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Pursuant to the
NORTH AMERICAN FREE TRADE AGREEMENT

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

REMAND DECISION OF THE PANEL

April 19, 2004

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

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I. INTRODUCTION

This NAFTA Binational Panel is reviewing the International Trade Commission's ("Commission") remand determination regarding *Certain Softwood Lumber Products from Canada*, issued on December 15, 2003. In its remand determination, the Commission found that an industry in the United States was 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. Remand Determination at 1.

An oral argument on the Commission's remand determination was held on February 25, 2004, in Washington, D.C.

II. STANDARD OF REVIEW

The same standard of review applies to the review of a remand determination as to the review of the original determination, to wit, whether the agency's determination is "unsupported by substantial evidence on the record, or is otherwise not in accordance with law." See Ausimont SPA v. United States, 2002 WL 31966590, at *3 (Ct. Int'l Trade December 17, 2002) (quoting 19 U.S.C. §

1516a(b)(1)(B)); Bethlehem Steel Corp. v. United States, 223 F. Supp. 2d 1372, 1376 (Ct. Int'l Trade 2002).[2]

Like the original determination, the remand determination on threat of injury cannot be based on "mere conjecture or supposition." 19 U.S.C. § 1677(F)(ii). The Court of International Trade ("CIT") has held that "[c]onjectures are not facts and cannot constitute substantial evidence." China Nat'l Import & Export Corp. v. United States, 264 F. Supp. 2d 1229, 1240 (Ct. Int'l Trade 2003). The CIT has also noted that "by warning that a 'mere conjecture' is not enough to sustain an affirmative threat determination . . . the statute aims to limit hypothesizing that naturally accompanies such a prediction." The Committee for Fair Beam Imports v. United States, 2003 WL 21555105 at *19 (Ct. Int'l Trade June 27, 2003). See also China Nat'l Arts & Crafts Import & Export Corp. v. United States, 771 F. Supp. 407, 413 (Ct. Int'l Trade 1991) ("Guesswork is no substitute for substantial evidence in justifying decisions.").

[2] This Panel incorporates herein, by reference; the section on Standard of Review set forth in its September 5, 2003, original decision ("Panel Decision" herein).

III. ANALYSIS

A. Whether The Commission's Remand Determination that Square-End Bed Frame Components and Flangestock Are Part Of A Continuum Of Softwood Lumber Products Defined As A Single Domestic Like Product Is In Accordance With The Law And Supported By Substantial Evidence

In its original determination, the Commission found that both square-end bed frame components and flangestock are part of a continuum of softwood lumber products defined as a single domestic like product. Final Determination at 15. This Panel remanded the Commission's holding that both square-end bed frame components and flangestock are part of a continuum of softwood lumber products defined as a single domestic like product, and instructed the Commission on remand "to consider, based on the existing record evidence, all six like product factors to determine whether square-end bed frame components and flangestock are part of a continuum of softwood lumber products defined as a single domestic like product." Panel Decision at 24.

On remand, the Commission did, in fact, consider all six like product factors and determined that both square-end bed frame components and flangestock are part of a continuum of softwood lumber products defined as a single domestic like product. Remand Determination at 18-34. Although the Commission considered these like product factors in a rather conclusory manner, the Panel recognizes the high degree of deference that the Commission is to be accorded in determining the

like product. See, e.g., NEC Corp. v. Department of Commerce, 36 F. Supp. 2d 380, 384 (Ct. Int'l Trade 1998) ("In reviewing the Commission's like product findings under the substantial evidence test, it is not the province of the courts to change the priority of the relevant like product factors or to reweigh or judge the credibility of conflicting evidence . . . . It is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence . . . [T]he relevant case law demonstrates that the Commission has broad discretion in determining whether a particular difference or similarity is minor."); Timken Co. v. United States, 913 F. Supp. 580, 584 (Ct. Int'l Trade 1996) (The "bases upon which a like product determination is made fall [ ] within the Commission's broad discretion and expertise in conducting investigations."). Accordingly, this Panel finds that the Commission's remand determination that square-end bed frame components and flangestock are part of a continuum of softwood lumber products defined as a single domestic like product is in accordance with the law and supported by substantial evidence.

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

1. Procedural History

In its original determination, the Commission did not find present material injury by reason of subject imports. Final Determination at 37. However, the Commission found that the domestic softwood lumber industry is threatened with material injury by reason of subsidized imports and dumped imports from Canada. Final Determination at 44. The Commission's threat of material injury determination was appealed to this Panel. On appeal, this Panel remanded the Commission's threat of material injury determination and instructed the Commission to consider in its remand analysis "all of the information and data that it considered in its present material injury determination." Panel Decision at 112.

2. The Governing Statutory Framework

In its threat of injury analysis, the Commission is required to determine "whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted." 19 U.S.C. § 1677(7)(F)(ii). The Commission is not permitted to make such a determination "on the basis of mere conjecture or supposition." Id. To "avoid speculation and conjecture," and due to the predictive

nature of a threat determination, the Commission is directed to use "special care" in making its threat determination. See Statement of Administrative Action on the Uruguay Round Agreements Act ("SAA"), *reprinted in* H.R. Doc. No. 103-316, at 855 (1994); see also Goss Graphic Systems, Inc. v. United States, 33 F. Supp.2d 1082, 1102 (Ct. Int'l Trade 1998) ("Due to the predictive nature of a threat of material injury determination, the ITC must use special care in making such a determination to avoid speculation or conjecture.").

To guide the Commission's threat analysis, Congress has set forth eight specific factors that the Commission must consider in each case. See 19 U.S.C. § 1677(7)(F)(i). On remand, the CLTA challenges the Commission's affirmative threat finding based on the Commission's holdings as to three of the eight factors[3]:

- "any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports." 19 U.S.C. § 1677(7)(F)(i)(II) ("Capacity" threat factor);

- "a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports." 19 U.S.C. § 1677(7)(F)(i)(III) ("Volume" threat factor);

- "whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic

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[3] The other five threat factors -- (1) the nature of the subsidy threat factor (19 U.S.C. § 1677(7)(F)(i)(I)); (2) the inventory threat factor (19 U.S.C. § 1677(7)(F)(i)(V)); (3) the factor concerning potential product-shifting (19 U.S.C. § 1677(7)(F)(i)(VI)); (4) the factor pertaining to the shifting of agricultural products (19 U.S.C. § 1677(7)(F)(i)(VII)); and (5) the development and production threat factor (19 U.S.C. § 1677(7)(F)(i)(VIII)) – are not challenged in this appeal. The Commission's affirmative threat finding is not based on any of these five threat factors.

> prices, and are likely to increase demand for further imports." 19 U.S.C. § 1677(7)(F)(i)(IV) ("Price" threat factor).

