

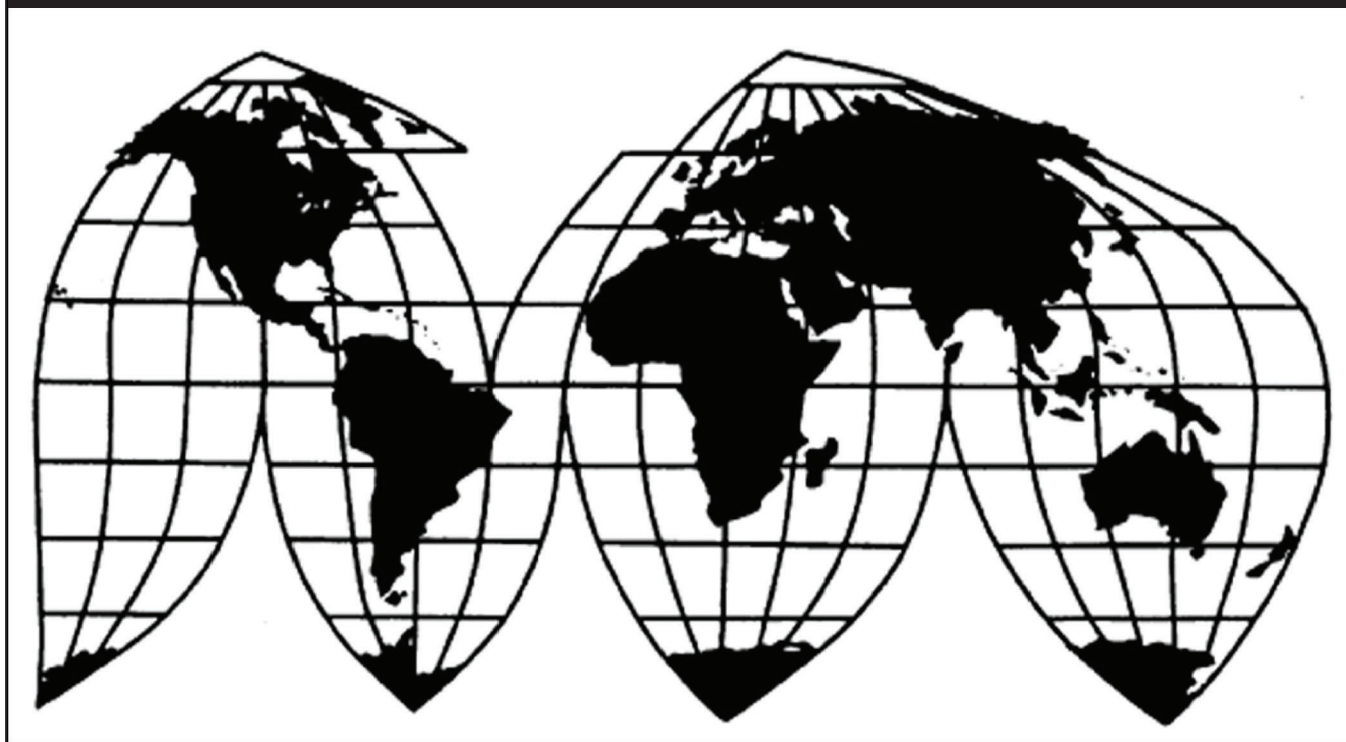
Softwood Lumber from Canada

Investigation Nos. 701-TA-566 and 731-TA-1342 (Final) (Remand)

Publication 5010

December 2019

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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Views of the Commission

On September 4, 2019, a NAFTA Chapter 19 Binational Panel issued an interim decision and order¹ concerning the Panel's review of the Commission's unanimous final affirmative determinations in *Softwood Lumber Products from Canada*.² While affirming the Commission's determinations on some issues, the Panel remanded certain aspects of the Commission's injury analysis for further consideration and explanation. Upon consideration of the remand order, as discussed below, the Commission again determines that an industry in the United States is materially injured by reason of imports of softwood lumber from Canada found by the U.S. Department of Commerce ("Commerce") to be sold in the United States at less than fair value and to be subsidized by the government of Canada.

I. Background

On December 7, 2017, the Commission unanimously determined that an industry in the United States was materially injured by reason of imports from Canada that Commerce found to be dumped and subsidized. A number of respondents timely filed requests for a NAFTA Panel Review of the Commission's final injury determinations with respect to softwood lumber from Canada.³ On September 4, 2019 the Panel issued its interim decision and order, in which it remanded the Commission's findings concerning certain aspects of conditions of competition (*i.e.*, business cycle and substitutability), post-petition data, subject import volume, and price effects, but affirmed the Commission's findings on the other challenged issues it addressed.⁴

¹ *Softwood Lumber from Canada: Final Affirmative Injury Determinations*, Secretariat File No. USA-CDA-2018-1904-03, Interim Decision and Order of the Panel, issued September 4, 2019 ("Panel Decision"). All citations herein are to the Non-Proprietary Version of the Panel Decision.

² *Softwood Lumber Products from Canada*, Inv. Nos. 701-TA-566 and 731-TA-1342, USITC Pub. 4749 (Dec. 2017) (Final).

³ See 19 U.S.C. § 1516a(g)(2). The NAFTA Complainants consist of the Government of Canada, Government of Alberta, Government of British Columbia, Government of Ontario, Government of Québec, Alberta Softwood Lumber Trade Council ("ASLTC"), British Columbia Lumber Trade Council ("BCLTC"), Canfor Corporation ("Canfor"), J.D. Irving Limited ("J.D. Irving"), and West Fraser Mills Ltd. ("West Fraser") (collectively "Canadian Parties"); Western Forest Products Inc. ("WFP"); Resolute FP Canada Inc. ("Resolute"); and the Conseil de l'industrie forestière du Québec ("CQ") and the Ontario Forest Industries Association ("OFIA") (CQ and OFIA collectively referred to as "Central Canada").

⁴ Panel Decision at 115.

On September 23, 2019, the Commission issued a notice, published in the Federal Register, of its remand proceedings.⁵ In the notice, the Commission stated that it was not reopening the record, and was permitting the parties to file comments by October 15, 2019, concerning how the Commission could best comply with the Panel’s remand instructions based solely on the information in the Commission’s record. The Commission received three sets of comments, one from the petitioner, the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (“Coalition”),⁶ another from the Canadian Parties, and a separate submission filed by respondent/NAFTA Complainant Resolute. In addition to considering these comments, we have relied on the entire underlying factual record developed in the original Commission proceedings, as well as submissions made by parties in the original proceedings.⁷

II. Material Injury by Reason of Subject Imports

Except for the specific issues on which the Panel remanded, it affirmed the Commission in all other respects and we adopt our original determinations on those affirmed issues in their entirety.⁸ We also incorporate our prior findings, analyses, and conclusions set out in the Original Views on the conditions of competition (*i.e.*, business cycle and substitutability), post-petition data, subject import volume, and price effects, as supplemented and further explained or clarified below in response to the Panel’s instructions.

⁵ *Softwood Lumber from Canada*, 84 Fed. Reg. 51175 (Sept. 27, 2019).

⁶ The Coalition is an ad hoc association whose members are the U.S. Lumber Coalition, Inc.; Collum’s Lumber Products, L.L.C.; Hankins, Inc.; PotlatchDeltic; Rex Lumber Company; Seneca Sawmill Company; Stimson Lumber Company; Swanson Group; Weyerhaeuser Company; Carpenters Industrial Council; Giustina Land and Timber Company; and Sullivan Forestry Consultants, Inc.

⁷ Before the Commission, a group of Canadian respondents submitted joint submissions. These “Joint Respondents” largely overlap with the “Canadian Parties” participating in the NAFTA appeal. Accordingly, for ease of reference, we refer to both groups as Joint Respondents.

⁸ Commissioners Karpel, Kearns, and Stayin were not members of the Commission at the time of the original investigations, and they did not participate in those determinations. They have reviewed *de novo* the record from the original determinations. For purposes of these remand proceedings, in addition to joining in full these Remand Views, they have adopted all findings from the Original Views and determinations that have not been modified herein.

