the record reflects that at least some of the mill closures were due to conditions in the U.S. market. USITC Pub. 3509 at Tables II-3 and Appendix G; Petitioners' Original Prehearing Brief at 61-62, 87-89, and Exh. 38; Petitioners' Original Posthearing Brief at Appendix A-1 - A-5 and Appendix H, Exh. 3; CLTA's Original Posthearing Brief at Vol. 2, Tab D, Attachment 1, and Vol. 3.

<sup>175</sup>USITC Pub. 3509 at Table IV-2.

<sup>176</sup>Section 129 Report at Table C-1B.

<sup>177</sup>USITC Pub. 3509 at Tables III-16 and C-1. The end-of-period inventories reported by the domestic industry rose from 1,382 mmbf in 1999 to 1,467 mmbf in 2001. Inventories as a share of U.S. shipments increased from 6.4 percent in 1999 to 7.1 percent in 2000, and declined to 6.6 percent in 2001. *Id.*

investigation.<sup>178</sup>

The domestic industry's financial performance declined during the period of investigation, with a dramatic drop from 1999 to 2000 as excess total supply contributed to price declines.<sup>179</sup> The domestic industry's unit net sales value decreased from 1999 to 2001 with the largest decrease occurring from 1999 to 2000.<sup>180</sup> While unit cost of goods sold declined throughout the period of investigation,<sup>181</sup> unit net sales value fell by a greater amount, and the ratio of operating income to net sales fell from 14.3 percent in 1999 to 1.8 percent in 2000, and 1.3 percent in 2001.<sup>182</sup> Total operating income declined from \$1.26 billion in 1999 to \$93 million in 2001, and over \$1 billion of that decline occurred in one year, from 1999 to 2000.<sup>183</sup> Net income as a share of net sales followed a similar trend, decreasing from 13.7 percent in 1999 to 0.8 percent in 2000 and 0.1 percent in 2001.<sup>184</sup> Total net

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<sup>178</sup>USITC Pub. 3509 at Table III-19 and C-1.

<sup>179</sup>While we have considered the financial performance based on the standard Commission practice for examining full production costs, *i.e.*, transfers from related firms at cost, we note that our finding regarding the vulnerability of the domestic industry would not have changed on the basis of consideration of the data with transfer costs at market value. See USITC Pub. 3509 at Tables VI-1 and F-1.

<sup>180</sup>USITC Pub. 3509 at Tables VI-1 and C-1. The domestic industry's unit net sales value decreased from \$416.48 in 1999 to \$362.05 in 2000, and decreased again to \$344.46 in 2001. Id.

<sup>181</sup>Unit cost of goods sold decreased from \$342.39 in 1999 to \$339.79 in 2000 and decreased again to \$324.69 in 2001. USITC Pub. 3509 at Tables VI-I and C-1.

<sup>182</sup>USITC Pub. 3509 at Tables VI-1 and C-1.

<sup>183</sup>USITC Pub. 3509 at Tables VI-1 and C-1.

<sup>184</sup>USITC Pub. 3509 at Table VI-1.

income declined from \$1.21 billion in 1999 to \$8 million in 2001.<sup>185</sup> The domestic industry's capital expenditures fluctuated between years but decreased from \$327 million in 1999 to \$253 million in 2001.<sup>186</sup>

We recognize that the data collected in this Section 129 proceeding show some improvements in the domestic industry's financial performance in the first quarter of 2002 compared with the first quarter of 2001,<sup>187</sup> but the financial performance was less favorable when compared with the first quarter of 2000.<sup>188</sup> Financial data for a single quarter, moreover, is not necessarily an accurate indicator of the industry's performance for the entire year. For example, for the first quarter of 2000, the domestic industry reported an operating income margin of 9.2 percent, which became a less favorable 1.8 percent when the industry's performance for full year 2000 was reported.<sup>189</sup> Apparent U.S. consumption increased in Jan.-March 2002,<sup>190</sup> which resulted in increases in prices that had a

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<sup>185</sup>USITC Pub. 3509 at Tables VI-1 and C-1.

<sup>186</sup>USITC Pub. 3509 at Table VI-11.

<sup>187</sup>Confidential evidence in the record suggests that the improvement in the financial performance for the first quarter of 2002 may in part be attributed to methods of cost accounting, and may not signal a sustainable improvement. See Coalition's Posthearing Brief at Appendix C-24 and 25.

<sup>188</sup>Section 129 Report at Table VI-1B.

<sup>189</sup>Compare Section 129 Report at Table VI-1 with Table VI-1B. Similarly, the domestic industry reported a net income margin of 8.0 percent for the first quarter of 2000, which became a less favorable 0.8 percent when the industry's performance for full year 2000 was reported. Id. We also note that the domestic producers responding to the questionnaire in this Section 129 proceeding reported more favorable financial performance than the larger reporting group responding to the Commission's questionnaire in the original investigation. Compare Id. at Table VI-1 with Table D-1.

<sup>190</sup>While apparent U.S. consumption was 9.7 percent higher in the first quarter of 2002 compared with the first quarter of 2001, it was 2.3 percent lower compared with the first quarter of

favorable effect on the performance of the domestic industry. However, this increase in consumption of softwood lumber was not likely to be sustained, as evident by the sharp decline in U.S. housing starts in March 2002 from the record high reported for February 2002.<sup>191</sup> Thus, the evidence, considered in its entirety, shows a domestic industry whose performance, particularly its financial performance, has deteriorated and remained weak during the period of investigation.

For the reasons discussed above, we find that the domestic industry is vulnerable to injury. As discussed below, this finding, combined with our prior findings regarding likely substantial increases in the volume of subject imports and their likely price effects, lead us to determine that the domestic softwood lumber industry is threatened with material injury by reason of subject imports of softwood lumber from Canada that are subsidized and sold at less than fair value.<sup>192</sup>

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2000. Section 129 Report at Table C-1B.

<sup>191</sup>Section 129 Report at Tables 1 and 2.

<sup>192</sup>19 U.S.C. §§ 1671d(b) and 1673d(b).

#### IV. The Causal Relationship

The statute and Agreements require that the Commission determine that the domestic industry is materially injured or threatened with material injury by reason of subject imports.<sup>193 194</sup> In making this determination, the Commission examines “any known factors” other than the dumped and subsidized imports that might be injuring the domestic industry to ensure that it does not improperly attribute injury from other causal factors to the subject imports.<sup>195 196</sup> The Commission is not required to use any

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<sup>193</sup>See 19 U.S.C. §§ 1671d(b)(1) and 1673d(b)(1).

<sup>194</sup>Under Article 3.5 of the Antidumping Agreement and Article 15.5 of the SCM Agreement, the Commission first must demonstrate a causal relationship between the dumped and subsidized imports and the injury or threat of injury to the domestic industry by reason of subject imports. Article 3.5 of the Antidumping Agreement states in relevant part:

It must be demonstrated that the dumped [subsidized] imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped [subsidized] imports and injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. . . .

A similar provision in Article 15.5 of the SCM Agreement applies to subsidized imports.