The Commission determined that there was an interrelationship between (a) the capacity and the volume threat factors, and (b) six factors subsidiary to these two statutory factors that warranted considering the capacity and volume threat factors together in determining whether "there is a likelihood of substantial increases in subject imports." Remand Determination at 53. The CLTA does not contest the notion that there is an interrelationship between (a) the capacity and volume threat factors, and (b) five of the six factors subsidiary to the capacity and volume threat factors that warranted considering capacity and volume threat factors together in determining whether subject imports would increase substantially in the imminent future.[4] See CLTA Remand Brief at 22-23. Accordingly, below, we analyze the capacity and volume threat factors together. We also analyze the other challenged threat factor, the price threat factor.

Before we undertake this analysis, we note that at the remand hearing, counsel for the Coalition argued to this Panel that if the volume threat factor or the price threat factor indicates threat of material injury, then the Commission, based upon Mitsubishi Materials Corp. v. United States, 918 F. Supp. 422 (Ct. Int'l Trade 1996), could have, in fact, found threat of material injury. See Argument of John A. Ragosta, Remand Hearing Transcript at 164.

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[4] The CLTA, however, takes issue with one of the six subsidiary factors; see discussion, infra, at page 30-32.

We find the Coalition's argument in this regard to be without merit. Contrary to the Coalition's argument, Mitsubishi did not hold that if the volume threat factor *or* the price threat factor indicated threat of material injury, then the Commission could have, in fact, found threat of material injury. It held that *"[n]o one* factor is conclusive" as to whether there exists threat of material injury, and that the Commissioners "gave many reasons for their finding threat of injury." Mitsubishi, 918 F. Supp. at 428 (emphasis supplied).

It is also well settled that increased import volume, in and of itself, is not sufficient to sustain an affirmative threat determination. See, e.g., Durum and Hard Red Spring Wheat From Canada, Invs. Nos. 701-TA-430A and 430B and 731-TA-1019A and 1019B, USITC Pub. 3639 (October 2003) ("The Commission rejects the assertion here, that . . . the mere presence of subject imports is sufficient to demonstrate material injury by reason of subject imports. . . . As the CIT noted in Iwatsu Electric Co. v. United States (758 F. Supp. 1506, 1512-13 (Ct. Int'l Trade 1991)), 'The court cannot envision a case in which causation could be proved by volume alone.'"). Dry Film Photoresist from Japan, Inv. No. 731-TA-622, USITC Pub. 2555 (August 1992) (Additional Views of Commissioner Carol T. Crawford) at 34 ("An increase in the share of imports does not in and of itself constitute unfair trade. The statute directs the Commission to find evidence that supports the probability that imports of the merchandise will enter the United States at prices that will have a depressing effect on the domestic prices of the like product."); Fresh

Cut Roses From Columbia, Inv. No. 731-TA-148, USITC Pub. 1450 (November 1983) at 35 ("Increased import volume and penetration is not – in and of itself – sufficient to sustain an affirmative preliminary determination with respect to injury, threat of injury, and causation.").

Accordingly, based on these precedents and the record on which the Commission relies in this case, we reject the notion that if the volume threat factor alone, *or* the price threat factor alone, indicated threat of material injury, then the Commission could have, in fact, found threat of material injury. As set forth below, however, we hold that on the basis of the record evidence on which the Commission has based its findings, neither the volume threat factor, the capacity threat factor, nor the price threat factor, whether alone or in combination, indicate threat of material injury in this case.

3. **Analysis**

a) Capacity and Volume Threat Factors: Whether The Commission's Finding That Subject Imports Would Increase Substantially In The Imminent Future Is Supported By Substantial Evidence

In analyzing the capacity and volume threat factors, the Commission found on remand that "there is a likelihood of substantial increases in subject imports." Remand Determination at 53. The CLTA challenges this finding, and contends that the Commission has cured none of the deficiencies that the Panel identified in its decision, and therefore, the Commission's finding remains unsupported by substantial evidence. CLTA Remand Brief at 22-23.

(1) Canadian Producers' Excess Production Capacity and Projected Increases In Capacity, Capacity Utilization And Production

One factor that the Commission cited on remand in support of its finding that "there is a likelihood of substantial increases in subject imports" was "Canadian producers' excess production capacity and projected increases in capacity, capacity utilization and production." Remand Determination at 53. The CLTA challenges the Commission's decision that "Canadian producers' excess production capacity and projected increases in capacity, capacity utilization and production" advanced

its finding that "there is a likelihood of substantial increases in subject imports." CLTA Remand Brief at 23-25.

The statutory threat factor regarding capacity requires the Commission to assess whether either (a) "any existing unused production capacity" or (b) "imminent, substantial increase in production capacity" in Canada, indicates "the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports."[5] 19 U.S.C. § 1677(7)(F)(i)(II) (emphasis added). As this Panel noted in its first decision, the Commission must tie (a) "any existing unused production capacity" or (b) "imminent, substantial increase in production capacity" in Canada to "the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports." Panel Decision at 65.

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[5] In analyzing the capacity threat factor, the Commission believes that this Panel misinterpreted the capacity threat factor, asserting that this Panel's remand decision “seems to require a showing of both "existing unused production capacity," and "imminent, substantial increase in production capacity" when the text of the capacity threat factor permits only one. Remand Determination at 52, n.147 (citing 19 U.S.C. § 1677(7)(F)(II)). The Commission’s point is misplaced. See Panel Decision at 65-68. On page 65 of the Panel's remand decision, the Panel explicitly acknowledges that the Commission need only consider "whether either (a) 'any existing unused production capacity' or (b) 'imminent, substantial increase in production capacity' in Canada, indicates 'the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports." Because the Commission had analyzed both factors, the Panel analyzed both factors to show that the Commission's analysis was incorrect on both accounts, and thus, the Commission's finding that the capacity threat factor indicates a threat of material injury was not supported by substantial evidence. See Panel Decision at 65-68. The Panel, in this remand decision, likewise considers both whether "any existing unused production capacity" indicates "the likelihood of substantially increased imports of the subject merchandise into the United States," and whether "imminent, substantial increase in production capacity" indicates "the likelihood of substantially increased imports of the subject merchandise into the United States."

On remand, we find that the Commission has not tied "any existing unused production capacity" to "the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports." Instead the Commission asserts that the Panel inverted the capacity utilization data, and "appears to confuse whether a decline [in the capacity utilization data] supports the ITC or, as the Panel mistakenly holds, it does not." Remand Determination at 58, n.163. Specifically, the Commission states as follows:

> The evidence showed that capacity utilization was projected to increase from the 83.7 percent to 90 percent. The Panel takes the 83.7 percent capacity utilization number and inverts it to 16.3 percent unused Canadian production capacity. Panel Decision at 65-66. Thus, the Panel finds that unused production capacity was forecasted to fall from 16.3 percent in 2001 to 9.6 percent in 2003. The Panel_fails to recognize that a decline in "unused capacity" is the same as an increase in "capacity utilization." That is, a decline in "unused capacity" comes as a result of increased use of production facilities which would mean more supply that could be shipped to the U.S. market, which supports the ITC's finding. The Panel, however, erroneously holds that "[b]ecause existing Canadian unused production capacity was predicted to decline, and Canadian exports to the United States were predicted to fall (with exports to other export markets predicted to increase) we find that there is no support on the record to show that 'existing unused production capacity' in Canada indicates (sic) 'the likelihood of substantially increased imports."
> Panel Decision at 66. Remand Determination at 58, n.163.