A. Conditions of Competition and the Business Cycle

1. Demand Considerations

In the original determinations, the Commission observed that demand for softwood lumber, which increased during the January 2014 through June 2017 period of investigation (“POI”), was derived from demand for its end uses such as residential construction activity for new home construction and repairs and renovations on existing homes, nonresidential construction, and non-construction uses.⁹ It found that these end uses of softwood lumber were affected by conditions of competition such as the general strength of the overall economy, cyclical trends in the housing market, and seasonality of housing and remodeling starts.¹⁰ It noted that the parties agreed that the primary indicator of demand for softwood lumber was U.S. housing starts. It observed that housing starts had decreased substantially as a result of the recession of 2008-2009, but then slowly and erratically improved from 2010 to 2012, and then steadily increased overall during the POI, with total units after 2015 surpassing 2008 levels.¹¹

The Panel, despite recognizing that the Commission explicitly acknowledged the existence of business cycles and the negative impact of the Great Recession of 2008-2009 on housing starts, found that the Commission did not provide any indication that it accounted for the multi-year boom-and-bust business cycles as acknowledged by both the Coalition and the Canadian Parties. In this regard, the Panel found that the Commission based its understanding of the business cycles exclusively on questionnaire responses, which in large part referred only to seasonal fluctuations, and that the Commission failed to address the evidence on the record that ran contrary to its conclusion. The Panel found that, as a result, the Commission did not adequately establish the context required for its injury analysis to consider the relevant economic factors “within the context of the business cycle and conditions of competition that are distinctive to the industry.” The Panel, therefore, remanded this issue to the Commission and directed it to reconsider the record evidence in relation to the business cycle(s) distinctive to the U.S. lumber industry and to apply its findings in its injury analysis.¹²

As in the Original Views, we find that demand for softwood lumber is derived primarily from demand for residential construction activity for new home construction, residential

⁹ Original Confidential Views at 39-41 (CD582).

¹⁰ Original Confidential Views at 39 (CD582).

¹¹ Original Confidential Views at 40 (CD582).

¹² Panel Decision at 48-49.

construction activity for repairs and renovations on existing homes, nonresidential construction, and non-construction uses. These end-use demands are affected by the general strength of the overall U.S. economy, cyclical trends in the housing market, and seasonality of housing and remodeling starts. Consequently, we find that the softwood lumber market is subject to both an annual business cycle (reflecting the seasonality of the housing and remodeling markets),¹³ and a larger macro-economic cycle as discussed by the parties.¹⁴ Specifically, the parties state that the softwood lumber market responds to multi-year boom-and-bust cycles of the housing market.¹⁵

Regarding the larger macro-economic business cycle, we find that it began when total housing starts decreased substantially during the 2008-2009 recession and continued through 2017 as housing starts increased steadily after the recession, with total units in 2015 surpassing 2008 levels.¹⁶ The POI for these investigations thus covered a period during which there was an uptick in demand and growth. The vast majority of U.S. producers, importers, and purchasers corroborate that U.S. demand for softwood lumber increased since January 1, 2014 and that this increase was principally due to the continued recovery of the housing and repair/remodeling markets.¹⁷

¹³ Confidential Report (“CR”) at II-15 (CD564).

¹⁴ CR at II-16-17, Figure II-1 (CD564).

¹⁵ See, e.g., Coalition Posthearing Br. at 2, Appendix A at A-17-25 (CD551); Joint Respondents Posthearing Br. at Appendix A pp. 60-62 (CD552); Coalition Comments on Remand at 29-30; Joint Respondents Comments on Remand at 3-4; Panel Hearing Transcript at 96 (Nicely) (defining the business cycle as “the period of growth, or lack, or contraction in a market”).

¹⁶ CR at II-16-17, Figure II-1 (CD564).

¹⁷ CR at II-19-20, Table II-5 (CD564). The Commission’s analysis of volume, price effects, and impact analyses in the Original Views accounted for the fact that the POI covered a time period of economic recovery. See, e.g., Original Confidential Views at 48 (observing that the volume of subject imports rose at a faster rate than apparent U.S. consumption), 55-56 (analyzing the price effects of subject imports within the context of relatively strong and increasing demand), 60-61 (finding that the domestic industry’s performance, particularly from 2014 to 2015, was not commensurate with increasing apparent U.S. consumption, and improvements during 2016 did not return the industry’s performance to levels experienced during 2014 when the softwood lumber agreement was in effect) (CD582).

In their Rule 57(1) Brief filed before the Panel and again in their Remand Comments, the Joint Respondents relied on the existence of a macroeconomic business cycle to argue that the Commission was required to compare the domestic industry’s performance during the POI to its historical performance in the prior lumber investigations, but the Panel rejected this argument. Canadian Parties NAFTA Rule 57(1) Br. at 56-64; Joint Respondents Comments on Remand at 8-10; Panel Decision at 111-12. As the Panel found, the Commission was not required to analyze data outside the POI. Panel Decision at 11-12 (recognizing that each investigation is *sui generis* and observing that the “Canadian Parties have not explained whether or to what extent the U.S. industry was at a similar point in the (Continued...)

2. Supply Considerations

In the original determinations, the Commission found that the capacity of the domestic softwood lumber industry was relatively flat from 2014 to 2016.¹⁸

The Panel remanded the Commission's finding on domestic industry capacity to respond to the Canadian Parties' allegations that the industry's capacity increased from 2014 to 2015.¹⁹ Specifically, as the Panel observed, the Canadian Parties argued that the Commission did not use the most current data from the Forest Economic Advisors ("FEA") to determine domestic industry capacity and therefore considered its determination unsupported by substantial evidence. According to the Canadian Parties, the FEA capacity data they submitted on the record demonstrated that the domestic industry's capacity increased by *** board feet between 2014 to 2015, and did not decline by 0.06 percent as the Commission found in its Original Views.²⁰ On this point, the Panel observed that the Commission acknowledged that the data from West Wood Products Association ("WWPA") used in the agency's domestic industry capacity calculation were based on data from FEA. The Panel found, however, that it was not apparent whether the WWPA data included any adjustments to FEA data that occurred after the WWPA had published the relevant Lumber Track issue. The Panel therefore instructed the Commission to consider whether to "take the more recent FEA data into account in its domestic capacity analysis."²¹

To address the Panel's concern on whether the Commission considered "the more recent FEA data" for its capacity calculations, we must first ascertain the most appropriate dataset for domestic industry capacity. As discussed in the Original Views, while we followed our normal approach of collecting data from questionnaires completed by domestic producers, importers, and foreign producers, we also considered available published data from secondary sources due to incomplete questionnaire response coverage.²² In these investigations, the U.S.

(...Continued)

business cycle or how the conditions of competition were otherwise comparable during the previous investigations as compared to the investigation now under review").

¹⁸ Original Confidential Views at 41 (CD582).

¹⁹ Although the Panel analyzed this issue within the context of remanding the Commission's price analysis, we address it within our discussion on supply as well as our discussion on price effects. Panel Decision at 89-90.

²⁰ Canadian Parties NAFTA Rule 57(1) Br. at 80-81; Joint Respondents Comments on Remand at 23-24.

²¹ Panel Decision at 90.

²² Original Confidential Views at 34-35 (CD582).

producer questionnaire responses accounted for 63.3 percent of domestic industry capacity and 59.0 percent of domestic production in 2016.²³

The statute permits the Commission to rely on secondary information, and its reviewing courts have upheld the Commission's use of such information.²⁴ Moreover, both the petitioning and respondent parties in these investigations generally supported the use of secondary data sources in the Commission's analysis.²⁵ In particular, the Coalition endorsed the use of WWPA data, which it described as the "standard industry reference for production and shipment information for U.S. softwood lumber producers."²⁶ The Joint Respondents similarly touted WWPA publications as the "industry's most reliable sources for U.S. production and shipment data" and observed that these publications provide data for "U.S. shipments, production, and practical capacity utilization."²⁷ They further observed that the Commission relied on WWPA data in both the prehearing report and prior lumber investigations and stated their position that WWPA "continues to be the most accurate metric for those calculations in the current investigations."²⁸ Given the universal acceptance of WWPA and the comprehensive data in the publications regarding the domestic industry, we continue to rely on this secondary source to determine the domestic industry's production, capacity utilization, and capacity during the POI.

WWPA reports U.S. production and capacity utilization information.²⁹ WWPA relies on its own survey information in addition to data from the Southern Forest Products Association and U.S. Census Bureau to report U.S. production; it relies on its own survey information as well as FEA data for the domestic industry's capacity utilization.³⁰ Although WWPA does not provide data with respect to domestic industry capacity, we are able to derive the domestic industry's capacity by dividing reported U.S. softwood lumber production by reported capacity utilization.

²³ CR at III-7 (CD564). The domestic industry's coverage data were based on a comparison of U.S. producers' reported capacity and production and industry-wide total production and capacity, using WWPA data (see CR at Table III-4 (CD564)).

²⁴ See, e.g., *Ranchers-Cattlemen Action Legal Found. v. United States*, 74 F. Supp. 2d 1353 (1999); *Live Swine and Pork from Canada*, Inv. No. 701-TA-224 (Final), *aff'd*, *Alberta Pork Producers' Mktg. Bd. v. United States*, 669 F. Supp. 445, 460 (Ct. Int'l Trade 1987).

²⁵ Commission Hearing Transcript at 141-142 (PD146); Joint Respondents Posthearing Br. at Appendix A p.135 (CD552).

²⁶ Petition, Vol. I. at 5-6 (PD1); Commission Hearing Transcript at 141 (PD146).

²⁷ Joint Respondents Posthearing Br. at Appendix A pp.135-36 (CD552).

²⁸ Joint Respondents Posthearing Br. at Appendix A p.136 (CD552).

²⁹ See, e.g., Joint Respondents Prehearing Br. at Exhibits 59 & 75 (CD537).