<sup>195</sup>Article 3.5 of the Antidumping Agreement states in relevant part:

The authorities shall also examine any known factors other than the dumped imports, which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.

The same provision in Article 15.5 of the SCM Agreement applies to subsidized imports. See *European Communities - Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, AB Report, WT/DS219/AB/R, para. 188 (“*EC-Pipe*”).

<sup>196</sup>Similarly, 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.” SAA at 851-852. The Federal Circuit has affirmed in a threat analysis



particular methodology in examining the causal relationship between dumped or subsidized imports and injury, provided that it “does not attribute the injuries of other causal factors to dumped imports.”<sup>197</sup>

Such an analysis, however, only is warranted if an alleged other factor is in fact having, or threatening to have, a causal impact. When upon examination, if the factor is found not to have, or threaten to have, injurious effects on the domestic industry, such a factor is not an “other known factor” and no further consideration or examination of the factor is called for.<sup>198 199</sup> On the other hand, if an alleged other

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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.).

<sup>197</sup>*EC-Pipe*, AB Report, para. 189, *citing to United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, AB Report, WT/DS184/AB/R, para. 224, states:

We underscored in *US-Hot-Rolled Steel*, however, that the *Anti-Dumping Agreement* does not prescribe the *methodology* by which an investigating authority must avoid attributing the injuries of other causal factors to dumped imports. . . . Thus, provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the “causal relationship” between dumped imports and injury.

See also *US-Hot-Rolled Steel*, AB Report, para. 224 (“[W]hat the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made.”).

<sup>198</sup>*EC-Pipe*, AB Report, paras. 178-179:

. . . “the European Communities did examine these factors, and, in light of its findings, did not perceive of them as ‘known’ causal factors.” . . . once the cost of production difference was found by the European Commission to be “minimal”, the factor claimed by Brazil to be “injuring the domestic industry” had effectively been found *not* to exist. As such, there was no “factor” for the European Commission to “examine” further pursuant to Article 3.5.

factor is found to be a known factor (i.e., more than “tangential or minor cause”), our analysis would consider such causal or known factor to ensure that we are not attributing the injury from other sources to subject imports.<sup>200</sup> Such causal factor, while more than a “tangential or minor cause,” still may not independently fully account for any injury or threat of injury.

**A. Likely Substantial Increases in Subject Imports at Depressed Prices Threaten to Injure the Domestic Industry in the Imminent Future**

As discussed above, the evidence demonstrates that the domestic industry is vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance.<sup>201</sup>

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179. We therefore uphold the Panel’s finding, in paragraph 7.362 of the Panel Report, that the difference in cost of production between the Brazilian exporter and the European Communities industry was not a “known factor[] other than the dumped imports which at the same time [was] injuring the domestic industry.”

<sup>199</sup>See Gerald Metals, Inc. v. 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.”); 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.”).

<sup>200</sup>See Nippon Steel Corp., 345 F.3d at 1381 (Fed. Cir. 2003) (“the ‘dumping’ need not be the sole or principal cause of injury. 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.”); Gerald Metals, 132 F.3d at 722 (Fed. Cir. 1997).

<sup>201</sup>In brief, the evidence shows that many performance indicators declined significantly from 1999 to 2000, and then declined slightly or stabilized with relative weak performance from 2000 to 2001. 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. We recognize that the data collected in this Section 129 proceeding show some improvements in the domestic industry’s financial performance in the first quarter of 2002 compared with the first quarter of 2001, but the financial performance was less favorable when compared with the

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 and increasing levels even with the restraining effect of the SLA in place, and with significant increases in volume after expiration of the SLA, will continue to enter the U.S. market at significant levels and are projected to further increase substantially. Prices were weak toward the end of the period of investigation, with prices in the third and fourth quarters of 2001 again at levels as low as they were in 2000. While prices increased in the first quarter of 2002, as consumption temporarily increased, they were still at the low levels reported in 2000 when subject imports were impacting the financial performance of the domestic industry. The likely substantial increases in subject imports will result in excess supply in the U.S. market, putting further downward pressure on prices. Excess supply generally caused the substantial price declines in 2000 that led to the deterioration in the condition of the domestic industry. U.S. producers have brought their production in line with consumption. Canadian producers, however, have excess capacity, and project increased production; the United States is the likely market for this excess production which will result in excess supply in the U.S. market. Thus, we find that subject imports are likely to increase substantially and are entering at prices, particularly at the low levels seen 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 are likely to adversely impact the U.S. industry in the imminent future,

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first quarter of 2000. Financial data for a single quarter, moreover, is not necessarily an accurate indicator of the industry's performance for the entire year. Thus, the evidence, considered in its entirety, shows a domestic industry whose performance, particularly its financial performance, has deteriorated and remained weak during the period of investigation.

unless protective action is taken.

**B. Alleged Other “Known” Factors**

Canadian parties to these investigations alleged that a number of potential other known factors were threatening injury to the domestic industry. We consider whether any of the following alleged potential other factors is an other known or causal factor in the context of our injury and/or threat of injury analysis: (1) the excess supply from the domestic industry itself; (2) third-country or non-subject imports; (3) increases in importation to meet demand in the U.S. market; (4) integration in the North American market; (5) the growth in importance of engineered wood products (‘EWPs’); and (6) constraints on domestic production/insufficient timber supplies in the United States. We discussed these factors as alleged other known factors as the Panel characterized them in its Report. We note, however, that some of these factors (specifically increases in importation to meet demand and market integration) could also be viewed as factors potentially lessening the effect of subject imports rather than as alternative causes of injury.

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

**Excess supply from the domestic industry.** While we find in our present material injury analysis that excess supply from both subject imports and the domestic industry were contributing factors to price declines in 2000 that adversely affected the performance of the domestic industry, 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. We base this finding on evidence regarding domestic production and capacity as well as evidence indicating that the domestic producers have brought their production in line with consumption. Canadian producers, however, have excess capacity, and project increases in production; the likely market for this excess production is the U.S. market. Moreover, the evidence demonstrates that Canadian exports continue to oversupply the U.S. market.

We have relied on a variety of factors in reaching our conclusion that the U.S. industry had restrained its overproduction. 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.<sup>202</sup> Public data indicate that domestic production of softwood lumber steadily declined from a peak of 36,606 mmbf in 1999 to 34,996 mmbf in 2001, a decline of 4.4 percent.<sup>203</sup> The revised U.S. production data collected in this Section 129 proceeding show a similar trend, with a larger decline of 5.5 percent from 36,606 mmbf in 1999 to 34,579 mmbf in 2001.<sup>204</sup> While domestic production in the first quarter of 2002 was 4.9 percent higher than the first quarter of 2001, apparent

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<sup>202</sup>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, with lower coverage than the public data, reported production capacity of 22,847 mmbf in 1999, 24,233 mmbf in 2000, and 24,709 mmbf in 2001. Id. at Table III-7 and C-1. Apparent U.S. consumption increased by 13.5 percent from 1995 to 1999. Id. at Table IV-2.