The Commission is incorrect when it asserts that the Panel appears to confuse whether a decline in unused Canadian production capacity data supports the Commission's original threat finding. This Panel is aware that a decline in unused Canadian production capacity data *could* support such a finding. However, this Panel held that a decline in unused Canadian production capacity data *did not* support the Commission because "the Commission *failed to tie* this existing unused production capacity to 'the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,'" as mandated by the statute. Panel Decision at 65 (emphasis added). On remand, we find that the Commission still has not tied any Canadian unused production capacity to "the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports."

The Commission relies on the exact same record evidence that this Panel rejected in its original decision to show that there was "imminent, substantial increase in production capacity" in Canada. Specifically, the Commission continues to rely on Table VII-2 of the Staff Report for the proposition that production capacity was going to increase from 25,804 mmbf in 2001 to 26,206 mmbf in 2003. See Remand Determination at 57, n.161. However, this Panel held in its original decision that this increase "may not, in our mind, be fairly characterized as

'imminent' and 'substantial.'" Panel Decision at 67. We note, however, that the Commission properly recognized that RISI forecasts predicted declines from 2001 to 2003 in production capacity. Remand Determination at 57.

Even in the event that, arguendo, there exists "imminent, substantial increase in production capacity" in Canada, the Commission did not tie "imminent, substantial increase in production capacity" in Canada to "the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports."

In light of the foregoing, we conclude that the Commission's observations regarding Canadian producers' excess production and projected increases in capacity, and capacity utilization and production fail to support its finding that "there is a likelihood of substantial increases in subject imports." Remand Determination at 53.

(2) The Export Orientation of Canadian Producers to the U.S. Market

Another factor that the Commission cites on remand in support of its finding that "there is a likelihood of substantial increases in subject imports" is "the export orientation of Canadian producers to the U.S. market." Remand Determination at 53. The CLTA challenges the Commission's decision that "the export orientation of Canadian producers to the U.S. market" advanced its finding that "there is a

likelihood of substantial increases in subject imports." CLTA Remand Brief at 26-32.

In its original decision, this Panel found that, based upon projections by Canadian exporters, Canadian exports to the United States as a share of total Canadian shipments were projected to decrease from 60.9 percent in 2001 to 58.8 percent in 2002, and further decrease from 58.8 percent in 2002 to 58.5 percent in 2003. Panel Decision at 83. In addition, this Panel found that, at most, the record evidence indicated there would be a minimal increase in absolute Canadian exports to the United States, *viz.*, an increase of 0.84 percent from 2001 to 2002 (from 13,546 mmbf to 13,660 mmbf), and an increase of 2.15 percent from 2002 to 2003 (from 13,660 mmbf to 13,954 mmbf). Panel Decision at 83-84. Based upon this record evidence, this Panel concluded that the Commission failed to explain how projected minimal increases in absolute Canadian exports to the United States, combined with projected decreases in the percentage of total Canadian shipments that were exported to the United States, provided support for its finding that there is a likelihood of substantial increases in subject imports.

On remand, the Commission rejected the Canadian exporters' projections for exports to the United States. While the Commission relied on these very same exporters' projections in its Final Determination, it chose instead on remand to look at historical patterns of the direction by the Canadian industry of two thirds of its lumber production to the United States. Finding the Canadian exporters'

projections to be inconsistent with other data including data showing excess Canadian capacity, declines in home market shipments, declines in exports to other markets and projected increases in production, the Commission concluded that the projected increases in production would likely be distributed among the U.S. market, the Canadian home market and non U.S. export markets in shares similar to those prevailing in the prior five years.

This Panel does not accept the Commission's unexplained rejection on remand of the Canadian exporters' projections in the face of its reliance upon the very same exporters' projections in its Final Determination.[6] The Commission explained at the hearing that it was rejecting the Canadian exporters' projections on remand "based on the fact that they are inconsistent with *other evidence*."[7] However, the Commission conceded the *other evidence* was also in the Commission's Final Determination[8].

[6] As he states in his concurring opinion, Panelist Joelson believes that the Commission, in reformulating its position on remand, was entitled to discount the Canadian producers' projections about their likely exports to the United States as possibly self-serving in the context of this dispute and to rely, as the Commission does, on the historical distribution of Canadian softwood lumber production among the markets.

[7] At the remand hearing, the Commission conceded that it rejected the Canadian exporters' projections in the Remand Determination, even though it cited the very same exporters' projections in the Final Determination. Remand Hearing Transcript at 80, Lines 1-7. Hearing Transcript at page 80, lines 15-16 (Emphasis added).

[8] The following remand hearing colloquy illustrates this:

PANELIST MASTRIANI: Ms. Turner, in the Commission's original opinion it cited the Canadian exporters' projections for exports to the U.S., and without reservation or qualification. In the remand, it rejects those. I'm wondering what the reason for that is.

Considering that the Commission did not reject the Canadian exporters' projections in its Final Determination, and the underlying evidence remains the same, this Panel finds the Commission's rejection of the Canadian exporters' projections in its Remand Determination to be unwarranted with no explanation of its change of position.

The Commission also asserts that this Panel "relied incorrectly on data regarding Canadian exports as a share of Canadian shipments to indicate that exports would fall, when the evidence demonstrated that absolute level of Canadian exports was projected to increase." Remand Determination at 58, n. 163. However, the record evidence regarding Canadian exports as a share of Canadian shipments clearly indicated that Canadian exports to the United States were projected to fall. Panel Decision at 66. Such exports were projected to fall from 60.9 percent in 2001 to 58.8 percent in 2002 and to 58.5 percent in 2003. Id.

MR. [SIC] TURNER: . . . Its discounting of those projections are based on the fact that they are inconsistent with other evidence.

PANELIST MASTRIANI: And what is that other evidence?

MS. TURNER: Well, the other evidence is the fact that 65 percent of production has come to the United States historically. It has been 63 to 68 percent, actually, in 2001.

PANELIST MASTRIANI: And that information and that number, and other numbers related to that, are in the original decision, are they not?

MR. [SIC] TURNER: They are in the original decision, as well as they are in the remand decision.

Remand Hearing Transcript at page 80, lines 1-6, 15-17, 19-25; page 81, lines 1-4.

(citing Table VII-2). While the Panel in its original decision acknowledged, the evidence demonstrated that the absolute level of Canadian exports was projected to increase, the Panel also found that the projected absolute increase to be "minimal" and insufficient to support a finding that "subject imports are likely to increase substantially." Id. at 84. Specifically, the Panel stated:

> While the record reflects the historical export orientation of the Canadian producers to the U.S. market, clearly, the export data do not indicate any "substantial" increase in the export orientation of Canadian producers to the U.S. market. At most, the record indicates a *minimal increase* in absolute Canadian exports to the United States. The Commission, however, failed to explain how projected minimal increases in absolute Canadian exports to the United States, combined with projected decreases in the percentage of total Canadian shipments that were exported to the United States, taking into account "the export orientation of Canadian producers to the U.S. market," provides support for its finding that "subject imports are likely to increase *substantially*."
> Panel Decision at 84 (emphasis added).