³⁰ See, e.g., Joint Respondents Prehearing Br. at Exhibits 59 & 75 (CD537).

Using WWPA data, adjusted to exclude data for related parties *** and ***, we find that the domestic industry’s capacity declined from *** board feet in 2014 to *** board feet in 2015 and *** board feet in 2016.³¹ We do not find any merit to the Joint Respondents’ argument that the WWPA publications used for our calculations do not account for updated data.³² To support their claim that the information used by the Commission was outdated, the Joint Respondents point to “capacity” data reported by FEA, which they claim differ from the capacity information the Commission derived from WWPA’s production and capacity utilization data.³³ The record, however, does not contain specific revision information from FEA with respect to the WWPA’s reported “production” and “capacity utilization” data.³⁴

In their Remand Comments, Joint Respondents include a table containing not only what they claim are “updated FEA” domestic industry capacity data, but also “updated FEA” production and capacity utilization data.³⁵ As an initial matter, Joint Respondents never previously challenged the Commission’s data with respect to domestic industry production and capacity utilization. They also ignore that they had advocated to the Commission for the agency’s use of WWPA for domestic industry production and capacity utilization data. Although the cited FEA tables show “capacity” information, this is a different dataset than the FEA “capacity utilization” information used by WWPA. Additionally, as explained above, the FEA excerpts cited by the Joint Respondents do not demonstrate that the WWPA data used by the Commission were outdated. Given our use of WWPA data for the domestic industry’s production and capacity utilization information as advocated by the parties, and in order to

³¹ Derived from Revisions to Confidential Staff Report at Table III-4 n.1 (CD564); *see also* Petition, Vol. I at Exhibit 2 (PD1); Joint Respondents Prehearing Br. at Exhibits 59 & 75 (CD537). As the Panel found, the Commission’s exclusion of *** and *** from the definition of the domestic industry was reasonable and the “Commission properly excluded those parties in its domestic capacity analysis.” Panel Decision at 41-42, 90.

³² To the contrary, the Commission relied upon WWPA publications issued in July of each year, which contained “final revisions” for the prior year. Revisions to Confidential Staff Report at Table III-4 n.1 (CD564); *see also* Petition, Vol. I at Exhibit 2 (PD1); Joint Respondents Prehearing Br. at Exhibit 59 (CD537).

³³ Joint Respondents Prehearing Br. at Appendix A-9 Tables 7 & 11 (CD537).

³⁴ Joint Respondents rely on excerpts from FEA that they purport to be “FEA LFS Q2 2017” data, but it is unclear when these data were published. Joint Respondents Prehearing Br. at Appendix A, Index and A-9 Tables 7 & 11 (CD537). The excerpts are entitled “FEA Quarterly Lumber Forecast Service” and contain data from 2011 to 2022. Additionally, the excerpts are stamped “Q213,” thus indicating that they might have been published in the second quarter of 2013. *See id.* We, therefore, are unable to determine the accuracy of these data with respect to domestic industry capacity in 2014-2016, and do not find that they demonstrate that the data reported in WWPA and used by the Commission were outdated.

³⁵ Joint Respondents Comments on Remand at 24.

maintain consistency, we use the same WWPA dataset for the related domestic industry capacity information.

3. Substitutability

In comparing the domestic like product and subject imports, the Commission, in its Original Views, found that subject imports of softwood lumber from Canada were at least moderately substitutable with domestically produced softwood lumber.³⁶ The Commission observed that softwood lumber species common to both countries accounted for approximately 41 percent of U.S. production and about 95 percent of Canadian production in 2015.³⁷ While observing that the parties disagreed regarding the extent to which there is species segmentation by application, region of the country, or builder preferences, the Commission found that the majority of U.S. producers described softwood lumber from domestic and Canadian sources as always or frequently interchangeable, and the majority of U.S. importers and purchasers described them as sometimes interchangeable.³⁸ In addition, the Commission found that questionnaire responses and survey information from the National Association of Home Builders (“NAHB”) evinced that subject imports and the domestic like product were used in the same applications.³⁹

In a footnote, the Commission acknowledged Joint Respondents’ assertions that the elasticity of substitution was lower than the lowest end of the range identified by Staff. Without suggesting that it was relying on any numerical elasticity estimates, the Commission noted that the studies submitted by respondents did not rely on the methodologies and data used by Staff to estimate elasticities in this case; rather, Joint Respondents’ studies relied on methodologies that examined very short time periods and/or aggregated data, which tended to minimize the resulting elasticity.⁴⁰

The Panel affirmed the Commission’s characterization of “at least moderate” substitutability between the domestic like product and subject imports.⁴¹ The Panel, however, found that the Commission failed to explain Commission Staff’s basis for arriving at its elasticity of substitution range of 2.0 to 5.0 and how and to what degree the Commission applied the elasticity estimate in its fuller analysis of substitutability. The Panel acknowledged the

³⁶ Original Confidential Views at 45 (CD582).

³⁷ Original Confidential Views at 44 (CD582).

³⁸ Original Confidential Views at 44-45 (CD582).

³⁹ Original Confidential Views at 44-46 (CD582).

⁴⁰ Original Confidential Views at 45 n.162 (CD582).

⁴¹ Panel Decision at 74-75.

Commission's argument that it had not relied on Commission Staff's calculation, but stated that the Commission never explicitly disavowed Staff's calculated range in its Views or provided information as to how it quantified elasticity as part of its substitutability analysis.⁴² The Panel therefore remanded this issue to the Commission and directed it to reconsider its calculation of elasticity of substitution. It instructed the Commission to explain how it reached its conclusion and demonstrate how that conclusion was applied in its injury analysis.⁴³ The Panel also directed the Commission to demonstrate how, and to what extent, it factored its finding of "at least moderately substitutable" and the "attendant attenuation of competition" into its injury analysis.⁴⁴

The statute does not direct the Commission to analyze substitutability in any particular manner or to use Staff-recommended elasticity estimates or any elasticity estimates submitted by the parties. As the Court of International Trade has explained, the Commission is not required to consider such estimates, or any particular model, in its analysis because an econometric study based on a theoretical model and a set of assumptions may be outweighed by real world data.⁴⁵ In these investigations, Staff provided various estimates on elasticities pertaining to the softwood lumber market for consideration by the Commission in its analysis, including the elasticities of domestic supply, domestic demand, and substitutability. Staff's estimate addressing substitutability represented Staff's own judgment based upon available qualitative information, including several academic papers, party submissions, and purchaser responses, and served as a numerical complement to its characterization of "at least a moderate degree of substitutability."⁴⁶

The Commission generally has not relied on quantitative elasticity estimates in arriving at its substitutability conclusions, and we find no reason to do so in these investigations. While quantified elasticity estimates have been a tool available to the Commission, the court has repeatedly recognized that the Commission may reasonably reach a conclusion based instead upon an evaluation of the actual facts in the record.⁴⁷ We have examined the extensive data and other information on the record (such as questionnaire responses, industry surveys, and hearing testimony) and find this information to be more useful than Staff's estimated elasticity

⁴² Panel Decision at 76.

⁴³ Panel Decision at 7-8 and 77-78.

⁴⁴ Panel Decision at 8 and 75, 78.

⁴⁵ *Altx, Inc. v. United States*, 370 F.3d 1108, 1121-22 (Ct. Int'l Trade 2004); *Maverick Tube Corp. v. United States*, 12 C.I.T. 444, 448, 687 F. Supp. 1569, 1574 (1988); *Maine Potato Council v. United States*, 9 C.I.T. 293, 300 n.8, 613 F. Supp. 1237, 1244 n.8 (1985).

⁴⁶ CR at II-42 (CD564).

⁴⁷ *Altx*, 370 F.3d at 1122.

of substitution.⁴⁸ We therefore rely on this qualitative record evidence as support for our conclusion that the domestic like product and subject imports are at least moderately substitutable.⁴⁹

With respect to the second part of the Panel’s remand instructions on substitutability – regarding how the Commission factored the limitations on substitutability into its injury analysis – we take this opportunity to clarify our finding of “at least moderate substitutability.” The issue of substitutability is only one factor that informs the Commission’s analysis regarding the degree of competition between subject imports and the domestic like product in the market.⁵⁰ Specifically, “substitutability” refers to the ease with which different products can be substituted for one another.⁵¹ Our finding of at least moderate substitutability acknowledges some aspects of differences in physical characteristics of lumber products and customer preferences that may exist in the market, but also takes into account the substantial record evidence showing the comparability and interchangeability of the products,⁵² substantially overlapping end-uses,⁵³ price being most frequently cited by purchasers as the first-most important factor in purchasing decisions (over all other factors, including species),⁵⁴ and the large number of purchasers (35 of 40 responding purchasers) reporting that they usually or sometimes purchase the lowest-priced softwood lumber.⁵⁵

Our finding of “at least a moderate” degree of substitutability therefore does not imply that there is a significant lack of competition between the subject imports and the domestic like

⁴⁸ Original Confidential Views at 43-47 (CD582). *See, e.g.*, CR at II-22-39 (CD564); NAHB Survey (CD526); NAHB Posthearing Br. at Exhibit 2 (CD550); Commission Hearing Transcript at 36-65 (PD146).