<sup>203</sup>USITC Pub. 3509 at Tables III-6 and C-1 (public data). On the other hand, domestic producers' questionnaire responses (covering approximately 63 percent of domestic production) indicated an increase of 1.9 percent in production from 21,758 mmbf in 1999 to 22,163 mmbf in 2001. Id. at Tables III-7 and C-1.

<sup>204</sup>INV-BB-138 at Tables III-6 and IV-2.

U.S. consumption was 9.7 percent higher; moreover, domestic production in the first quarter of 2002 was 9.3 percent lower than in the first quarter of 2000.<sup>205</sup> 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 1995-2001;<sup>206</sup> based on revised U.S. production data, domestic capacity utilization was 86.4 percent in 2001.<sup>207</sup>

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.<sup>208</sup> Thus, in 2001, excess Canadian capacity had increased to 5,343 mmbf, which was equivalent to 10 percent of U.S.

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<sup>205</sup>Section 129 Report at Tables III-6B and C-1B. Domestic producers' questionnaire responses in the Section 129 proceeding (covering approximately 60 percent of the domestic production) reported production in the first quarter of 2002 at 8.2 percent higher than first quarter 2001 and 1.4 percent higher than first quarter 2000. *Id.* at Tables III-7B and C-1B.

<sup>206</sup>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.

<sup>207</sup>INV-BB-138 at Tables III-6 and IV-2. Public data for domestic capacity utilization collected in this Section 129 proceeding for first quarter 2000, 2001, and 2002 were 96.1 percent, 83.2 percent and 87.5 percent, respectively. Section 129 Report at Tables III-6B and C-1B. Domestic producers' questionnaire responses reported similar trends in capacity utilization rates: 84.1 percent in first quarter 2002, 78.3 percent in first quarter 2001, and 88.4 percent in first quarter 2000. *Id.* at Tables III-7B and C-1B.

<sup>208</sup>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.

apparent consumption.<sup>209</sup> 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 of 8.9 percent from 2001 to 2003,<sup>210</sup> and a return of capacity utilization to 90.4 percent in 2003.<sup>211 212</sup> Thus, Canadian producers expected to further increase their ability to supply the U.S. softwood lumber market. These increases were projected at the same time that demand in the U.S. market was forecast to remain relatively unchanged or increase only slightly as the economy improved.

We recognize that while production data for the 2000-2001 period (public data) show that both Canadian and U.S. production declined by similar quantities,<sup>213</sup> the evidence also demonstrates that Canadian exports to the U.S. market increased for this period. Moreover, Canadian producers

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<sup>209</sup>USITC Pub. 3509 at Tables VII-1 and C-1.

<sup>210</sup>Canadian producers projected production increases from 21,770 mmbf in 2001 to 23,698 mmbf in 2003. USITC Pub. 3509 at Table VII-2.

<sup>211</sup>USITC Pub. 3509 at Table VII-2.

<sup>212</sup>The revised quarterly data show first quarter 2002 at a lower capacity utilization rate (90 percent) compared with first quarter 2001 (93.1 percent) and first quarter 2000 (97.9 percent). Section 129 Report at Table VII-1B (129). While only accounting for 20 percent of Canadian production, we note that questionnaire responses also show capacity utilization lower at 86.6 percent in first quarter 2002 compared with about 96 percent in both first quarter 2001 and 2000. *Id.* at Table VII-2B.

<sup>213</sup>Section 129 Report at Tables VII-1 and C-1; INV-BB-138 at Table III-6. Based on revised Canadian production data, Canadian production declined by 1,347 mmbf, or by 4.2 percent, from 2000 to 2001; Canadian production was only 1.2 percent lower in 2001 compared with 1999. Section 129 Report at Tables VII-1. Based on revised U.S. production data, U.S. production declined by 1,386 mmbf, or by 3.9 percent from 2000 to 2001; U.S. production was 5.5 percent lower in 2001 compared with 1999. INV-BB-138 at Table III-6.

projected increases in production of 8.9 percent from 2001 to 2003.<sup>214</sup> The first quarter data provide further confirmation that Canadian producers had increasing excess capacity to use to increase exports to the U.S. market. When Canadian consumption declined by 23 percent in the first quarter of 2002 compared with the first quarter of 2001, Canadian producers apparently made some adjustments to production as Canadian production reportedly was 2.6 percent lower, but primarily shifted sales to the U.S. market since subject imports were 14.6 percent higher for the same comparable periods.<sup>215</sup>

Thus, Canadian producers expected to further increase their ability to supply the U.S. softwood lumber market. In addition to the evidence regarding production and exports, evidence from industry analysts also indicated that U.S. production had been curbed at the end of the period of investigation while Canadian imports continued to oversupply the U.S. market.<sup>216</sup>

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<sup>214</sup>USITC Pub. 3509 at Table VII-2.

<sup>215</sup>Section 129 Report at Tables VII-1B and C-1B.

<sup>216</sup>See, e.g., Bank of America, “Wood & Building Products Quarterly,” at 11 (Nov. 2001) (emphasis added) in Petitioners’ Original Posthearing Brief at 2 and Appendix H, Exh. 2 at 11. This report states as follows:

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

We note that while the motivation for Canadian 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. 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.



We have thus considered, in the context of our threat of material injury analysis, the evidence regarding excess domestic supply and find it 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 excess domestic supply in the imminent future.

We considered and assessed the alleged other factors in our Conditions of Competition section of the original Views of the Commission, incorporated by reference here.<sup>217</sup> However, we provide a more detailed discussion for each of these alleged potential other factors.

**Third-country or nonsubject imports.** The evidence demonstrates that there is no basis for allegations that nonsubject imports, which were not an “other known factor” at present, would be an other known 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.<sup>218</sup> We also point out that the average unit values for non-subject imports

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<sup>217</sup>USITC Pub. 3509 at 21-27. Our analysis in Section III. Conditions of Competition of the original Views of the Commission is a distinct section of our opinion and applied to both our Section V. Present Material Injury analysis and our Section VI. Threat of Material Injury analysis.

<sup>218</sup>USITC Pub. 3509 at II-7, n.23 and Tables IV-1 and C-1. The additional evidence gathered in this Section 129 proceeding shows non-subject imports accounting for 3.0 percent of the U.S. market in the first quarter of 2002 compared with 2.2 percent and 1.9 percent in the first quarters of 2001 and 2000, respectively. Section 129 Report at Table C-1B.

were 80 to 90 percent higher than those for subject imports from 1999-2001.<sup>219</sup>

We recognize 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. However, this comparison must be placed in perspective: subject imports are responsible for an enormous volume of imports during the period of investigation, ranging from 17,983 mmbf to 18,483 mmbf and accounting for 33.2 percent to 34.3 percent of U.S. apparent consumption in the 1999-2001 period, compared with higher valued nonsubject imports, which never exceeded 1,378 mmbf or 2.6 percent of apparent domestic consumption.<sup>220</sup> Furthermore, individual country non-subject imports would have been deemed negligible under U.S. law and the WTO Agreements, 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.<sup>221</sup> Finally, imports from Canada were subject to import restraints for most of the period of investigation; nonsubject imports were not restrained. Thus, the less than 3 percent market share held by nonsubject imports in 2001 is not likely to increase in contrast to previously restrained subject imports.