In short, the Commission still has not explained how projected minimal increases in absolute Canadian exports to the United States, combined with projected decreases in the percentage of total Canadian shipments that were exported to the United States, provided support for its finding that there is a likelihood of substantial increases in subject imports. We, therefore, conclude that the Commission's observations regarding the export orientation of Canadian producers to the U.S. market fail to advance its finding that "there is a likelihood of substantial increases in subject imports." Remand Determination at 53.

(3) The Increase In Subject Imports Over The Period of Investigation (Market Share)

Another factor that the Commission cites on remand in support of its finding that "there is a likelihood of substantial increases in subject imports" is "the increase in subject imports over the period of investigation." Remand Determination at 53. The CLTA challenges the Commission's decision that "the increase in subject imports over the period of investigation" advanced its finding that "there is a likelihood of substantial increases in subject imports." CLTA Remand Brief at 32-33.

In its original decision, this Panel noted that the Commission's original decision stated the following about import volume:

> The volume of subject imports from Canada increased by 2.8 percent from 1999 to 2001. As a share of apparent domestic consumption, subject imports from Canada increased from 33.2 percent in 1999 to 34.3 percent in 2001. Final Determination at 41.

Based upon this record evidence, this Panel concluded that "[t]he record evidence relied upon by the Commission that is before this Panel is simply devoid of any support for the proposition that there has been a significant rate of increase of the volume or market penetration of imports of the subject merchandise." Panel Decision at 69. This Panel noted that 19 U.S.C. § 1677(24)(A), entitled "Negligible Imports," states that "imports from a country of merchandise corresponding to a domestic like product identified by the Commission are 'negligible' if such imports

account for less than 3 percent of the volume of all such merchandise imported into the United States." Id. at 69-70. This Panel recognized in its decision that 19 U.S.C. § 1677(24) is "not directly on point," but still considered it "to be a useful analogy" to demonstrate that the 2.8 percent increase in volume in subject imports is neither significant nor substantial. Id. at 70. Accordingly, this Panel held that the Commission's finding that this factor indicates threat of material injury was not supported by substantial evidence. Id.

On remand, the Commission cites the *same exact record evidence* that it did in its Final Determination to show an increase in subject imports over the period of investigation. The Commission repeats in its Remand Determination the identical statements it made at page 41 of its Final Determination.

> The volume of subject imports from Canada increased by 2.8 percent from 1999 to 2001 . . . . As a share of apparent domestic consumption, subject imports from Canada increased from 33.2 percent in 1999 to 34.3 percent in 2001. Remand Determination at 63-64.

The Commission cites no other record evidence to show that there was a significant rate of increase of the volume or market penetration of imports of the subject merchandise. Therefore, this Panel continues to hold on remand that "[t]he record evidence relied upon by the Commission that is before this Panel is simply devoid of any support for the proposition that there has been 'a significant rate of increase of the volume or market penetration of imports of the subject merchandise.'" See Panel Decision at 69 (citing 19 U.S.C. § 1677(7)(F)(i)(III)).

Rather than identifying other record evidence to show that there was a significant rate of increase of the volume or market penetration of imports of the subject merchandise, the Commission focuses on this Panel's use of 19 U.S.C. § 1677(24), stating:

> [T]he Panel's use of the statutory negligibility provision [19 U.S.C. § 1677(24)] *as a surrogate test for considering what constitutes a significant rate of increase in volume of imports* does not comport with Congressional intent and judicial precedent. The Panel refers to no legal basis and even acknowledges that there is "no judicial precedent" for its analysis . . . . There is nothing in the statute, case law or administrative practice to indicate Congressional intent *to bind the Commission to a precise numerical percentage for factors involving the injury analysis, as the Panel has done.* Remand Determination at 65-66 (emphasis added).

Contrary to the Commission's assertions, this Panel neither used 19 U.S.C. § 1677(24) "as a surrogate test for considering what constitutes a significant rate of increase in volume of imports," nor bound "the Commission to a precise numerical percentage for factors involving the injury analysis." Rather, this Panel, while recognizing that 19 U.S.C. § 1677(24) is "not directly on point," found it "to be a useful analogy" to demonstrate that the 2.8 percent increase in volume in subject imports is neither significant nor substantial. Remand Determination at 70.

Based upon the foregoing, we conclude that the Commission's observations regarding the increase in subject imports over the period of investigation fail to advance its finding that "there is a likelihood of substantial increases in subject imports." Remand Redetermination at 53.

(4) The Effects Of the Expiration Of The SLA (Restraining Effects of the SLA)

Another factor that the Commission cites on remand in support of its finding that "there is a likelihood of substantial increases in subject imports" is "the effects of expiration of the SLA." Remand Determination at 53. The CLTA challenges the Commission's decision that "the effects of expiration of the SLA" advanced its finding that "there is a likelihood of substantial increases in subject imports." CLTA Remand Brief at 34-38.

In its Final Determination, the Commission found that the SLA "*appears* to have restrained the subject imports from Canada at least to some extent." Final Determination at 144. (emphasis added). In its original decision, this Panel concluded that the Commission's finding that "the effects of expiration of the SLA" advanced its ultimate finding that "subject imports are likely to increase substantially," to be unsupported by substantial evidence because the Commission offered no explanation how the removal of a restraint that only "appears" to have restrained the volume of subject imports from Canada would be likely to result in a substantial increases in subject imports from Canada. Panel Decision at 85-86. The Panel also held that the Commission did not address the anecdotal information supporting the proposition that the SLA had led to a redistribution of imports among Canadian provinces, and that its expiration was returning provincial trade

patterns to their pre-SLA state, while having no effect on overall import volumes from Canada. Panel Decision at 90.

On remand, the Commission makes the less qualified finding that the SLA did constrain Canadian market share at a relatively stable level, with a range during the SLA years of 33.2% to 34.6%. Moreover, each year during the pendency of the SLA, Canadian producers "used their fee-free quota, substantially all of their $50 fee quota in every year except 2000-2001, and in each year, including 2000-2001, exported significant quantities of softwood lumber with $100 fees…The significant quantity of imports subject to $100 fees indicates that, in the absence of the SLA, Canadian producers would have shipped more, given the near prohibitive level of the $100 fee." Remand Determination at 68-69. According to the Commission, the redistribution claim is not justified, inasmuch as, for example, "while imports from the Maritime Provinces declined by 289 mmbf from 2000 to 2001, other Canadian imports increased by 720 mmbf for the same period." Remand Determination at 71. The Commission also says that the partial quotes in the Panel opinion do not fairly reflect the anecdotal statements made about the effects of the SLA claiming, "the full statements of each of the Canadian producers, as set forth in Appendix E of INV-Z-049, demonstrate that the SLA constrained Canadian exports". Remand Determination at 70.