⁴⁹ The Court of International Trade has upheld Commission findings of moderate substitutability and other findings of similar generality. *See, e.g.*, *American Alliance for Hardwood Plywood v. United States*, 392 F. Supp. 3d 1298, 1309 (Ct. Int’l Trade 2019) (“*Hardwood Plywood II*”); *ITG Voma Corp. v. U.S. Int’l Trade Comm’n*, 253 F. Supp. 3d 1339, 1351-57 (Ct. Int’l Trade 2017); *Altx, Inc. v. United States*, 26 C.I.T. 709, 712-15 (2002).

⁵⁰ Other factors may attenuate competition, such as distinct market segmentation. *See, e.g.*, *Whirlpool Corp. v. United States*, 2013 WL 6980820 (Ct. Int’l Trade 2013); *Diamond Sawblades Mfr. Coal. v. United States*, 33 C.I.T. 48 (2009). Here, as discussed below, the domestic like product and softwood lumber from Canada competed in virtually all the same end-use applications in all regions of the United States.

⁵¹ *See Hardwood Plywood II*, 392 F. Supp. 3d at 1305-06.

⁵² CR at Tables II-11-12 (CD564).

⁵³ CR at Table II-9 (CD564); NAHB Survey (CD526); NAHB Posthearing Br. at Exhibit 2 (CD550).

⁵⁴ CR at Table II-7 (CD564). Fourteen responding purchasers identified price as their first-most important purchasing factor, compared to only five doing so for species. Twenty-seven responding purchasers identified price as among their top three purchasing factors, while only nine did so for species.

⁵⁵ CR at II-25 (CD564).

product in the market. In these investigations, softwood lumber species common to both countries accounted for approximately 41 percent of U.S. production and about 95 percent of Canadian production in 2015.⁵⁶ Thus, 41 percent of U.S. production of softwood lumber directly overlapped with lumber species produced in Canada. To the extent there were any substitutability limitations posed by the fact that southern yellow pine (“SYP”) was the leading species of lumber produced in the United States and spruce-pine-fir (“SPF”) was the predominant species of lumber produced in Canada, the evidence demonstrates that both SYP and SPF competed in virtually all of the same end-use applications in all regions of the United States.⁵⁷ Thus, the evidence in these investigations demonstrates that despite there being certain physical differences in lumber species and some regional preferences that may affect the ease with which they can be substituted, competition between subject imports and the domestic like product during the POI was nevertheless meaningful in every end-use application. Indeed, the majority of purchasers reported that they or their customers frequently or sometimes used or were willing to substitute other species for preferred species for framing/wall studs, headers, floor joists, roof trusses, roof rafters, fencing, and shipping/packaging.⁵⁸

Other record evidence corroborates that purchasers substituted one lumber species for another. For instance, a letter from the Structural Board Components Association, an association composed of members that purchase roughly 8 billion board feet of lumber annually with approximately 40 percent of that lumber coming from Canada, stated that by “definition, buyers of wood trusses and wall panels are very price sensitive and will switch loyalty and buy Lumber or products made from Lumber, such as wood trusses, Lumber I-joists

⁵⁶ Original Confidential Views at 44 (CD582).

⁵⁷ CR at Table II-2 (CD564); NAHB’s 2016 survey showed a similar overlap in species usage by construction application as the prior NAHB surveys as follows:

- For floor joists: SPF – 15.3 percent, SYP – 40.6 percent, Douglas fir (“DF”) – 30.4 percent, Hemlock fir (“HF”) or other western wood –13.6 percent;
- For wall studs: SPF – 40.0 percent, SYP – 22.7 percent, DF – 23.6 percent, HF or other western wood –8.3 percent, other species/don’t know – 4.8 percent;
- For roof rafters: SPF – 24.5 percent, SYP – 47.7 percent, DF – 20.1 percent, HF or other western wood –5.0 percent, other species/don’t know – 2.7 percent; and
- For roof trusses: SPF – 21.2 percent, SYP – 40.7 percent, DF – 19.4 percent, HF or other western wood –7.7 percent, other species/don’t know – 11.0 percent.

NAHB Survey (CD526); *see also* NAHB Posthearing Br. at Exhibit 2 (CD550).

⁵⁸ CR at Table II-9 (CD564).

and wall panels, from the lowest cost supplier.”⁵⁹ Additionally, ***, one of the leading national dealers of products to professional builders and contractors in the residential housing market, confirmed that U.S. purchasers will switch from SYP to SPF based entirely on “shifts in price.” *** reported that in 2017, it switched from purchasing SYP to SPF because SPF was being sold for between 3-12 percent less than SYP.⁶⁰ Further, ***, a construction company in *** that provides framing, siding, and renovation services for single family, multifamily, and commercial projects, confirmed that it ***.⁶¹

In accordance with the Panel’s instructions, we address the application of our finding that subject imports are “at least moderately substitutable” with the domestic like product in our separate discussions below of volume and price.

B. Post-Petition Data

In the Original Views, the Commission attributed the change in prices in 2017 to the pendency of the investigations and therefore decided to reduce the weight it accorded “to the volume, price effects, and impact of subject imports for interim 2017, pursuant to 19 U.S.C. § 1677(7)(I).”⁶²

The Panel, finding that the Commission failed to provide a reasoned basis for its determination to discount interim (January to June) 2017 data, remanded the issue regarding the impact of the pendency of the investigations.⁶³ The Panel highlighted four issues regarding the Commission’s treatment of post-petition data. First, the Panel found that the Commission failed to discuss conflicting evidence submitted by Joint Respondents regarding alleged other market factors that caused the increase in prices in 2017.⁶⁴ Second, the Panel found it unclear from the Commission’s decision whether the Commission was invoking a presumption that changes were related to the pendency of the investigations (which the Panel acknowledged the Commission was entitled to do under the statute), or whether the Commission was making a factual finding, after weighing the record evidence. Third, the Panel faulted the Commission for failing to discuss what weight, if any, it had given to interim 2017 data and under which circumstances it relied on such data.⁶⁵ Fourth, the Panel found that the Commission failed to

⁵⁹ Petitioner Prehearing Br. at Exhibit 10 (CD540).

⁶⁰ Petitioner Prehearing Br. at Exhibit 12 (CD540).

⁶¹ Petitioner Prehearing Br. at Exhibit 13 (CD540).

⁶² Confidential Views at 55 n.203 (CD582).

⁶³ Panel Decision at 57.

⁶⁴ Panel Decision at 59.

⁶⁵ Panel Decision at 59.

discuss its treatment of third and fourth quarter 2017 data, which fell outside the POI, but which the Panel found to be properly in the record.⁶⁶ In light of these findings, the Panel remanded the Commission’s decision to reduce the weight it accorded to interim 2017 data. The Panel directed the Commission to provide a reasoned determination on whether or not to reduce the weight accorded to interim 2017 data and to third and fourth quarter 2017 data.⁶⁷ Additionally, the Panel further directed, if the Commission on remand decided again to reduce the weight given to post-petition data, to clarify what weight, if any, it was giving to post-petition data and the reasons for this determination.⁶⁸

Under the statute, the Commission is directed to “consider whether any change in the volume, price effects, or impact of {subject imports} . . . since the filing of the petition . . . is related to the pendency of the investigation.” If so, “the Commission *may* reduce the weight accorded to the data for the period after the filing of the petition”⁶⁹ As the Court of International Trade has recognized, the statutory language grants broad discretion to the Commission to consider whether “any change” is related to the pendency of the investigation.⁷⁰ Additionally, the Statement of Administrative Action (“SAA”), which is regarded as “an authoritative expression by the United States concerning the interpretation and application of the {Uruguay Round Agreements Act},”⁷¹ provides that:

. . . when the Commission finds evidence on the record of a significant change in data concerning the imports or their effects subsequent to the filing of the petition or the imposition of provisional duties, the Commission may *presume* that such change is related to the pendency of the investigation. In the absence of sufficient evidence rebutting that presumption and establishing that such change is related to factors other than the

⁶⁶ Panel Decision at 59-60. These data fell within the so-called “CVD gap period,” *i.e.*, after Commerce ended preliminary countervailing (“CVD”) duties that had been in effect for the statutory 120 days, but before Commerce’s reimposition of duties after the Commission published its final affirmative determination. *See* Panel Decision at 11. Because Joint Respondents submitted these data, which included *Random Lengths* pricing data for the third and fourth quarters of 2017, to the Commission in the original investigations prior to the closing of the record, we agree with the Panel that these data are properly in the record.

⁶⁷ Panel Decision at 7 and 60.

⁶⁸ Panel Decision at 7 and 61.

⁶⁹ 19 U.S.C. § 1677(7)(I) (emphasis added).

⁷⁰ *LG Electronics, Inc. v. U.S. Int’l Trade Comm’n*, 26 F. Supp. 3d 1338, 1353 (Ct. Int’l Trade 2014).