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<sup>219</sup>USITC Pub. 3509 at Table C-1. The average unit values for non-subject imports ranged from \$623.60 to \$712.22 from 1999 to 2001, whereas the average unit values for subject imports ranged from \$323.57 to \$395.72. *Id.*

<sup>220</sup>USITC Pub. 3509 at Tables IV-2 and C-1..

<sup>221</sup>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.”).

The speculative theories proffered by respondents 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. The 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 trade remedies were imposed against Canadian imports.<sup>222</sup> The statute, however, directs us to consider “whether material injury by reason of the [subject] imports would occur unless an order is issued,”<sup>223</sup> not to 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.

**Importation relative to Demand.** The evidence does not demonstrate that likely substantial increases in subject imports will be to meet alleged substantial growth in demand for softwood lumber

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<sup>222</sup>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 share of U.S. imports held in 2001 by European countries was only 2.3 percent of total imports. *Id.* at II-7, n. 23.

<sup>223</sup>19 U.S.C. § 1677(7)(F)(ii).

in the U.S. market and thus would be an other known factor in the imminent future, nor that importation relative to demand would lessen the effect of subject imports.

First, the actual evidence in 2001 shows that the increase in subject imports outstripped demand; imports of softwood lumber from Canada increased by 2.4 percent from 2000 to 2001 and U.S. apparent consumption increased by only 0.2 percent for the same period.<sup>224</sup> Moreover, subject imports after removal of the restraining effect of the SLA were 11.3 percent higher for the April-August 2001 period compared to the same period in 2000, and 4.9 percent for the April-December 2001 period compared to the April-December 2000 period,<sup>225</sup> while apparent U.S. consumption for the entire year was only 0.2 percent.<sup>226</sup> The evidence in this Section 129 proceeding demonstrates that while apparent U.S. consumption for first quarter 2002 increased compared with first quarter 2001, it was at a substantially lower rate, 9.7 percent, than the 14.6 percent increase in subject imports.<sup>227</sup> Moreover, subject imports were 6.2 percent higher in the first quarter of 2002 compared with the first quarter of 2000, while apparent U.S. consumption declined by 2.3 percent for first quarter 2002 compared with first quarter 2000.<sup>228</sup> Thus, the actual increases in subject imports during the period of investigation substantially outstripped demand; similarly, actual data shows that subject imports after expiration of the SLA have increased at a significantly higher rate than any forecasts for increases in

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<sup>224</sup>USITC Pub. 3509 at Table C-1.

<sup>225</sup>Official import statistics.

<sup>226</sup>USITC Report 3509 at Table C-1.

<sup>227</sup>Section 129 Report at Table C-1B (129).

<sup>228</sup>Section 129 Report at Table C-1B (129).

demand for softwood lumber for 2002 and 2003.

The evidence dispels any claims that projected substantial growth in demand for softwood lumber in the imminent future.<sup>229</sup> The record indicates that U.S. apparent consumption was high on a historical basis, but relatively stable or flat during the period of investigation.<sup>230</sup> Forecasts of softwood lumber demand on the record indicated little change or a slight increase in 2002, and then an increase in 2003 as the U.S. economy rebounds from recession. Most producers and importers, in response to Commission questionnaires, indicated that they believed overall demand would remain relatively unchanged until the second half of 2002 or the beginning of 2003, and then would begin to increase as the U.S. economy rebounded from recession.<sup>231</sup> The demand forecasts for softwood lumber from industry analysts are somewhat mixed. However, the more optimistic forecasts do not correlate to

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<sup>229</sup>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. USITC Pub. 3509 at II-3 and Table I-1.

<sup>230</sup>USITC Pub. 3509 at Table C-1; Section 129 Report at Table C-1B. 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. USITC Pub. 3509 at Table IV-2.

<sup>231</sup>USITC Pub. 3509 at II-3-4.

forecasts for softwood lumber's primary end-use, U.S. housing starts.<sup>232 233</sup> Moreover, the forecasts do not correlate to the actual data for 1995 to 2001, where U.S. housing starts (i.e., new residential construction) substantially outpaced softwood lumber demand.<sup>234</sup> For example, RISI projected demand for lumber to increase by 1 percent<sup>235</sup> and demand for housing starts to increase by 4.3 percent for the 2001-2002 period,<sup>236</sup> but projected the opposite correlation – 4 percent growth for lumber demand and 1.8 percent growth for housing starts – for the 2002-2003 period. Industry analyst Clear Vision forecast that demand for softwood lumber from 2001-2002 would increase by 3.7

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<sup>232</sup>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. USITC Pub. 3509 at Table I-1.

<sup>233</sup>Respondents' claims regarding cyclical demand and housing construction cycles is an extension of their claims regarding alleged effects of substantial growth in demand and not a claim that housing construction cycles are about to enter a downturn and be a cause of injury to the domestic industry. In fact, this argument is posited on the opposite result that improvements in demand for softwood lumber derived from demand for new housing will benefit the U.S. industry. Thus, there is no basis that this is an other known factor.

<sup>234</sup>From 1995 to 2001, U.S. housing starts increased by 18.3 percent while increases in apparent domestic consumption for softwood lumber were 13.1 percent. 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.

<sup>235</sup>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. Section 129 Report at F-4 (Table 2); Petitioners' Original Posthearing Brief, Vol. II, Appendix H, Exhibit 28 at 5 (Table 3; CLTA's Original Posthearing Brief, Vol. 2, Tab R at 2.

<sup>236</sup>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. Section 129 Report at F-5 (Table 4); Petitioners' Original Posthearing Brief, Vol. II, Appendix H, Exhibit 28 at 3 (Table 2); CLTA's Original Posthearing Brief, Vol. 2, Tab R at 1.

percent,<sup>237</sup> its forecast for U.S. housing start growth for the same period was 3 percent.<sup>238</sup> But, another industry analyst report, from the Bank of America, projected a slight decline in demand for lumber in 2002 and increases below the 2 percent range in 2003.<sup>239</sup> Thus, the U.S. demand forecasts for softwood lumber in 2002 include a forecast for a slight decline (Bank of America), a 1 percent increase (RISI), and a 3.7 percent increase (Clear Vision).<sup>240</sup> While there was a correlation between actual data for lumber demand and housing starts during the period of investigation, the lack of a correlation between lumber and housing forecasts, and any agreement among forecasters, raised questions about the usefulness of these forecasts.

Moreover, the most recent actual data show 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

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<sup>237</sup>Clear Vision forecast 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. Section 129 Report at F-6 (Table 5); CLTA's Original Prehearing Brief, Vol. 3, Tab 1 at 1 and 3; CLTA's Original Posthearing Brief, Vol. 2, Tab R at 1-3.