This Panel has again reviewed the full statements of each of these Canadian producers, all of which contain business proprietary information. See Final

Determination, Staff Report at Appendix E. In view of the Commission's less qualified finding and the other evidence cited, this Panel finds that it can be fairly concluded that the SLA had *some* restraining effect. The difficulty remains that it is not possible to appraise the magnitude or impact of that effect and therefore this Panel concludes that the Commission's observations regarding the effects of the expiration of the SLA fail significantly to advance its finding that "there is a likelihood of substantial increases in subject imports." Remand Redetermination at 53.

(5) Subject Import Trends *(i.e., Substantial Increases In Subject Imports)* During Periods When There Were No Import Restraints (Such As The SLA)

Another factor that the Commission cites on remand in support of its finding that "there is a likelihood of substantial increases in subject imports" is "subject imports trends during periods when there were no import restraints, such as the SLA." Remand Determination at 53. The CLTA challenges the Commission's decision that subject import trends during periods when there were no import restraints advanced its finding that "there is a likelihood of substantial increases in subject imports." CLTA Remand Brief at 38-46.

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

SLA expired and before suspension of liquidation in this investigation" (April 2001 to August 2001). Id.

(a) The August 1994 to April 1996 Time Period

In its original decision, this Panel concluded that because the Commission did not undertake an analysis of *market conditions* for the August 1994 to April 1996 period in using such import data to draw inferences about the likely future import trends after the period of investigation, the Commission's finding that subject import trends during the August 1994 to April 1996 time period advanced its ultimate finding that subject imports are likely to increase substantially was unsupported by substantial evidence. Panel Decision at 93-96. Specifically, this Panel held:

> [T]he Commission failed to examine market conditions in the August 1994-April 1996 period. Without this examination, this Panel simply cannot accept the notion that just because there were no import restraints in the August 1994-April 1996 period, and imports increased from 32.6 percent to 37.4 percent during this period, it necessarily follows that imports are likely to increase substantially after the period of investigation.
>
> In light of the above, the Panel finds the Commission's reliance on import data during the August 1994-April 1996 period to draw inferences about the likely future import trends after the period of investigation is unsupported by substantial evidence.
> Panel Decision at 94.

On remand, the Commission again did not examine market conditions in the August 1994 to April 1996 period. At best, this is dated information of little

consequence in evaluating the validity of the Commission's ultimate conclusions. Accordingly, this Panel, consistent with its original decision, concludes that the Commission's finding that "subject imports trends during periods when there were no import restraints, such as the SLA" significantly advanced its ultimate finding that "subject imports are likely to increase substantially," to be unsupported by substantial evidence.

(b) The April 2001 to August 2001 Time Period

In its original decision, this Panel concluded that the Commission did not undertake an analysis to determine whether the increase in imports from April 2001 to August 2001 represents (1) a fair measure of the allegedly higher level of imports that would occur absent any restraint, or (2) a shift in timing of imports that otherwise would have been shipped to the United States. Panel Decision at 96-98. Absent the Commission's analysis to determine the cause of the increase in imports from April 2001 to August 2001, this Panel found the Commission's reliance on import data during the April 2001 to August 2001 period to draw inferences about the likely future import trends after the period of investigation to be unsupported by substantial evidence. Panel Decision at 97.

On remand, the Commission undertakes some analysis, to determine whether the increase in imports from April 2001 to August 2001 represents (1) a fair measure of the allegedly higher level of imports that would occur absent any restraint, or (2) a shift in timing of imports that otherwise would have been shipped

to the United States. Remand Determination at 75-76. The Commission does not, however, affirmatively assert that the increase in imports from April 2001 to August 2001 represents a fair measure of the allegedly higher level of imports that would occur absent any restraint. Id. The Commission instead attempts to persuade this Panel that this is the case by way of negative implication – *i.e.,* by attempting to dispel the notion that the increase in imports from April 2001 to August 2001 could represent a shift in timing of imports that otherwise would have been shipped to the United States. Id. Nonetheless, this Panel finds the Commission's reliance on import data during the April 2001 to August 2001 period to draw inferences about the likely future import trends after the period of investigation to be supported by substantial evidence. By its nature, however, this finding is of little significance in supporting the Commission's ultimate conclusions.

(6) Forecasts for Strong But Increasing/Relatively Stable Demand In The U.S. Market

In its original determination, the Commission held that subject imports are likely to increase substantially based on, among other factors, "forecasts of strong and improving demand in the U.S. market." Final Determination at 40. Specifically, the Commission asserted:

> We find that subject imports are likely to increase substantially based on several factors: [1] Canadian

> producers' excess capacity and projected increases in capacity, capacity utilization, and production; [2] the export orientation of Canadian producers to the U.S. market; [3] the increase in subject imports over the period of investigation; [4] the effects of expiration of the SLA; [5] subject import trends during periods when there were no import restraints; and [6] *forecasts of strong and improving demand in the U.S. market*. Final Determination at 40 (Emphasis added).

In our remand decision, this Panel found that "[t]he Commission fails to explain how strong and improving demand advances its finding that 'subject imports are likely to *increase substantially*,'" and concluded that the Commission's finding that "forecasts of strong and improving demand" establishes its finding that "subject imports are likely to increase substantially," to be unsupported by substantial evidence. Panel Decision at 98 (quoting Final Determination at 40, 43)).

On remand, the Commission did not explain how *strong and improving demand* advances its finding that "subject imports are likely to increase substantially." Rather, the Commission rewrote its original finding on remand, by stating that "there is a likelihood of substantial increases in subject imports" due, in part, to "*forecasts for strong but relatively stable demand in the U.S. market*" (not due, in part, to "strong and improving demand"). Remand Determination at 53. Specifically, the Commission asserted:

> We find that there is a likelihood of substantial increases in subject imports based on evidence regarding, *inter alia*, [1] Canadian producers' excess production capacity and projected increases in capacity, capacity utilization, and production; [2] the export orientation of Canadian producers to the U.S. market; [3] the increase in subject

> imports over the period of investigation; [4] the effects of expiration of the SLA; [5] subject import trends during periods when there were no import restraints, such as the SLA; and [6] *forecasts for strong but relatively stable demand in the U.S. market.* Remand Determination at 53 (Emphasis added).

In short, the Commission changes one of its six reasons it cited in its Final Determination in support of its position that subject imports would increase substantially *from* "forecasts of strong and improving demand" *to* "forecasts for strong but relatively stable demand in the U.S. market." *Cf.* Final Determination at 40, with Remand Determination at 53. However, the Commission never explained why it has now changed its position on demand forecasts. Nor did the Commission cite any record evidence that would give credence to the proposition that demand was forecasted to be strong but relatively stable in the U.S. market. Considering that the record evidence clearly indicates that the forecasts in the record support the Commission's original proposition that demand was forecasted to be strong and improving,[9] this Panel finds the Commission's new reliance on purported forecasts for strong but relatively stable demand in the U.S. market to draw inferences about the likely future import trends after the period of investigation to be unsupported by substantial evidence, and an indication that it has no explanation as to how strong and improving demand advances its finding that subject imports are likely to increase substantially.