⁷¹ 19 U.S.C. § 3512(d).

pendency of the investigation, the Commission may reduce the weight to be accorded to the affected data.⁷²

The SAA makes clear that the Commission is not required to demonstrate that the change is not related to other factors.⁷³

We find that there was a significant change in prices after the filing of the petitions in these investigations, and we presume that this change was related to the pendency of the investigations. Specifically, as discussed in the Original Views, *Random Lengths* price data show that while prices fluctuated from month to month, monthly prices for each species in 2015 and 2016 were below January 2014 prices for that species, despite steadily increasing demand, in 23 of 24 possible comparisons for WSPF, 22 of 24 for ESPF, 24 of 24 for Douglas fir (“DF”), 23 of 24 for Hemlock fir (“HF”), and 15 of 24 for SYP; similarly, the framing lumber composite price for all months in 2015 and 2016 was below the framing lumber composite price in January 2014.⁷⁴ In contrast, prices in 2017, including interim 2017 and third and fourth quarter 2017, were higher than prices at the beginning of the POI.⁷⁵

The Joint Respondents argued that the evidence demonstrates that the price increases in 2017 were not linked to the pendency of the investigations, but rather to other market factors – namely, increasing demand and supply constraints – as evidenced by the fact that 2017 price increases for softwood lumber followed the same trends as prices for other building materials not subject to the investigations.⁷⁶ Additionally, according to the Joint Respondents, the CVD gap period, when CVD cash deposits terminated pursuant to the law limiting the length of CVD provisional measures, coincided with “dramatically” higher prices for softwood lumber, refuting the Commission’s determination that the increase in lumber prices was due to the effect of the investigations.⁷⁷

⁷² SAA, H.R. Doc. 103-316, vol. 1 at 854 (emphasis added).

⁷³ SAA at 854. Specifically, the SAA states that “{t}o the extent that the decision of the Court of International Trade in *Chr. Bjelland Seafood/A/S v. United States*, slip op. 92-196 (Ct. Int’l Trade Oct. 23, 1992) could be interpreted as requiring the Commission to demonstrate that the change is not related to other factors, it is disapproved.” *Id.*

⁷⁴ CR at Tables V-10-11 (CD564).

⁷⁵ CR at Tables V-10-11 (CD564); NAHB Submission of Supplemental Factual Information at Attachment 3 p.9 (CD562); Joint Respondents Final Comments at 6 (CD578); Joint Respondents Comments on Remand at 10-11.

⁷⁶ Canadian Parties NAFTA Rule 57(1) Br. at 87-88.

⁷⁷ Canadian Parties NAFTA Rule 57(1) Br. at 90-91.

Even if other market forces such as increasing demand played a role in price increases for building materials in 2017, however, there is substantial evidence on the record that supports the presumption that the increase in prices was related to the pendency of the investigations.⁷⁸ Indeed, *Random Lengths*, the publication upon which Joint Respondents themselves rely for prices of other building materials, consistently ***.⁷⁹ Several responding firms also reported that the duties and/or the pending investigations impacted domestic prices.⁸⁰

We also do not find that removal of provisional CVD duties necessarily results in an abatement of post-petition effects, particularly in these investigations, in which provisional antidumping measures on softwood lumber from Canada were still in place during the CVD gap period and the investigations were still pending. We recognize that after provisional CVD duties were removed in August 2017, other forces contributed to higher prices in the U.S. market, but this did not eliminate the restraining effect of the provisional antidumping duties in place and the pendency of the investigations on softwood lumber imports.⁸¹

⁷⁸ The Commission is not required to demonstrate that the change in the post-petition data is not related to any other factor. SAA at 854.

⁷⁹ Joint Respondents Prehearing Br. at Exhibit 78 (*Random Lengths*, “The Weekly Report on North American Forest Products Market,” Vol. 73, Issue 34 at 1 (Aug. 25, 2017) (stating that ***)) (CD537); Petitioner Submission of Supplemental Factual Information at Exhibit 1 (*Random Lengths*, “The Weekly Report on North American Forest Products Market,” Vol. 27, Issue 10 at 1 (Oct. 2017) (stating that ***)) (CD561); Joint Respondents Request to Supplement the Record at Att. 2 (*Random Lengths*, “The Weekly Report on North American Forest Products Market,” Vol. 73, Issue 40 at 1 (Oct. 6, 2017) (***)) (CD560a).

⁸⁰ *** U.S. Importer Questionnaire Response at III-20 (stating that ***); *** U.S. Importer Questionnaire Response at III-20 (stating that ***); *** U.S. Importer Questionnaire Response at III-20 (stating that ***); *** U.S. Importer Questionnaire Response at III-20 (stating that the ***); *** U.S. Purchaser Questionnaire Response at III-33 (pointing to *** as affecting prices); *** U.S. Purchaser Questionnaire Response at III-33 (stating that *** affected prices); *** U.S. Purchaser Questionnaire Response at III-33; *** U.S. Purchaser Questionnaire Response at III-33; *** U.S. Purchaser Questionnaire Response at III-33; *** U.S. Purchaser Questionnaire Response at III-33; *** U.S. Purchaser Questionnaire Response at III-33; *** U.S. Purchaser Questionnaire Response at III-33; *** U.S. Purchaser Questionnaire Response at III-33; *** U.S. Purchaser Questionnaire Response at III-33; *** U.S. Purchaser Questionnaire Response at III-33; *** U.S. Purchaser Questionnaire Response at III-33; *** U.S. Purchaser Questionnaire Response at III-33; *** U.S. Purchaser Questionnaire Response at III-33; *** U.S. Purchaser Questionnaire Response at III-33.

⁸¹ For example, *Random Lengths* reported that ***. Coalition Prehearing Br. at Exhibit 1 (*Random Lengths*, “The Monthly Measure of Forest Products Statistic,” Vol. 27, Issue 10 at 1 (October 2017)), Exhibit 78 (*Random Lengths*, “The Weekly Report on North American Forest Products Markets,” Vol. 73, Issue 34 at 1 (Aug. 25, 2017)) (CD540); see also Joint Respondents Prehearing Br. at Exhibits 66-70 (various articles addressing wildfires in Canada) (CD537).

Based on the information in the record, we find that the significant post-petition change in subject import prices in 2017 was related to the pendency of the investigations. We, therefore, reduce the weight accorded to post-petition volume, price effects, and impact data pursuant to 19 U.S.C. § 1677(7)(I). In doing so, we give controlling weight to the 2014-2016 data for our material injury analysis.

C. Volume of Subject Imports

During the POI, the volume of subject imports increased. The Commission, in the Original Views, found that apparent U.S. consumption also increased during this time, but that the volume of subject imports increased at a much greater rate. It further found that as subject imports increased, they experienced significant gains in market share directly at the expense of the domestic industry.⁸² Based on this evidence, the Commission concluded that the volume of subject imports and the increase in that volume were significant both in absolute terms and relative to consumption in the United States.⁸³

The Panel, in remanding the Commission's volume analysis, directed the Commission to demonstrate how, and to what extent, the limitations to substitutability implied in its conclusion that the domestic like product and subject imports were "at least moderately substitutable" factored into its injury analysis.⁸⁴ It ordered the Commission to consider all record evidence to demonstrate how, and to what extent, the limitations to substitutability factored into its conclusion that subject imports experienced significant gains in market share directly at the expense of the domestic industry. It also directed the Commission to further reconsider its volume analysis as it determines to be appropriate.⁸⁵

As clarified above in our expanded discussion of conditions of competition, we do not find there to be significantly attenuated competition between the domestic like product and the subject imports. With respect to substitutability, however, we recognize the existence of customer and regional preferences for certain species for particular end-use applications. While these preferences suggest that the products are not perfect substitutes in some end-use applications, most purchasers reported that they and/or their customers were frequently or

⁸² Original Confidential Views at 48 (CD582).

⁸³ Original Confidential Views at 47-48 (CD582). As noted in our discussion of post-petition data, our volume findings are based primarily on data for the three full years of the POI.

⁸⁴ Panel Decision at 77-78.

⁸⁵ Panel Decision at 82.

sometimes willing to substitute different species in place of their preferred species for all specified applications (except decks and decking structures) based on differences in price.⁸⁶

The realities of the shifts in the type and source of softwood lumber purchased are demonstrated by the data showing an overlap between domestic softwood lumber (SYP, DF, and HF) and Canadian softwood lumber (SPF and, possibly to a small extent, some DF/HF) in virtually all end-use applications during the POI.⁸⁷ Specifically, the NAHB survey data show the following actual usage of lumber species in the United States:⁸⁸

**Lumber Species Percentile Usage in New Residential Construction
(SPF, SYP, DF/HF)⁸⁹**

		2014	2015	2016
Roof Trusses	***	***	***	***
	***	***	***	***
	***	***	***	***
Floor Lumber Joists	***	***	***	***
	***	***	***	***
	***	***	***	***
Roof Rafters	***	***	***	***
	***	***	***	***
	***	***	***	***
Wall Framing	***	***	***	***
	***	***	***	***
	***	***	***	***

As found in the Original Views, the volume of subject imports rose from 12.1 billion board feet in 2014 to 13.2 billion board feet in 2015 and 15.0 billion board feet in 2016,

⁸⁶ CR at Table II-9 (CD564).