<sup>238</sup>Clear Vision forecast 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. Section 129 Report at F-6 (Table 6); CLTA's Original Prehearing Brief, Vol. 3, Tab 1 at 1 and 2; CLTA's Original Posthearing Brief, Vol. 2, Tab R at 1-3.

<sup>239</sup>Bank of America, "Wood & Building Products Quarterly," at 12 (Nov. 2001) (Bank of America projected "U.S. consumption [for lumber] to decline by a little less than 1% next year [2002] . . . consumption growth should remain below the 2% range in those two years [2003 and 2004]") in Petitioners' Original Posthearing Brief at 2 and Appendix H, Exh. 2 at 11.

<sup>240</sup>Subject imports after the expiration of the SLA, on the other hand, were higher by 11.3 percent in April-August 2001, 4.9 percent in April-December 2001, and 14.6 percent in the first quarter of 2002 than the comparable period in the prior year.

by 10.2 percent in March 2002.<sup>241</sup> This sharp decline in housing starts shows that the improvements in demand during the mild winter of 2001-2002 were not sustainable.<sup>242</sup>

When this evidence is considered together with the mixed evidence regarding forecasts for demand and U.S. housing starts and questionnaire responses, there is substantial evidence to support our finding that demand is forecast to remain relatively unchanged or flat in 2002 and then begin to increase in 2003 as the U.S. economy rebounds from recession. However, demand in the U.S. market for softwood lumber will remain at a high absolute level of consumption and will continue to make the U.S. market a very attractive, and necessary, one for Canadian producers (as the U.S. market has consistently accounted for about 60- 65 percent of Canadian production). Nevertheless, the evidence does not support finding that there will be substantial growth in demand that would eclipse the likely substantial increases in subject imports.

We have thus considered, in the context of our threat of material injury analysis, the evidence regarding the likely substantial increases in subject imports relative to forecasts for growth in demand. We find demand not likely to be an other factor potentially causing injury to the domestic industry in the imminent future, nor would it lessen the effect of subject imports. Thus, there is no basis to examine whether any injury can be attributed to alleged increases in demand in the imminent future.

**Integration of North American Softwood Lumber Industry.** The evidence demonstrates that there is no basis for allegations that the integration of the North American softwood lumber industry

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<sup>241</sup>Section 129 Report at Table 2.

<sup>242</sup>USITC Pub. 3509 at II-3-4, n.10. Coalition's Posthearing Brief at 40-42; Coalition's Posthearing Brief at Appendix C-5 - C-7 and C-22 - C-25.



was an “other known factor” at present or would be an other known factor in the imminent future, nor that integration would lessen the effect of subject imports. No evidence whatsoever has been proffered to support speculative assertions that integrated firms will not harm their related companies.<sup>243</sup>

Furthermore, such claims about related firms says nothing at all about the impact of the integrated companies’ operations on the remainder of the U.S. industry or on the industry as a whole, which is the required focus of the injury analysis.

Moreover, this integration is not new. There is no evidence that it would have a different effect in the future than during the period of investigation, when, with integration in place, subject import volumes were significant and subject imports had some adverse price effects. The Commission conducted a detailed analysis of the relationship between various integrated firms in its related parties analysis in its original investigation, as incorporated here.<sup>244</sup> The Commission 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.<sup>245 246</sup>

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<sup>243</sup>CLTA’s Original Prehearing Brief at 30-32.

<sup>244</sup>USITC Pub. 3509 at 16-19.

<sup>245</sup>See USITC Pub. 3509 at 16-19; Conference Transcript at 108 (CLTA).

<sup>246</sup>Canadian exporters also made allegations in the original investigations about the effect of the “Big Box” retailers, such as The Home Depot and Lowe’s, on U.S. consumption patterns and purchases of imports. These allegations are not supported by the evidence, most of it confidential, presented to the Commission. USITC Report at II-8 Dealers/Builders’ Original Prehearing Brief at Exhs. 2, 3, 4, 6, 8, 9, 11, 13, 14 15, 16, 17, 21, and 23; Petitioners’ Original Posthearing Brief at 5-6. In addition, there is evidence, including from representatives of some of the “Big Boxes,” that regional preferences reflect nothing more than the local availability of species.

We have thus considered, in the context of our threat of material injury analysis, the evidence regarding integration of the North American industry and find it not likely to be an other factor potentially causing injury to the domestic industry in the imminent future, nor that it would lessen the effect of subject imports. Thus, there is no basis to examine whether any injury can be attributed to such integration 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 known factor at present, would be an other known factor in the imminent future. We consider whether substitute products for softwood lumber have, or are likely to have, an effect 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.<sup>247</sup> While these substitute products may have 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.<sup>248</sup> We recognize that use of EWPs has gradually increased and will likely continue to increase, but the evidence shows it will continue to account for a relatively small share of the market. The evidence demonstrates that use of EWPs “constitutes 5 % of North American softwood dimension/structural lumber (sawnwood)

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<sup>247</sup>USITC Pub. 3509 at II-4.

<sup>248</sup>USITC Pub. 3509 at II-4.

consumption.”<sup>249</sup> <sup>250</sup> Furthermore, increased use of EWPs does not entirely “replace” softwood lumber because softwood lumber is an input into some EWPs.<sup>251</sup> Rather it may shift the demand for softwood lumber from larger to smaller dimensions.<sup>252</sup>

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

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<sup>249</sup>CLTA’s Original 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).

<sup>250</sup>Canadian exporters (CLTA) estimated that EWPs account for 5 percent of this U.S. market. CLTA’s Original 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’ Original Prehearing Brief at 40-44; Petitioners’ Original Posthearing Brief at Appendix A-28 - A-33.

<sup>251</sup>CLTA’s Original 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 ‘weed species’ such as aspen, birch, red maple and sweetgum, into EWPs with superior performance properties.”).

<sup>252</sup>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. Original 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’ Original Posthearing Brief at Appendix A-29-A-31.

or insufficient timber supplies, which were not an other known factor at present, would be an other known factor in the imminent future. We note at the outset 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,<sup>253</sup> 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 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.<sup>254</sup> 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.<sup>255</sup> 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 between 1995 and 2001.<sup>256</sup>

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<sup>253</sup>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.

<sup>254</sup>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.

<sup>255</sup>USITC Pub. 3509 at Tables III-6, III-7, and C-1.

<sup>256</sup>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

Arguments about the United State's self-sufficiency in the production of softwood lumber are partly based on the simplistic theory that growth in demand is likely to improve the U.S. industry's financial performance and insulate it from any further adverse effects from additional subject imports from Canada. But, as discussed above, the evidence does not indicate that demand is likely to increase in the manner Canadian parties suggest or to have the effects that they posit. Respondents' arguments ignore the likely price effects of increased subject imports in a market where demand is either static or improving slightly. In addition, 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.

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 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 alleged constraints on domestic production in the imminent future.

### **Conclusion**

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.<sup>257</sup>

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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.