[9] See RISI Forecast, Petitioner Post-hearing Brief, Vol. II, App. H, Ex. 28 at 5, P.R. List 1 321; Clear Vision Forecast, CLTA Pre-hearing Brief, Vol. II, Exhibit 1 at 1 & 3, P.R. List 1 228.

We, therefore, conclude that the Commission's observations on remand regarding forecasts for strong but relatively stable demand in the U.S. market do not advance its finding that "there is a likelihood of substantial increases in subject imports." Remand Determination at 53.

Based on the foregoing, we determine that the Commission's finding that subject imports would increase substantially in the imminent future is not supported by substantial evidence.

b) Price Threat Factor: Whether The Commission's Finding That Subject Imports Are Likely To Have A Significant Price-Depressing or Suppressing Effect Is Supported By Substantial Evidence

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

On remand, the Commission concluded that "subject imports' prices are likely to have a significant price-depressing or suppressing effect on domestic prices in the imminent future." Remand Determination at 95. The CLTA challenges this finding. CLTA Remand Brief at 46. The CLTA contends that the Commission "either ignores entirely or fails to provide an adequate response to the Panel's concerns about the initial determination," and therefore, the Commission's finding remains unsupported by substantial evidence. Id. In particular, the CLTA raises

four issues with regard to the Commission's analysis of this threat factor: (1) the Commission's price trends analysis; (2) the Commission's finding as to volume; (3) the Commission's finding as to moderate substitutability; and (4) the Commission's finding as to cross-border integration. Each of these issues is discussed below.

(1) Price Trends Analysis

In our original decision, this Panel concluded that the Commission, in its Final Determination, "simply did not rely on price trends in its discussion of the price threat factor," and termed price trends arguments raised by Commission counsel on appeal to this Panel to be "nothing more than a *post-hoc* rationalization." Panel Decision at 77. Rather, this Panel found that the Commission reached its conclusion that "subject imports from Canada are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices" based on (a) "likely significant increases in subject import volumes," and (b) its finding of "at least moderate substitutability between subject imports and domestic product." Id. Therefore, the Panel concluded that *volume* and *substitutability* – not price trends – were the bases the Commission relied upon in reaching its conclusion that "subject imports from Canada are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices." Id.

In its Remand Determination, the Commission adopted the same price trends argument raised by Commission counsel on appeal to this Panel. See Hearing

Transcript at 165-66. The Commission concluded that "based on the price trends evidence . . . subject imports are likely to have a significant depressing effect on domestic prices." Remand Determination at 89.

This Panel has analyzed the Commission's price trends analysis and finds it to be unsupported by substantial evidence. The Commission's price trends analysis is based on its conclusion that "prices declined substantially at the end of the period of investigation." See Remand Determination at 95; see also Remand Determination at 51, 80, 81, 113. The record evidence does not support this conclusion. That evidence clearly demonstrates that prices rose steadily after the fourth quarter of 2001. By the time the record closed in mid-April 2002, first quarter 2002 prices were more than ten percent *above* prior year levels, and *higher* than the fourth quarter 2001 lows by roughly the same amount.[10]

Accordingly, we determine that the record evidence does not support the proposition advanced by the Commission that, based on the price trends analysis, subject imports are likely to have a significant depressing effect on domestic prices.

[10] See CLTA Pre-hearing Brief, Vol. 1 at 38 & Vol. 2, Exh. 56, P.R. List 1 228; CLTA Post-hearing Brief, Vol. 1, Exh. 1, P.R. List 1 323.

(2) Volume

As noted above, this Panel concluded in its original decision that *volume* of Canadian imports was one of the two bases the Commission relied upon in reaching its conclusion that "subject imports from Canada are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices." Panel Decision at 72, 77. This Panel also concluded that "unless the increase in imports from Canada would outstrip the 'strong and improving demand' in the U.S. market – *viz*., unless the market share held by imports from Canada was likely to increase significantly – the future 'significant price depressing effect' predicted by the Commission, (Final Determination at 43-44), would not occur." The Commission also did not make a finding that the increase in Canadian imports would outstrip the "strong and improving demand" in the U.S. Panel Decision at 73. This Panel stated:

> The Commission's lack of any finding that the increase in imports from Canada would outstrip the 'strong and improving demand' that it found in the U.S. market renders the Commission's conclusion that 'subject imports from Canada are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices' to be unsupported by substantial evidence. Panel Decision at 74.

On remand, the Commission still does not make a finding that the increase in imports from Canada would outstrip the "strong and improving demand" that it found in the U.S. market. Instead, the Commission attempts to show that based on

volume, subject imports are likely to have a significant depressing effect on domestic prices by asserting (a) that the forecasts show "strong but relatively stable demand in the U.S. market," (not "strong and improving demand") and (b) that U.S. producers had curbed their production of subject imports.

This Panel finds that the Commission has not shown that subject imports, based on volume, are likely to have a significant depressing effect on domestic prices. As discussed above, we find that the record evidence clearly indicates that the forecasts in the record support the Commission's original proposition that demand was forecasted to be "strong and improving." Therefore, this Panel finds the Commission's new reliance on purported forecasts for "strong but relatively stable demand," to show that subject imports, based on volume, are likely to have a significant depressing effect on domestic prices to be unsupported by substantial evidence.

This Panel also finds that the record evidence does not support the Commission's finding that U.S. producers had curbed their production of subject merchandise. On remand, the Commission made the following statement about U.S. producers curbing their production vis-à-vis price depressing effects:

> [B]ecause the substantial price decline in 2000, which led to the deterioration in the condition of the domestic industry, was due to excess supply from both subject imports and domestic production, the Commission did not conclude that subject imports had had *significant* price effects and an adverse impact.

> The evidence regarding supply at the end of the period of investigation, however, indicated that U.S. producers *had curbed* their production, but that overproduction remains a problem in Canada. We find that the evidence demonstrates that . . . in the imminent future likely substantial increases in subject imports with *likely price depressing effects* would cause material injury to the domestic industry.
> Remand Determination at 83-84 (Emphasis added).

The Commission's conclusion as to *likely price depressing effects* is not based on substantial evidence. It is too heavily dependent on the finding that the domestic industry has curbed oversupply, on which there is simply insufficient record evidence.[11] The Commission relies on a Bank of America publication, "Wood and Building Products," at 11 (November 2001) ("Bank of America Report," or "Report," heretofore) for the proposition that U.S. producers had curbed their production of softwood lumber. See Final Determination at 35, n.217. The Bank of America report states:

> The U.S. industry was widely criticized in years passed *for lumber overproduction in order to secure wood chips for pulp and paper manufacturing. This behavior has been curbed considerably here*, but remains a problem in Canada, where Provincial forestry officials must also protect pulp mill employment, which is the lifeblood of many small towns.
> See Bank of America Report at 11.