⁸⁷ NAHB Survey (CD526); *see also* NAHB Posthearing Br. at Exhibit 2 (CD550).

⁸⁸ NAHB Posthearing Br. at Exhibit 2 (CD550).

⁸⁹ NAHB's surveys also accounted for "Other" and "Don't Know" responses. NAHB Posthearing Br. at Exhibit 2 (CD550).

increasing by 23.8 percent.⁹⁰ Subject import market share rose from 28.4 percent in 2014 to 30.0 percent in 2015 and 31.8 percent in 2016.⁹¹ By contrast, the domestic industry's market share declined by *** percentage points from 2014 to 2016.⁹² Taking into account the overlap in end uses and willingness of purchasers to shift supply to take advantage of lower prices, we continue to find, as the Commission found in the Original Views, that the volume of subject imports and the increase in that volume are significant, both in absolute terms and relative to consumption in the United States.⁹³

Notwithstanding the shift in market share, the Joint Respondents argued that there was limited overlap in demand for subject imports and the domestic like product during the POI, which mitigated or eliminated the significance of subject import volumes. Specifically, they claimed that as the share of softwood lumber being used in residential housing construction increased relative to the share being used in other applications, demand for SPF lumber increased relative to the demand for lumber species produced in the United States. According to the Joint Respondents, this relationship meant that, as new housing construction increased, demand for SPF lumber from Canada increased and filled product-specific demand.⁹⁴ In support, they relied on an econometric study, which was based on a theoretical model and a set of assumptions, performed by their own experts.⁹⁵ However, for the reasons we have explained above, we find the real world data to be more probative. Thus, we rely on the

⁹⁰ CR at Table IV-2 and C-1 (CD564). The volume of subject imports was 7.0 billion board feet in interim 2016 and 7.3 billion board feet in interim 2017.

⁹¹ CR at Table C-3 (CD564). Subject import market share was 29.6 percent in interim 2016 and 29.8 percent in interim 2017.

⁹² The domestic industry's market share was *** percent in 2014, *** percent in 2015, and *** percent in 2016; it was *** percent in interim 2016 and *** percent in interim 2017. CR at Table C-3 (CD564).

⁹³ Original Confidential Views at 48 (CD582). *Random Lengths* publications also discuss ***. See, e.g., Joint Respondents Posthearing Br., Vol. VI, Exhibit 56 (*Random Lengths*, "The Weekly Report on North American Forest Products Market," Vol. 72, Issue 6 at 1 (Feb. 12, 2016) (discussing ***) (CD552); Coalition Posthearing Br. at Exhibit 2 (*Random Lengths*, "The Monthly Measure of Forest Products Statistics," Vol. 26, Issue 9 (Sept. 2016) (discussing ***) (CD551); Coalition Prehearing Br. at Exhibit 25 (*Random Lengths*, "The Weekly Report on North American Forest Products Market," Vol. 73, Issue 3 at 1 (Jan. 20, 2017) (observing that ***) (CD537).

⁹⁴ Canadian Parties NAFTA Rule 57(1) Br. at 138; Canadian Parties NAFTA Rule 57(3) Br. at 73-76; Joint Respondents Comments on Remand at 21.

⁹⁵ Joint Respondents Prehearing Br. at Appendix B pp.41-42 (CD537).

extensive actual data on the record in these investigations demonstrating that subject imports and the domestic like product were used in the same end-use applications.⁹⁶

The Joint Respondents further argued that differences in whether lumber was pressure treated or in “green” form, rather than kiln-dried, limited the overlap in competition between subject imports and the domestic like product in particular applications.⁹⁷ Rather than indicating limited overlap based on such differences, however, the record demonstrates substantial overlap. The vast majority of shipments of domestic lumber, including SYP, and of subject imports were non-treated lumber.⁹⁸ Additionally, the vast majority of shipments of domestic lumber and subject imports were kiln-dried.⁹⁹ We therefore find no merit to the Joint Respondents’ argument that competition between the domestic like product and subject imports was “highly attenuated.”

In sum, although we acknowledge that some purchasers may have preferred certain lumber species for some end-use applications, the record nevertheless shows that the large majority of responding purchasers reported that domestically produced lumber and subject imports were comparable on all 20 specified purchasing factors, including availability of species,

⁹⁶ See, e.g., CR at II-22-39 (CD564); NAHB Survey (CD526); NAHB Posthearing Br. at Exhibit 2 (CD550); Commission Hearing Transcript at 36-65 (PD146).

In fact, the NAHB surveys contradict Joint Respondents’ argument. In support of their contention that in periods when housing starts increase the market share of softwood lumber imported from Canada would increase, the Joint Respondents rely on their econometric study that presumes SPF is primarily used for framing in home-building applications. Joint Respondents 57(3) Br. at 74-75. NAHB’s study of actual uses, however, shows that while there was an overlap between domestic softwood lumber and subject imports, ***. NAHB Posthearing Br. at Exhibit 2 (CD550). Thus, these data do not support the contention that increased home building would benefit imports from Canada more than domestic producers, and therefore do not explain the increase in subject import market share.

⁹⁷ Canadian Parties NAFTA Rule 57(1) Br. at 119-20; Joint Respondents Comments on Remand at 22.

⁹⁸ CR at Tables III-9, IV-3 (CD564). Joint Respondents misstate the record in their assertion that approximately half of SYP produced in the United States was sold to end users as pressure-treated lumber. Joint Respondents Comments on Remand at 22. The record shows that the vast majority of SYP, *** percent, was sold to end users as non-treated lumber. See *id.* at Table III-9 (CD564).

⁹⁹ CR at Tables III-10, IV-4 (CD564). Joint Respondents focus on DF to argue that “most of the DF sold in the United States, which represented nearly a quarter of domestic production, was sold in ‘green’ form rather than kiln dried” whereas most subject DF was kiln dried. Joint Respondents Comments on Remand at 22. DF accounted for 24 percent of U.S. production and three percent of Canadian softwood lumber production. Original Confidential Views at 43 n.155, 44 n.156 (CD582). In any event, the record shows that a substantial portion of domestically produced DF, 49 percent, was kiln dried. CR at Table III-10 (CD564). We therefore find that there was substantial overlap between domestically produced DF and DF imported from Canada.

geographic proximity, grade, product range, and quality.¹⁰⁰ The record further shows a significant overlap of domestically produced lumber and subject imports in virtually all end-use applications.¹⁰¹ Additionally, as discussed below, several purchasers confirmed that during the POI, they, in fact, purchased subject imports instead of the domestic like product and that price was a primary reason for their purchases of subject imports. Consequently, any moderate limitations on substitutability do not render the volume of subject imports and the increase in that volume insignificant.

D. Price Effects of the Subject Imports

In accordance with the statute, the Commission in the Original Views considered two issues for its price effects analysis: whether “there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States” and whether “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.” 19 U.S.C. § 1677(7)(C)(ii).

The Commission first examined the quarterly pricing comparison data it collected, but determined that it was unable to conclude whether there had been significant underselling by subject imports. Specifically, the Commission found that the questionnaire response data, which were not specific to any geographic market areas, had limited utility due to the high variability of freight costs.¹⁰² The Commission observed, however, that purchasers confirmed purchasing subject imports rather than the domestic like product due to the lower prices of the imports.¹⁰³

The Commission also analyzed price trends and found that the pricing data published in *Random Lengths* demonstrated that prices of different species closely tracked each other and seemed to have an effect on others’ prices, particularly those that were used in the same or similar applications.¹⁰⁴ It observed that *Random Lengths* data indicated that despite rising apparent U.S. consumption, prices for softwood lumber declined substantially from 2014 to 2015 as the volume and market share of subject imports increased. The Commission further observed that although prices for all products increased overall in 2016, as demand continued

¹⁰⁰ CR at Table II-11 (CD564).

¹⁰¹ CR at II-22-39 (CD564); NAHB Survey (CD526); NAHB Posthearing Br. at Exhibit 2 (CD550); Commission Hearing Transcript at 36-65 (PD146).

¹⁰² Original Confidential Views at 51-52 (CD582).

¹⁰³ Original Confidential Views at 52 (CD582).