<sup>257</sup>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

Softwood Lumber: Framing Lumber Composite Price by Quarters<sup>1</sup>

<b>Period</b>	<b>\$/mbf</b>
<b>1999</b>	
Jan.-Mar.	<b>384</b>
Apr.-June	<b>425</b>
July-Sept.	<b>424</b>
Oct.-Dec.	<b>375</b>
<b>2000</b>	
Jan.-Mar.	<b>384</b>
Apr.-June	<b>337</b>
July-Sept.	<b>294</b>
Oct.-Dec.	<b>277</b>
<b>2001</b>	
Jan.-Mar.	<b>284</b>
Apr.-June	<b>364</b>
July-Sept.	<b>322</b>
Oct.-Dec.	<b>279</b>
<b>2002</b>	
Jan.-Mar.	<b>318</b>

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any suspension of liquidation of entries of such merchandise. 19 U.S.C. §§ 1671d(b)(4)(B) and 1673d(b)(4)(B).

<sup>1</sup>Source: Section 129 Report at Tables V-1 and V-2. The framing composite price indexes include prices of softwood lumber encompassing four grades, two dimensions, and six species (kiln-dried fir/larch, hem fir, ESPF, SYP, WSPF, and green Douglas fir).

**Exhibit 2**

Home Builders and Purchasers Break-Out by Region of Lumber Species Used for 4 Applications<sup>1</sup>

<b>Region</b>	<b>Floor Joist</b>	<b>Wall/Framing</b>	<b>Headers</b>	<b>Trusses</b>
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

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<sup>1</sup>Source: Commission Hearing Transcript at 185-190 and 204-207.





**ADDITIONAL AND DISSENTING VIEWS OF  
COMMISSIONER DANIEL R. PEARSON**

**I. Introduction**

I concur with the determination by my fellow commissioners that the domestic industry producing softwood lumber is not materially injured by reason of subject imports from Canada found to be subsidized and sold in the United States at less than fair value. In reaching this determination, I adopt the reasoning and conclusions of my fellow commissioners on the issues of domestic like product, domestic industry, cross-cumulation, the Canadian Maritime Provinces, and the conditions of competition.<sup>2</sup> I find, however, that the domestic industry producing softwood lumber is not threatened with material injury.

**II. Data issues**

The Commission gathered extensive additional information during this investigation. Not all of the data presented in the Commission staff report were available at the time of the Commission's original final determination in May 2002. Parties have presented conflicting arguments to support their contentions that the Commission may, or may not, use data not available or not on the record at the time of its original determination.<sup>3</sup> As noted in the majority views, no clear law or precedent prevents the Commission from gathering or relying upon such data. In reaching my determination in this investigation, I have chosen to rely only on data that were available at the time of the Commission's

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<sup>2</sup>In other words, I concur with, and adopt, sections I.-V. of the Views of the Commission in *Softwood Lumber from Canada*, Inv. Nos. 701-TA-414 and 731-TA-928 (Final), USITC Pub. 3509 (May 2002).

<sup>3</sup>Respondents have also argued that the Commission lacked the authority to reopen the record and to gather additional data. As noted in the views of my fellow commissioners, *infra*, U.S. law leaves this decision to the Commission's discretion.

original determination, even if not on the record at that time. As the following makes clear, however, I would have reached the same determination had I relied upon the additional information gathered in this investigation.

### **III. The domestic industry is not threatened with material injury by reason of subject imports**

Section 771(7)(F) of the Act directs the Commission to consider 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.”<sup>4</sup> 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.<sup>5</sup> The Commission must consider, in addition to other relevant economic factors, the following statutory factors in its threat analysis:

(I) if a countervailable subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement) and whether imports of the subject merchandise are likely to increase,

(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,

(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,

(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

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<sup>4</sup>19 U.S.C. § 1677(7)(F)(ii).

<sup>5</sup>19 U.S.C. § 1677(7)(F)(ii).

demand for further imports,

(V) inventories of the subject merchandise,

(VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products,

(VII) in any investigation under this subtitle which involves imports of both a raw agricultural product (within the meaning of paragraph (4)(E)(iv)) and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission under section 1671d(b)(1) or 1673d(b)(1) of this title with respect to either the raw agricultural product or the processed agricultural product (but not both),

(VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

(IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).<sup>6</sup>

In this investigation, factor VI was not addressed by the parties and does not appear to be an issue; factor VII is inapplicable because these investigations do not involve imports of both raw and processed agricultural products. In addition, no dumping findings or antidumping remedies against softwood lumber from Canada in other markets have been alleged.

*The nature of the subsidies.* Commerce identified numerous programs that conferred countervailable subsidies to producers and exporters of softwood lumber in Canada. In particular, stumpage programs exist in the provinces of Quebec, British Columbia, Ontario, Alberta, Manitoba, and Saskatchewan.<sup>7</sup> These stumpage programs adjust stumpage costs to changes in market prices.

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<sup>6</sup>19 U.S.C. § 1677(7)(F)(i).

<sup>7</sup>USITC Pub. 3509 at 39 n.246.

When prices are rising, these stumpage programs would be expected to have modest effects on supply of softwood lumber from Canada or shipments to the U.S. market. In times of falling prices, however, these stumpage programs interfere with market adjustments. In a free market, owners of raw timber stands may opt to remove their goods from the market when prices fall, in hopes of gaining a higher price in the future. The reduction in supply will then slow the fall in prices and hasten market adjustments. With the stumpage programs, softwood producers in Canada will tend to overproduce in times of falling prices or slackening demand. The subsidies provided to producers in Canada suggest that, in times of declining demand, adjustment to market pressures will fall disproportionately on the U.S. industry, which must face market pressures both for raw materials and for sales of its own products.<sup>8</sup> For example, apparent consumption in Canada dropped sharply between 2000 and 2001.<sup>9</sup> Production in Canada decreased, but by a smaller margin, and this difference was directed to the U.S. market.<sup>10</sup> In 2001, apparent U.S. domestic consumption was essentially stagnant, increasing by less than 120 mmbf, or 0.2 percent. Shipments of domestically produced softwood lumber declined by nearly 500 mmbf, down 1.7 percent from 2000. But subject imports from Canada increased by over 400 mmbf, or 2.4 percent.<sup>11</sup>

Other policies in Canada, such as the annual allowable cut requirements, which require firms to “use or lose” rights to harvest timber, may also introduce some distortion into the U.S. market.<sup>12</sup> These programs will also tend to discourage market-driven reductions in production, and, like the stumpage

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<sup>8</sup>USITC Pub. 3509 at Table VII-1.

<sup>9</sup>USITC Pub. 3509 at Table VII-1.

<sup>10</sup>USITC Pub. 3509 at Tables VII-1 and VII-2.

<sup>11</sup>USITC Pub. 3509 at Table C-1.

<sup>12</sup>USITC Pub. 3509 at 40-41 and n.257.

programs, are far more likely to lead to injurious levels of subject imports from Canada at times of weak or falling demand.<sup>13</sup> When demand is increasing, as was forecast for 2002 and 2003, the distorting effects of the stumpage and other subsidy programs will be significantly lessened.