The Bank of America report fails to support the Commission's findings for several reasons. First, the Bank of America Report's observation that lumber

[11] The Panel notes that the record is devoid of any production and capacity projections by the domestic industry for 2002 and 2003.

overproduction in Canada has continued while U.S. overproduction has been "curbed considerably" fails to state its evidentiary basis. Second, the Bank of America Report is appended by a broad disclaimer as to accuracy and completeness of the report.[12] Even if we were to accept the Bank of America Report's observations, the Report does not assert that anything was "curbed," *i.e.,* eliminated. Rather, the Report asserts that some production was "curbed considerably." The Commission ignores this important qualitative difference. Finally, the Report indicates that what was "curbed considerably," was not the oversupply of subject imports (softwood lumber), but rather, overproduction in order to secure wood chips for pulp and paper manufacturing in Canada, which is a critical difference. Consequently, this Panel concludes that the Bank of America Report does not support the proposition for which the Commission relied on it – to wit, that U.S. producers had curbed their production of softwood lumber. Therefore, this Panel finds the Commission's reliance on the proposition that U.S. producers had curbed their production to show that based on volume, subject imports are likely to have a significant depressing effect on domestic prices to be unsupported by substantial evidence.

Accordingly, the Commission, on remand, does not make a finding that the increase in imports from Canada would outstrip the "strong and improving demand" that it found in the U.S. market. Consequently, we determine that the record

[12] Bank of America Report at 16.

evidence does not support the proposition advanced by the Commission that, based on volume, subject imports are likely to have a significant depressing effect on domestic prices.

(3) Moderate Substitutability

In the Final Determination, the Commission found "at least moderate substitutability between subject imports and domestic product." Final Determination at 43. As noted above, this Panel concluded in its original decision that *substitutability* was one of the two bases the Commission relied upon in reaching its conclusion that "subject imports from Canada are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices." Panel Decision at 77. Yet, the Panel concluded that "the Commission failed to consider whether, and to what extent, its predicted increase in imports from Canada would likely serve segments of the U.S. market *where purchasers do not consider Canadian and U.S. lumber to be close substitutes*, thereby possibly minimizing the potential for imports to cause significant price depression." Id. at 74 (emphasis added).

On remand, the Commission did not consider whether, and to what extent, its predicted increase in imports from Canada would likely serve segments of the U.S. market where purchasers do not consider Canadian and U.S. lumber to be

close substitutes. Instead, the Commission attempts to show that Canadian and U.S. lumber are, in fact, substitutable and interchangeable.

Regardless of how much substitutability there may be,[13] the Commission, on remand, still "fail[s] to consider whether, and to what extent, its predicted increase in imports from Canada would likely serve segments of the U.S. market *where purchasers do not consider Canadian and U.S. lumber to be close substitutes.*" Panel Decision at 74. (Emphasis added.) Consequently, we determine that the record evidence does not support the proposition advanced by the Commission that, based on substitutability, subject imports are likely to have a significant depressing effect on domestic prices.

[13] The Commission, in considering likely adverse price effects, states that this Panel "has referred to a single quote from an employee of Home Depot" to support its proposition that imported and domestic softwood lumber are not interchangeable and do not compete with each other. Remand Determination at 90. The Commission alludes to Commission hearing testimony of an unnamed Home Depot employee, as well as responses to Commission hearing questions from three other unnamed lumber purchasers, to show that imported and domestic softwood lumber are interchangeable and compete with each other. Remand Determination at 90-91; Ex. 1. The Commission attempts to show the substitutability of lumber, by providing a chart that purports to show these persons' preferences for floor joists, wall/framing, headers, and trusses. NAFTA Remand Hearing Transcript at 117; Remand Determination at Exhibit 1; see also Final Determination at 26, n. 162. The Panel has reviewed all the record testimony relied upon by the Commission. See ITC Hearing Transcript at 198-99, 189-90, 191-92, 201-02. An analysis of the ITC hearing transcript, upon which the chart is based, reveals that this chart does not comport with the testimony elicited at the ITC hearing. ITC Hearing Transcript at 204-05. The Commission's chart is in clear conflict with the evidence and does not support any substitutability between the subject imports and the domestic product.

(4) Cross-Border Integration

In our original decision, this Panel concluded that the Commission, in its Final Determination, "failed to address the significance of its own acknowledgement that there has been 'substantial and increasing integration in the North American lumber market.'" Panel Decision at 76 (quoting Final Determination at 27). We noted that "[i]f considered by the Commission, this 'substantial and increasing integration in the North American lumber market' may be found to have an impact on any threat of future price effects, and therefore, any threat of material injury. This is particularly so, since the Commission also found that 'U.S. producers import or purchase a sizable volume of subject imports.'" Id.

On remand, the Commission's discussion of the cross-border integration issue is reflected in the following three sentences:

> We considered allegations raised by Canadian exporters that the integrated companies in the North American lumber industry would not harm related U.S. producers. Yet, no evidence whatsoever was presented to support this supposition that integrated firms will not harm their related parties. Moreover, this integration is not new, which raises the question of why it would have a different effect in the future than during the period of investigation, when, with integration in place, the evidence demonstrated that import volumes were significant, and imports had some adverse price effects.
> Remand Determination at 94.

We, therefore, accept the views advanced by the Commission on the cross-border integration issue to be supported by substantial evidence.[14]

[14] The Panel need not reach a conclusion on whether the Commission properly made an "analytically distinct determination" to ensure that the threatened injury is "by reason of" subject imports since we find that the Commission's remand determination that the domestic softwood lumber industry is threatened with material injury to be not supported by substantial evidence.

IV. Conclusion

Based on the foregoing, we determine that the Commission's finding that subject imports' prices are likely to have a significant price-depressing or suppressing effect on domestic prices in the imminent future is not supported by substantial evidence. Since we determined that the Commission's finding that subject imports would increase substantially in the imminent future is, likewise, not supported by substantial evidence, see supra at 32, we find the Commission's remand determination that the domestic softwood lumber industry is threatened with material injury by reason of subsidized imports and dumped imports from Canada to be not supported by substantial evidence.

V. Separate Views of Panelist Mark R. Joelson, Concurring

I agree with the conclusion of the Panel that the Commission's Remand Determination, again finding that an industry in the United States is threatened with material injury by reason of Canadian softwood lumber imports, is not supported by substantial evidence. Because the path by which I reach that conclusion is, in some significant respects, different from that followed by the Panel, I am submitting this concurring opinion.

I agree with the Panel's conclusion that the record data relied upon by the Commission with respect to Canadian producers' existing and expected production capacity and capacity utilization are insufficient by themselves to support the Commission's finding that there is a likelihood of substantial increases in subject imports. It seems to me, therefore, that the Commission's finding of such a likely substantial increase in volume must rise or fall on two other premises of the agency's opinion: (1) that the Canadian producers had projected increases in production in 2002 and 2003[1] and (2) that, notwithstanding the Canadian producers' projections as to where this production would be sold, about two thirds of the increase could, by reason of established historical patterns, be assumed to be destined for the United States market.[2] Unlike my colleagues, I believe that, on

[1] Remand Determination at 56-58.