¹⁰⁴ Original Confidential Views at 52-53 (CD582).

to improve and subject imports captured significant market share, prices generally did not return to levels similar to those at the beginning of the POI.¹⁰⁵

The Commission found that the increasing and significant volume of subject imports that gained market share at the expense of the domestic industry during a time of rising demand prevented price increases, which otherwise would have occurred, to a significant degree. In arriving at this conclusion, the Commission observed that the domestic industry experienced a cost-price squeeze in 2014 to 2015 when the domestic industry faced rising costs and pricing pressure from the substantially increasing volume of subject imports at declining prices. It further observed that although the domestic industry's ratio of cost of goods sold ("COGS") to net sales improved in 2016 as demand continued to rise and prices increased, it did not recover to 2014 levels due to increasing volumes of subject imports, which prevented sufficient price increases relative to cost increases over the POI.¹⁰⁶

The Panel, in remanding the Commission's price effects analysis, instructed the Commission to reconsider certain of its factual findings and to account for its finding of "at least moderate" substitutability between the domestic like product and subject imports. Regarding substitutability, the Panel found that the Commission did not properly account for the impact of "attenuated competition" between subject imports and the domestic like product in its price suppression analysis. In this regard, the Panel observed that the Court of International Trade, in *Coalition for Fair Trade of Hardwood Plywood v. United States Int'l Trade Comm'n*, 180 F. Supp. 3d 1137 (Ct. Int'l Trade 2016) ("*Hardwood Plywood I*"), indicated that substitutability "can" have a direct impact on the evaluation of price effects.¹⁰⁷ It therefore directed the Commission to reconsider its price effects analysis in light of its substitutability finding.¹⁰⁸

Our finding that there is at least a moderate degree of substitutability between the domestic like product and subject imports does not alter the conclusion in the Original Views that prices of subject imports prevented price increases, which otherwise would have occurred, to a significant degree. As discussed above, we find that competition between the domestic like product and subject imports was meaningful in virtually all end-use applications. The Court of International Trade in *Hardwood Plywood I* indicated that substitutability can have a direct impact on the evaluation of price effects. In the investigations underlying *Hardwood Plywood I*, the Commission found that, despite significant underselling, hardwood plywood imports from

¹⁰⁵ Original Confidential Views at 54-55 (CD582).

¹⁰⁶ Original Confidential Views at 56 (CD582).

¹⁰⁷ Panel Decision at 98.

¹⁰⁸ Panel Decision at 98.

China did not depress or suppress prices to a significant degree.¹⁰⁹ Specifically, the Commission found in those investigations that prices for subject imports and the domestic like product trended upward, demonstrating a lack of price depression.¹¹⁰ Additionally, the record in those investigations demonstrated that the domestic industry's COGS to net sales ratio remained generally flat throughout most of the POI, showing that the domestic industry was able to raise prices consistent with rising production costs.¹¹¹ As the court observed, the Commission found that the lack of price effects was attributable in some degree to differences in product characteristics between the domestic product and subject imports, which resulted in different end-uses.¹¹²

The facts of these investigations, however, do not lead to a conclusion that the lack of perfect substitutability between the domestic like product and subject imports resulted in a lack of any significant price effects. Rather, the evidence in these investigations demonstrates that although some purchasers may have preferred certain lumber species for certain end-use applications, there was nonetheless an overlap in competition between the domestic like product and subject imports in virtually all end-uses in the U.S. market. Thus, the impact of the significant and increasing volume of subject imports would have been felt throughout the market. And, although factors other than price affected purchasers' decisions, price was nevertheless still an important consideration.¹¹³ Indeed, most purchasers reported that, based on differences in price, they and/or their customers were frequently or sometimes willing to substitute different species in place of their preferred species in all specified applications except decks and decking structures.¹¹⁴ Moreover, as discussed below, several purchasers also confirmed that price was a primary reason they bought subject imports instead of the domestic product.

Further, unlike the domestic industry in *Hardwood Plywood I*, the domestic industry in these investigations experienced a cost-price squeeze as its costs increased and prices declined

¹⁰⁹ *Hardwood Plywood I*, 180 F. Supp. 3d at 1163.

¹¹⁰ *Hardwood Plywood I*, 180 F. Supp. 3d at 1163.

¹¹¹ *Hardwood Plywood I*, 180 F. Supp. 3d at 1164.

¹¹² *Hardwood Plywood I*, 180 F. Supp. 3d at 1163-64.

¹¹³ In response to a question regarding the top three factors in purchasing decisions, price was cited most frequently (14 firms), followed by quality (10 firms) and then availability (8 firms). CR at II-24 and Table II-7 (CD564). Among 40 responding purchasers, 35 firms reported that they usually or sometimes purchase the lowest-priced product. CR at II-25 (CD564).

¹¹⁴ CR at Table II-9 (CD564).

and its COGS to net sales ratio increased during a period of strong and increasing demand.¹¹⁵ Specifically, the domestic industry's ratio of COGS to net sales increased from *** percent in 2014 to *** percent in 2015, and then declined to *** percent in 2016, a level *** percentage points higher than that in 2014.¹¹⁶ This increase in the industry's COGS to net sales ratio occurred at the same time subject imports substantially increased in volume, supporting the finding that subject imports suppressed domestic prices to a significant degree.¹¹⁷

In addition to instructing the Commission to account for its substitutability finding, the Panel directed the Commission to reconsider certain of its other factual findings in its price effects analysis. Specifically, the Panel found that the pricing data from *Random Lengths* and an industry article in *Madison Lumber Reporter* cited by the Commission in its Original Views did not support the finding that prices of different lumber species "closely" tracked each other.¹¹⁸

¹¹⁵ The domestic industry's COGS increased from \$*** in 2014 to \$*** in 2015 and \$*** in 2016. It was higher in interim 2017 at \$*** than in interim 2016 at \$*** in interim 2016. CR at Table C-3 (CD564).

¹¹⁶ CR at Table C-3 (CD564). The domestic industry's ratio of COGS to net sales was *** percent in interim 2016 and *** percent in interim 2017. *Id.* As the Court of International Trade has repeatedly recognized, a rising COGS to net sales ratio is evidence of price suppression. *Siemens Energy Inc. v. United States*, 992 F. Supp. 2d 1315, 1335 (Ct. Int'l Trade 2014), *aff'd*, 806 F.3d 1367 (Fed. Cir. 2015); *CP Kelco US, Inc. v. United States*, 24 F. Supp. 3d 1337, 1345 (Ct. Int'l Trade 2014), *aff'd*, 623 F. App'x 1012 (Fed. Cir. 2015); *LG Electronics v. U.S. Int'l Trade Comm'n*, 26 F. Supp. 3d 1338, 1357 (Ct. Int'l Trade 2014).

¹¹⁷ In more recent investigations of hardwood plywood, the Commission reached affirmative determinations, even while again finding a moderate degree of substitutability. Specifically, in *Hardwood Plywood II*, 392 F. Supp. 3d 1298, the Court of International Trade affirmed the Commission's finding that subject imports, which were "moderately" substitutable with the domestic like product, significantly undersold the domestic like product and suppressed domestic prices to a significant degree. It found that the Commission's conclusions, which were based on the important role price played in purchasing decisions, the increase in the volume of subject imports in segments of the plywood market where domestic like products participated, and relatively flat prices of the domestic product in a period where demand and costs increased, were supported by substantial evidence. *See id.* at 1312-13; *see also Voma*, 253 F. Supp. 3d 1339 (upholding Commission determination that competition was not attenuated despite a finding of less than perfect substitutability).

¹¹⁸ Panel Decision at 93. In the Original Views, the Commission referred to the following language in the *Madison Lumber Reporter* (April 17, 2015) article:

In a potentially alarming development, benchmark Western Spruce-Pine-Fir KD 2x4 #2&Btr construction framing dimension lumber prices have dropped much farther than similar commodities in the past year.

Eastern Spruce-Pine-Fir KD 2x4 #2&Btr prices fell 16.5 per cent since April 2014, from US \$437mfbm to US\$365 mfbm this week (net FOB mill).

(Continued...)

The Panel also questioned the Commission's citation to the questionnaire responses to support what the Panel understood to be the Commission's conclusion that purchasers purchased subject imports "solely" due to price considerations.¹¹⁹ Finally, although the Panel agreed with the Commission that it was proper to exclude capacity data of the related party firms that were not part of the domestic industry in its capacity calculations, it found that the Commission failed to consider whether to take into account the more recent FEA data in rendering its finding on domestic industry capacity.¹²⁰ The Panel therefore directed the Commission to reconsider the record evidence on each of these three factual findings and determine the effect that such reconsideration may have on its price suppression analysis.¹²¹

Upon reconsideration of the record evidence, we find that the pricing data from *Random Lengths* demonstrate that prices for different lumber species *generally* tracked each other during the POI.¹²² Specifically, the data show that despite there being slight and temporary deviations, prices of both predominantly domestically produced and predominantly

(...Continued)

By comparison, Southern Yellow Pine KD 2x4 #2&Btr East Side prices dropped by 4.2 per cent in the same time frame, from US\$428 mfbm at this time last year to US\$410 mfbm this week.

With the largest volumes sold, WSPF price trends generally lead the market. However, the disconnect in price movement between this and the two similar species this year could be cause for concern. Not in the least because the last time there was such a difference was in mid-2005, at the tail-end of major over-building of US homes and in advance of a serious crash in construction framing dimension lumber prices and general economic woes in the US.

Western Spruce-Pine-Fir KD 2x4 #2&Btr prices have fallen an astonishing 22.8 per cent since this time last year, from US\$342 mfbm in April 2014 to US\$264 this week.