*Existing capacity and imminent capacity increases.* Between 1999 and 2001 production capacity in Canada increased by a scant 2.2 percent, or 700 mmbf. Only 100 mmbf of that increase occurred between 2000 and 2001. Modest increases in production capacity in Canada have been the norm since before the imposition of the SLA in 1996. Between 1995 and 2001, production capacity in Canada increased by 3,100 mmbf, or by 10.4 percent. During that same time period, apparent domestic consumption in the U.S. increased by 13.1 percent; apparent consumption in Canada increased by 13.8 percent.<sup>14</sup>

Capacity utilization dropped notably in Canada in 2001, at only 83.7 percent for the year. However, the normal pattern has been a relatively stable relationship between production capacity and capacity utilization. Between 1995 and 1998, a period including the imposition of the SLA, capacity utilization varied by only a few tenths of a percentage point. Capacity utilization was above this norm in 1999 and 2000, despite modest increases in capacity, before dropping back down in 2001.<sup>15</sup>

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<sup>13</sup>Canadian respondents have argued that the stumpage programs do not lead to increased production or increased exports to the U.S. and have produced a study to support these claims. *See* Government of Canada posthearing brief (129 investigation) at Responses to Questions, pp. 22-26; CLTA prehearing brief (final investigation), Vol. 2 at App. D. After reviewing this study, I join with my fellow commissioners in not finding it persuasive, particularly in regard to the short-term supply and demand adjustments that must be considered when deciding whether an industry is threatened with material injury. USITC Pub. 3509 at 39 n.245.

<sup>14</sup>USITC Pub. 3509 at Tables VII-1 (capacity in Canada), IV-2 (consumption in U.S.), and VII-7 (consumption in Canada).

<sup>15</sup>USITC Pub. 3509 at Table VII-1.

Additional increases in capacity are forecast for 2002 and 2003. Again, however, these increases are modest, and questionnaire respondents reported that capacity in 2003 would be less than 1.6 percent higher than in 2001.<sup>16</sup> Assuming historical rates of capacity utilization, and assuming that export orientation exceeds the levels projected by respondents, subject imports are likely to remain at levels very close to those recorded between 1999 and 2001. Projections for capacity increases, considered with long-standing historical rates of capacity utilization and export orientation, do not suggest the likelihood of substantially increased imports of the subject merchandise into the United States in the imminent future.

The data gathered during the advisory phase of this investigation bear out these conclusions. Capacity in the first two months of 2002 was 5,510 mmbf, up less than one percent from the same two-month period in 2001. Capacity utilization, at 89.2 percent, was again within the historical range.<sup>17</sup> The newer data suggest that additional substantial increases in capacity in Canada are unlikely.

*A significant rate of increase in volume or market penetration.* The volume of subject imports increased by 2.8 percent between 1999 and 2001.<sup>18</sup> This increase occurred at a time when apparent domestic consumption declined, so even this small increase in volume led to an increase in market penetration. But the increase in market penetration was also modest. Subject imports accounted for 34.3 percent in 2001, up from 33.2 percent in 1999.<sup>19</sup> Subject import volume as a share of apparent domestic consumption has remained fairly constant over a six-year period. The SLA might

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<sup>16</sup>USITC Pub. 3509 at Table VII-2.

<sup>17</sup>Calculated from CR at Table VII-1B(129).

<sup>18</sup>USITC Pub. 3509 at Table C-1.

<sup>19</sup>USITC Pub. 3509 at Table C-1.

explain this consistency, but the effects of the SLA are likely to have been quite modest. In 1995, the last full year before the imposition of the SLA, subject imports accounted for 35.7 percent of apparent domestic consumption. The SLA took effect in 1996, and subject imports accounted for 35.9 percent of apparent domestic consumption that year. In subsequent years, the market share varied very little, regardless of changes in apparent domestic consumption or production capacity in Canada.<sup>20</sup>

Subject imports did not adjust as quickly to the slowing of demand in the U.S. market as did the domestic industry, and subject import volume increased modestly in 2001.<sup>21</sup> The market share remained below the 1996 level, another year in which the SLA was only in effect for a portion of the year. I agree with my fellow commissioners that, as subject imports account for a third of the market, the volume of those subject imports is significant. But given the long history of consistent presence in the U.S. market and the modest increase registered over the POI, I do not find that either the volume of subject imports or the market penetration of those imports has increased at a significant rate so as to indicate the likelihood of a substantial increase in subject imports.

In making this finding, I am mindful of increases in subject imports during the months of April-August in 2001, after the SLA had expired but before the suspension of liquidation. During that time period, subject import volume was 11.3 percent higher than in the corresponding period of the prior year.<sup>22</sup> But I do not find that this brief period outweighs the long history of steady participation in the U.S. market by subject imports, stretching back to the period before the imposition of the SLA. This petition was filed immediately after the expiration of the SLA, in April 2001. Even in that brief window

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<sup>20</sup>USITC Pub. 3509 at Table IV-2.

<sup>21</sup>USITC Pub. 3509 at Table IV-2.

<sup>22</sup>USITC Pub. 3509 at 42 n.269.

between April and August, market participants had to be aware that further restrictions were both possible and imminent.

Subject imports in the first two months of 2002 were 7.0 percent higher than in the first two months of 2001, and up 3.4 percent from the same period in 2000.<sup>23</sup> Subject import volume increased at a faster rate than did apparent consumption or shipments of the domestic like product.<sup>24</sup> Like the April-August period of 2001, however, the first quarter of 2002 represented a period in between remedies, when the preliminary countervailing duty had expired but parties on both sides expected final, and high, duties to be imposed in the near future. The increase in imports in the first quarter, like the increase in April-August 2001, better reflects the commercial pressures to import as much as possible prior to the initiation of new trade restrictions rather than the volume of subject imports likely under normal conditions.

*Prices likely to have a significant depressing or suppressing effect.* I agree with my fellow commissioners that subject imports did not have a significant price effect during the period of investigation.<sup>25</sup> Nor do I think the record supports a finding that subject imports will enter at prices likely to lead to significant price suppression or depression in the imminent future.

Between 1998 and 2000 the volume of subject imports was essentially flat, varying by less than one-half of a percent over that time period. Market penetration was also relatively stable.<sup>26</sup> Prices for

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<sup>23</sup>Calculated from CR at Table IV-2B(129). Apparent domestic consumption was 6.5 percent higher in the first two months of 2002 compared to the same period in 2001, while shipments of the domestic like product were 5.0 percent higher. *Id.*

<sup>24</sup>CR at Table C-1B(129).

<sup>25</sup>USITC Pub. 3509 at 35.

<sup>26</sup>USITC Pub. 3509 at Table IV-2.



products produced primarily in the U.S. rose in 1999 but declined sharply in 2000.<sup>27</sup> By the fourth quarter of 2000, the framing lumber composite was down nearly 30 points over the same quarter of 1999, and as were the indices for Engelmann spruce/lodgepole pine, Douglas fir, and southern yellow pine.<sup>28</sup> Yet the change in subject import volume in those years amounted to a decrease of 56 mmbf between 1998 and 1999 and an increase of 69 mmbf between 1999 and 2000.<sup>29</sup> Nothing in the record suggests that these extremely modest shifts in volume could have exerted such influence on price.