[2] Id. at 59-63.

reviewing the record in formulating its remand determination, the Commission could reasonably conclude that the Canadian exporters' projections as to the markets in which their future production would likely be sold might be self-serving in the context of this dispute, and that the clear historical pattern regarding the market distribution of Canadian softwood lumber sales was a better indicator of how future sales increases would likely be distributed. See, e.g., Asociacion de Productores de Salmon y Trucha de Chile A.G. v. U.S. Int'l Trade Comm'n, 180 F. Supp. 2d 1360, 1370 (Ct. Int'l Trade 2002) (Commission may rely on "trend" analysis); Citrosuco Paulista S.A. v. United States, 704 F. Supp. 1075, 1096-97 (Ct. Int'l Trade 1998) (Commission could reasonably conclude, based on past export pattern, that increased Brazilian production would result in greater exports to the United States); Bando Chem. Indus. v. United States, 17 C.I.T. 798, 811 (1993) (commissioner may revise his form of analysis on remand). Whether, once one accepts the two-thirds assumption, the resulting additional volume targeted at the United States market would represent a "substantial increase" in volume presents a different question but one that I need not decide here. As the Panel correctly holds, at least on the basis of the evidence in this record, both volume increase and price effect factors must be mustered to support an affirmative threat of injury conclusion, and the Commission's findings on the price effects issue are not based on substantial evidence.

I accept the Commission's premise that there exists substantial competition between U.S. and Canadian softwood lumber, subject to some species and performance differences, as well as regional preferences.[3] The question for decision, however, is the effect of this competition on prices in the U.S. market. On this latter issue, the Commission found, based on the price trends evidence, that subject imports were likely to have a significant depressing effect on domestic prices.[4] This finding was not based on evidence that Canadian subject imports were or would be underselling the products of the domestic industry. Instead, the Commission's reasoning was that depressed lumber prices in the U.S. market would likely come from the pressure of "excess Canadian supply" "rather than a combination of import and domestic supply, as it had in 2000…"[5] In its present material injury analysis, the Commission had found that the price declines in 2000 were the result of too much supply in the market, an excess supply condition to which both subject imports and domestic producers had contributed. The critical change that had recently taken place for purposes of the threat determination was, according to the Commission, "that U.S. producers had curbed their production, but that overproduction remains a problem in Canada."[6]

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[3] Id. at 90-94.

[4] Id. at 86.

[5] Id.

[6] Id. at 84.

To support its price conclusion on the premise of oversupply in the U.S. market, therefore, the Commission was obliged to find, on the basis of substantial evidence, both that the Canadian producers would likely continue to oversupply and that U.S. producers had stopped contributing to the excess supply. In finding that the Canadian producers would be oversupplying, the Commission relies on the "projected slight increases in capacity, increases in production, and return of capacity utilization to 90.4 percent in 2003."[7] As the Panel observes, this evidence does not substantiate likely Canadian oversupply at a future time when market demand was forecast to be "strong" or, in any event, "improving".[8]

In any event, there is not substantial evidence cited by the Commission to support its conclusion that U.S. producers had curbed, for the foreseeable future, their production of softwood lumber. It is noteworthy that, while, in predicting future Canadian oversupply of the U.S. market, the Commission has relied on Canadian producers' production and capacity projections for 2002 and 2003, its opinion points to no 2002 or 2003 domestic industry projections in the record in support of its conclusion that the domestic oversupply has been curbed. Rather, as in its original determination, the Commission relies heavily in the making of its assessment on the oversupply issue on the November 2001 Bank of America Forest

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[7] Id. at 85.

[8] See NAFTA Remand Hearing Transcript at 82-83.

Products Industry research publication which is in the record ("BOA Report").[9] As the Commission emphasizes, the BOA Report observes that the U.S. industry's past behavior of lumber overproduction in order to secure wood chips for pulp and paper manufacturing has been "curbed considerably" but such behavior "remains a problem in Canada…"[10] However, the BOA Report provides no orders of magnitude for measuring the scope of these conclusory statements and no list of authoritative sources or studies for appraising their soundness. Indeed, much of the BOA Report traces increased U.S. imports of Canadian softwood lumber to the erosion of the Canadian dollar, an issue on which the Commission's decision offers no findings.[11] Moreover, the BOA Report rebuts any expectation of likely imminent increases in Canadian lumber production, observing that "[w]e do not project Canadian production to return to 2000 levels until 2005, barring a major reversal in the Japanese residential construction industry or the return of these other [export] markets, both of which are not anticipated."[12] Finally, the BOA Report closes with a lengthy disclaimer in small print which includes, inter alia, the statement that "[t]he information contained herein is based upon sources believed reliable, but is not guaranteed as to accuracy and does not purport to be complete and should not

[9] Remand Determination at 85-86 and fn. 249.

[10] BOA Report at 11.

[11] Id. at 5, 6, and 11.

[12] Id. at 12.

be relied upon as such."[13]

In short, the BOA Report is too weak a reed to support the evidentiary burden which the Commission has placed on it on the issue of oversupply. It does not constitute substantial evidence on the matter. In my view, the evidence cumulatively relied upon by the Commission in support of its findings on the critical issue of oversupply does not rise to the level of substantial evidence or permit a conclusion that goes beyond conjecture.

[13] Id. at 16.

VI. SUMMARY AND REMAND INSTRUCTIONS

This Panel makes the following findings:

1. That the Commission's remand determination that square-end bed frame components and flangestock are part of a continuum of softwood lumber products defined as a single domestic like product is in accordance with the law and supported by substantial evidence.

2. That the Commission's remand determination that the domestic softwood lumber industry is threatened with material injury by reason of subsidized imports and dumped imports from Canada is not in accordance with the law and is not supported by substantial evidence.

Based upon the evidence that the Commission has set forth as underlying its findings, and the Panel's review thereof, this Panel hereby remands to the Commission the Remand Determination of Threat of Injury dated December 15, 2003, and the Commission is directed to conduct its threat of injury analysis consistent with the following conclusions of this Panel:

1. The Commission's finding of Canadian producers' excess production and projected increases in capacity, capacity utilization and production, indicating the likelihood of substantially increased imports of the subject merchandise into the United States, is not supported by substantial evidence.

2. The Commission's finding that the domestic industry is threatened with material injury by reason of a significant rate of increase of the volume or market penetration of imports of the subject merchandise, indicating the likelihood of substantially increased imports into the United States, is not supported by substantial evidence.

3. The Commission's finding that the domestic industry is threatened with material injury by reason of the fact that 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 is not supported by substantial evidence.

4. The Commission's finding that the domestic industry has curbed its overproduction of softwood lumber is not supported by substantial evidence.

The Commission is directed to conduct such further proceedings as may be required within twenty one (21) days of this decision.

Donald S. Affleck, Q.C.
Donald S. Affleck, Q.C.

Mark R. Joelson
Mark R. Joelson

Louis S. Mastriani
Louis S. Mastriani

M. Martha Ries
M. Martha Ries

Wilhelmina K. Tyler (Chair)
Wilhelmina K. Tyler (Chair)

Dated: April 19, 2004