Given that these three products, WSPF, ESPF and SYP, are basically interchangeable in terms of end-user and application, such a great difference in price movement of one compared to the other two is definitely worth watching. All three products sell into Canada and the US for home building, renovation, and remodeling.

Confidential Views at 54 n.201 (CD582).

¹¹⁹ Panel Decision at 101-102 ("the plain meaning of the wording used in the questionnaire, *i.e.*, whether price was 'a primary reason' and the specific questionnaire responses indicating there were also other primary reasons for purchases of subject imports, does not support a conclusion that these purchases were due solely to price considerations.").

¹²⁰ Panel Decision at 90.

¹²¹ Panel Decision at 90, 93-94, 101-102.

¹²² CR at Tables V-10-11 and Figures V-8-10 (CD564).

imported Canadian softwood lumber products generally declined substantially from 2014 to 2015, notwithstanding rising apparent U.S. consumption, as subject imports increased.¹²³ Although prices for all products increased overall in 2016, as demand continued to improve and subject imports captured significant market share, prices generally did not return to levels similar to those at the beginning of the POI until 2017.¹²⁴

The record evidence further demonstrates that low-priced subject imports from Canada exerted pricing pressure on the domestic industry. Domestic producers and importers of softwood lumber from Canada reported selling a majority of their product in the spot market, using mostly transaction-by-transaction negotiations and referring to weekly industry price reports such as *Random Lengths* to set prices, which provided transparency to pricing in the market.¹²⁵ Thus, in addition to generally tracking each other's prices, price differences in one species tended to have an effect on other species' prices. Indeed, *Random Lengths* publications discuss how ***.¹²⁶

In these Remand Views, we clarify that we do not find that the relevant purchasers' questionnaire responses showed that all of their purchases of subject imports were *solely* driven by price. Rather, we find that the purchaser questionnaire responses indicate that price was an important reason cited by some purchasers for purchasing subject imports.¹²⁷ In fact,

¹²³ CR at Tables V-10-11 and Figures V-8-10 (CD564).

¹²⁴ CR at Tables V-10-11 and Figures V-8-10 (CD564).

¹²⁵ CR at V-4-5 and Tables V-1 and V-2 (CD564). All 49 U.S. producers and 55 of 58 importers reported using the transaction-by-transaction method to set prices. CR at Table V-1 (CD564). U.S. producers and importers sold the majority of their U.S. commercial shipments (*** percent and *** percent, respectively) in the spot market. CR at Table V-2 (CD564).

¹²⁶ See, e.g., Joint Respondents Prehearing Br. at Exhibit 42 (*Random Lengths*, "The Weekly Report on North American Forest Products Market," Vol. 71, Issue 34 at 9 (Aug. 21, 2015) (discussing ***)) (CD537); Coalition Prehearing Br. at Exhibit 18 (*Random Lengths*, "The Weekly Report on North American Forest Products Market," Vol. 73, Issue 7 at 1 (Feb. 17, 2017) (observing that ***)), Exhibit 23 (*Random Lengths*, Lumber Market Report (stating that ***)) (CD540).

In addition, as observed in the Original Views, an article published in the *Madison Lumber Reporter* reported that with the largest volumes sold, "WSPF price trends generally lead the market." Coalition Posthearing Br. at Exhibit 11 (CD551). In particular, the article observes that prices for all lumber species declined in 2015, with prices for WSPF dropping to a greater degree, that disconnects in price movements among species could be "cause for concern," and that given the interchangeability of WSPF, ESPF, and SYP, the difference in magnitude of price movements was "worth watching." *Id.* This passage thus reflects the understanding that price movements among species normally will track each other.

¹²⁷ The Commission is not required to find that unfairly traded subject imports are the sole or primary cause of injury, but rather that they are more than a tangential or inconsequential cause of injury. *Changzhou Trina Solar Energy Co. v. United States*, 879 F.3d 1377 (Fed. Cir. 2018) (upholding the (Continued...))

several purchasers confirmed that price was one of the primary reasons for purchasing a substantial quantity of subject imports rather than the domestic like product.¹²⁸ Specifically, in response to the Commission's purchaser questionnaires, 30 of 40 responding purchasers reported that they had purchased subject imports instead of U.S.-produced product since 2014.¹²⁹ The responding purchasers reported purchasing and/or importing 26.6 billion board feet of softwood lumber (17.9 billion board feet of domestic product, 8.3 billion board feet of subject imports, and 0.4 billion board feet from other sources) during 2016.¹³⁰ Fourteen of these purchasers reported that subject imports were priced lower, and 12 reported that price was a *primary* reason for purchasing subject imports instead of the domestic like product. These purchasers reported purchasing a total of 5.6 billion board feet of subject imports.¹³¹

The Joint Respondents argue that for six of these purchasers, ***, factors other than price were important to their purchasing decisions.¹³² That these six purchasers also considered other factors in their purchasing decisions, however, does not detract from their responses that price was a primary reason for purchasing subject imports rather than the domestic like product.¹³³ In addition to reporting that price was a primary reason for their purchases of subject imports rather than the domestic like product, these purchasers made other statements in their questionnaire responses that corroborated that price was an

(...Continued)

Commission's affirmative material injury determination, which was based, in part on its finding that although there may have been additional factors exerting downward pressure on the domestic prices, there was a causal nexus between subject imports and the decline in prices). The natural corollary is that factors other than price may be having an impact in the market and the price of subject imports does not need to be the sole factor motivating purchasing decisions for the Commission to find significant price effects. Thus, in our analysis we consider whether price is a primary factor in purchasing decisions rather than the only factor.

¹²⁸ CR at V-37 and Table V-13 (CD564). In addition, four of the responding 40 purchasers reported that U.S. producers had reduced prices in order to compete with lower-priced subject imports, with reported price reductions ranging from 2.5 percent to 10 percent. CR at V-37 and Table V-14 (CD564).

¹²⁹ CR at V-37 (CD564).

¹³⁰ CR at Table V-12 (CD564).

¹³¹ CR at V-37 and Table V-13 (CD564).

¹³² Canadian Parties NAFTA Rule 57(3) Br. at 92-93.

¹³³ The Court of Appeals for the Federal Circuit has held that an affirmative material injury determination requires no more than a substantial factor showing. *Nippon Steel Corp. v. United States Int'l Trade Comm'n*, 345 F.3d 1379, 1381 (Fed Cir. 2003) (finding that the existence of other non-price factors for purchasers' increased purchases of subject imports did not detract from the Commission's determination that the low price of subject imports was a substantial factor in the decline in the domestic industry's performance).

important consideration in their purchasing decisions. For instance, ***.¹³⁴ All six purchasers reported that ***.¹³⁵

Finally, as we found in our discussion of WWPA/FEA data above, we continue to find that the domestic industry's capacity declined from *** board feet in 2014 to *** board feet in 2015 and *** board feet in 2016, and that the WWPA publications used for our calculations are not outdated.¹³⁶ We therefore do not find any merit to the Joint Respondents' corresponding price correction theory that the decline in prices in 2015 was due to an increase in domestic industry capacity.¹³⁷ Furthermore, we do not find the FEA data that go beyond 2016 to be probative for our analysis. As we have explained in our expanded discussion of post-petition data, we base our determination primarily on data for the three full years of the POI.

E. Impact of the Subject Imports

Having again found, as explained in additional detail above, that the increasing and significant volume of subject imports gained market share at the expense of the domestic industry during a time of increasing demand and prevented price increases, which otherwise would have occurred, to a significant degree, we adopt and incorporate in full from the Original Views our findings, analysis, and conclusions on impact. We do not find that our reconsideration and clarification of the remanded issues require us to provide additional explanation regarding any aspect of our findings on the impact of subject imports on the domestic industry.

¹³⁴ *** U.S. Purchaser Questionnaire Response at II-2 (CD386).

¹³⁵ *** U.S. Purchaser Questionnaire Response at III-22 & III-27 (CD386); *** U.S. Purchaser Questionnaire Response at III-22 & III-27 (CD378); *** U.S. Purchaser Questionnaire Response at III-22 & III-27 (CD401); *** U.S. Purchaser Questionnaire Response at III-22 & III-27 (CD390); *** U.S. Purchaser Questionnaire Response at III-22 & III-27 (CD376); *** U.S. Purchaser Questionnaire Response at III-22 & III-27 (CD379).

¹³⁶ Revisions to Confidential Staff Report at Table III-4 n.1 (CD564); *see also* Petition, Vol. I at Exhibit 2 (PD1); Joint Respondents Prehearing Br. at Exhibit 59 & 75 (CD537).

¹³⁷ Canadian Parties NAFTA Rule 57(1) Br. at 145.

III. Conclusion

For the foregoing reasons, and the reasons provided in the Original Views undisturbed by the Panel and adopted here, we determine that an industry in the United States is materially injured by reason of subject imports of softwood lumber from Canada that are sold in the United States at less than fair value and subsidized by the government of Canada.