The record also suggests that the SLA exerted little influence on price. Price indices for Engelmann spruce/lodgepole pine and Douglas fir peaked in the second and third quarters of 1996, immediately after the imposition of the SLA. But prices began drifting down soon after, and, except for the third quarter of 1999, never reached those peaks again. The price index for southern yellow pine did not peak until the fourth quarter of 1996, but it too showed a fairly rapid adjustment and subsequent decline.<sup>30</sup> The behavior of these indices suggest that the price effects of the SLA were not lasting, and further suggest that the expiration of the SLA would not lead to significant or lasting price changes, just as the expiration would not likely lead to significant changes in volume.

This investigation was instituted in April 2001. The brief period of untrammelled imports in April-August 2001 might have been expected to pull down prices, but the Commission's preliminary affirmative finding, along with the suspension of liquidation and the expectation of further remedies,

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<sup>27</sup>USITC Pub. 3509 at Table V-1.

<sup>28</sup>USITC Pub. 3509 at Table V-1.

<sup>29</sup>USITC Pub. 3509 at Table IV-2.

<sup>30</sup>USITC Pub. 3509 at Table V-1.

ought to have restricted import volume and buoyed domestic prices after that. But the record does not bear out these expectations. Rather, the price indices spiked in the second quarter but dropped sharply thereafter. The behavior of these price indices suggest that, especially in 2001, subject imports were not exerting a significant price suppressing or depressing influence on the price for the domestic like product. Nor is there any evidence on the record to suggest that subject imports would have a significant price suppressing or depressing effect in the imminent future, especially given that significant increases in volume are also unlikely.

The data gathered in the advisory phase of this investigation bear out these conclusions. Every measure available indicates that prices for the domestic like product increased substantially in the first quarter. The framing lumber composite index, as well as the pricing indices for Engelmann spruce/lodgepole pine, Douglas fir, and southern yellow pine all rose in the first quarter of 2002, and all were higher than in either the preceding quarter or the corresponding quarter in 2001.<sup>31</sup> The unit value for net sales by domestic producers was up 6.1 percent over the corresponding quarter in 2001.<sup>32</sup> These increases occurred despite increases in the volume of subject imports that actually outstripped the increase in apparent domestic consumption or shipments of the domestic like product.<sup>33</sup>

*Inventories.* Producers in Canada responding to the Commission's questionnaire reported inventories of 2,221 mmbf at the end of 2001.<sup>34</sup> Those inventories were equivalent to 12.0 percent of

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<sup>31</sup>CR at Table V-1.

<sup>32</sup>CR at Table C-1B(129).

<sup>33</sup>CR at Table C-1B(129). The average unit value for subject imports actually increased more from the first quarter of 2001 to the first quarter of 2002 than average unit values for the domestic like product. *Id.*

<sup>34</sup>USITC Pub. 3509 at Table VII-2.

imports from Canada in 2001 and 4.1 percent of U.S. apparent domestic consumption.<sup>35</sup> However, the inventory level had been relatively stable during the POI, at 2,154 mmbf in 1999 and 2,410 mmbf in 2000; in those years, exports by reporting producers were 13,021 and 13,041 mmbf.<sup>36</sup> In the past, inventory levels similar to those on hand at the end of 2001 had not led to significant changes in imports of the subject imports. Inventory at the end of 2001 was well within the range of prior years and not likely to lead to significant increases in the volume of subject imports.

*Actual and potential negative effects on the domestic industry.* There is no question that the condition of the domestic industry deteriorated in 2000 and 2001. In 1999, only 7 of 73 firms reported net losses; in 2001, 46 did.<sup>37</sup> The unit value of trade sales declined sharply in 2000 and again, though more modestly, in 2001. Reductions in the costs of goods sold were not sufficient to offset these losses in revenue, and operating income declined in 2000 and again in 2001.<sup>38</sup> Capital expenditures dropped significantly in 2001, as did research and development expenditures, suggesting the industry could face difficulties in maintaining productivity and competitiveness unless its condition improved in the near future.<sup>39</sup>

The condition of the industry in 2001, combined with the nature of the subsidies affecting production in Canada, indicate the domestic industry would be vulnerable to injury by reason of subject imports if demand continued to weaken. Falling prices would fail to discourage production, and thus exports, by producers in Canada, and adjustment would fall disproportionately on the domestic

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<sup>35</sup>USITC Pub. 3509 at Tables IV-2 and VII-2.

<sup>36</sup>USITC Pub. 3509 at Table VII-2.

<sup>37</sup>USITC Pub. 3509 at Table VI-1.

<sup>38</sup>USITC Pub. 3509 at Table C-1.

<sup>39</sup>USITC Pub. 3509 at Table VI-11.

industry. This can be seen somewhat in 2001, when net sales of the domestic like product stagnated, as did apparent domestic consumption, but subject imports increased.<sup>40</sup>

However, expectations at the time of the Commission's original determination were for a modest increase in demand in 2002, followed by a more robust expansion in 2003.<sup>41</sup> As noted above, subject imports are not increasing at a substantial rate, or entering at prices likely to have significant price suppressing or depressing effects. A modest recovery in demand, combined with modest increases in subject imports, should allow for a recovery in pricing and in the domestic industry's condition. In 1999, apparent consumption increased by less than four percent, subject imports were essentially unchanged, and prices for the domestic like product generally increased.<sup>42</sup> The record suggests a similar pattern for the imminent future.

The data gathered during the advisory phase of this investigation bear out these conclusions. Apparent domestic consumption increased, as did shipments of the domestic like product and prices. These increases led to notable improvements in the condition of the domestic industry. Capacity utilization rates for questionnaire respondents rose from 78.3 percent in the first quarter of 2001 to 84.1 percent in the first quarter of 2002. Productivity rose 10.5 percent. The cost of goods sold declined by 12.0 percent. Operating losses in the first quarter of 2001 were close to \$43 million; for the first quarter of 2002, operating income was \$104.7 million. Operating losses in the first quarter of 2001 were equivalent to 2.8 percent of sales; in the first quarter of 2002 operating income was equivalent to

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<sup>40</sup>USITC Pub. 3509 at Table C-1.

<sup>41</sup>Petitioner's posthearing brief at Exhibit 28, p.5 (increases of one percent and four percent in 2002 and 2003, respectively); CLTA posthearing brief at Tab R pp. 2-3.

<sup>42</sup>USITC Pub. 3509 at Tables IV-2 and V-1.

6.1 percent of sales. In the first quarter of 2001, 44 of 56 responding firms reported losses, while only 21 of 56 did so in the first quarter of 2002.<sup>43</sup> In the first quarter of 2002, the domestic industry appeared neither injured nor particularly vulnerable.

### **CONCLUSION**

For the reasons outlined above, I determine that the domestic industry producing softwood lumber is neither materially injured nor threatened with material injury by reason of subject imports from Canada.

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<sup>43</sup>CR at Table VI-1B(129).